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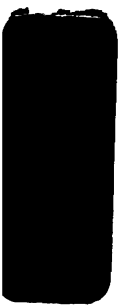
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THE
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SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,
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**CALIFORNIA TITLE INSURANCE &
TRUST CO. v. CONSOLIDATED PIED-
MONT CABLE CO. et al. (S. F. 551.)**

(Supreme Court of California. June 12, 1897.)

**VERIFIED PETITION—CONCLUSIVENESS—RECEIVER
—UNAUTHORIZED COLLECTION OF ASSETS.**

1. Unless the material allegations in a sworn petition on which an order to show cause was issued are controverted at the hearing on such order, they may be treated as established facts in the case.

2. Pending foreclosure, a receiver of the mortgaged property was appointed, who also took possession of certain moneys of defendant then on hand, and collected others then due defendant, and used the same in the course of the receivership, though they were not subject to the mortgage lien. *Held*, that a judgment creditor of defendant was entitled to an order, as against the receiver, subjecting such funds, as the moneys of defendant, in part satisfaction of his judgment.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by the California Title Insurance & Trust Company against the Consolidated Piedmont Cable Company to foreclose a mortgage. From an order on the petition of John Yule, a judgment creditor of defendant, requiring the receiver to pay over certain moneys received by him in part satisfaction of petitioner's judgment, defendant appeals. Affirmed.

C. H. Wilson, for appellant. John Yule (John M. Poston, of counsel), for respondent.

SEARLS, C. In November, 1893, the above-named plaintiff brought an action against the defendant, the Consolidated Piedmont Cable Company, to foreclose a mortgage made by defendant upon its property, consisting of real estate, buildings, franchises, street railway, cars, machinery, etc. The court, on the application of plaintiff, appointed Ira Bishop receiver of the mortgaged property, to take possession thereof, and to maintain and operate the railway pending the action and until final decree. Bishop qualified as receiver, took possession of and operated the railway until March 19, 1895. A decree of foreclosure was entered October 23, 1894, under which, on the 19th day of March, 1895, Ira Bishop, who was appointed by the decree a commissioner

so to do, sold the mortgaged property. The contention here arises over \$406.28, which came to the hands of the receiver as follows, viz. \$5.15 found by him in the safe of the defendant, and by him taken into possession when he went into possession as such receiver, and the further sum of \$401.13 collected by him from the Oakland Consolidated Street-Railway Company, and due to the defendant herein, for repairing some crossings, which sum was so due for services rendered by said defendant from March to November, 1893, and before the appointment of said receiver. The basis of the claim by John Yule, the respondent herein, to said sum of money, is shown by his sworn petition, filed May 10, 1895, to be as follows: On the 19th day of March, 1895, one Albert L. Black brought suit against the defendant and appellant herein to recover the sum of \$10,000, etc., and sued out a writ of attachment in due form, which was on the last-mentioned day duly served upon said receiver, whereby the said sum of \$406.28, and all other debts and credits and personal property of the defendant therein and appellant here in the possession of or under the control of said Ira Bishop, receiver, were duly attached. On the 6th day of May, 1895, Black recovered judgment against the defendant and appellant herein for \$11,540.80, no part of which has been paid. Black assigned said judgment to the petitioner, John Yule, on May 7, 1895. Upon filing this petition the court made an order on Bishop requiring him to appear and show cause, if any he had, why an order should not be made in accordance with the prayer of the petition directing him to pay over to petitioner said sum of \$406.28, etc., and requiring a copy of the petition and order to be served upon him, etc. On the day named in the order Bishop appeared, but did not answer or show cause against the order in any manner, except that he was called as a witness by petitioner, and testified as to his receipt of the money, and the sources from which it came, as hereinbefore stated, and to the further facts that the money, when received by him, was deposited to the credit of his account as receiver, and was paid out on account of running expenses of the road, long before service of the attachment. The court held that the \$406.-

28 was the property of the defendant, not subject to the lien of the plaintiff's mortgage or claim of the receiver, and ordered it paid over to the petitioner, John Yule, in part satisfaction of his judgment. The defendant appeals. Ira Bishop, against whom the order was taken, has not appealed, and neither he nor the plaintiff was served with the notice of appeal.

Assuming, as we do, without deciding, that defendant is a "party aggrieved" by the order, within the meaning of section 938, Code Civ. Proc., and that the appeal is properly taken, we fail to discern any good cause for reversal of the order appealed from. Appellant's first contention is, in substance, that there was no proof of the judgment in favor of Black, that it was assigned to Yule, or that it remained unpaid. This theory is founded upon the idea that the sworn petition, complaint, or affidavit upon which the order to show cause issued was not evidence of the facts therein stated, and, as there was no other evidence on the subject, that the omission was fatal to the proceeding. The argument, it seems to us, fails to sustain either the premises or conclusion. It is that "the petition is in the nature of a complaint, and is to all intents and purposes a pleading"; citing Code Civ. Proc. § 420, and *Duff v. Duff*, 71 Cal. 513, 522, 12 Pac. 570. If the petition is to be treated as in the nature of a complaint, then, being verified, under our practice, all its material allegations not denied under oath are to be taken as true, and no further evidence in support of them was necessary, and, there being no answer, they were to be taken as true. Code Civ. Proc. § 462. The doctrine of *Duff v. Duff*, supra, so far as applicable here, is that a petition for letters of administration is in the nature of a pleading, and the rules in regard to the admissions in pleadings apply to it. *Crane v. Brigham*, 11 N. J. Eq. 29, also cited by appellant, goes only to the practice in equity in the courts of that state, and has no necessary application under our system of practice. But the proceeding here is a motion (Code Civ. Proc. § 1008), in which the moving party made a *prima facie* case by his sworn statement; and whether we term that statement a complaint, a petition in the nature of a complaint, or an affidavit, matters not. It was evidence to be met at the hearing upon the order to show cause, and, as it was not, in the particulars complained of by defendant, in any wise controverted, the court was authorized to treat its statements as established facts in the case.

2. The mortgage did not cover the assets of the corporation defendant therein beyond the property as hereinbefore stated, and the receiver was appointed, not to collect the debts due the corporation defendant, but only to take possession of the mortgaged property, operate the road, etc. When, therefore, he took possession of the money of the defendant, and collected money due to it before his appointment, and which was not covered by

the lien of the mortgage, he transcended his authority as receiver, and it was no defense to the motion for him to say he had mingled the funds thus received with those received in the course of his receivership, and had paid out the money. The judgment of foreclosure only related to the mortgaged property, and the settlement of the receiver's accounts touching his receipts and expenditures as receiver did not absolve him from liability for moneys which had come to his hands in excess of his authority as receiver, and in violation of the authority conferred upon him by the court.

We need not dwell upon the point that the money received from the Oakland Company was by virtue of a sale of a one-half interest in the crossings to the last-named company made by him, for the reasons: (1) That as receiver he had no authority to make such sale. (2) There is no evidence that he made such sale, but, on the contrary, it appears the money was due the defendant for labor performed and materials furnished in putting in street crossings, the one-half of which was to be paid for by the Oakland Company; all of which was done and performed before he became receiver. We recommend that the order appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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McHUGH v. ADKINS et al. (S. F. 985.)
(Supreme Court of California. June 9, 1897.)

APPEAL—TIME FOR TAKING.

An appeal perfected on the day on which findings of fact and conclusions of law were filed and judgment was ordered, but two days before judgment was "entered" of record, was premature, under Code Civ. Proc. § 939, providing that an appeal from a judgment may be taken within one year after "entry" thereof; the provision in the same section, that an exception on the ground that the decision or verdict is not supported by the evidence cannot be reviewed on appeal unless such appeal is taken within 60 days after rendition of judgment, not changing the time within which the appeal must be taken.

Department 1. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by one McHugh against one Adkins and others, in which another intervened. Defendants and intervenor appealed from the judgment. Motion by plaintiff to dismiss the appeals. Dismissed.

Linforth & Whitaker, for appellants. O. C. Pratt, for respondent.

PER CURIAM. The findings of fact and conclusions of law made upon the trial of the above action were filed with the clerk May 1, 1897, and judgment ordered in favor of the plaintiff, and against the defendants and in-

tervener. On the same day, the defendants and intervener filed notices of appeal from this judgment, and also perfected their appeals. Judgment was not entered of record until May 3d. A motion is now made by the plaintiff to dismiss the appeal, upon the ground that it was taken prematurely. At the time this notice of appeal was given, section 939, Code Civ. Proc., provided that an appeal from a judgment might be taken within one year "after the entry of judgment"; and it has been repeatedly held that an appeal taken before the judgment is entered of record is premature, and must be dismissed. *Home for Inebriates v. Kaplan*, 84 Cal. 488, 24 Pac. 119, and cases there cited. The further provision in the same section, that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment," does not change the time within which the appeal must be taken, but is a limitation upon the matters that may be considered on the appeal. This court has no jurisdiction of an appeal from a judgment taken before the judgment has been entered of record, and, while it may review any errors of law committed at the trial when the appeal has been properly taken, its jurisdiction to review the evidence is limited to such appeals as are taken within 60 days after the rendition of the judgment. The appeals are dismissed.

5 Cal. Unrep. 701

CARLISLE v. TULARE COUNTY. (Sac. 218.)

(Supreme Court of California. May 29, 1897.)

MUNICIPAL CORPORATIONS—MARSHAL—SERVICE OF LEGAL PROCESS—FEES—LIABILITY OF COUNTY.

1. Act March 13, 1883, § 790 (St. 1883, p. 261), as amended by St. 1893, p. 299, provides, with reference to municipal corporations of the fifth class, that the city marshal shall execute and return all process issued and directed to him by any legal authority; that he shall, for service of any process, receive the same fees as constables, and shall receive from the city such compensation as shall be fixed by ordinance, in addition to the fees and mileage received for service of process in the state courts. Pen. Code, § 817, makes marshals peace officers, and section 814 provides that warrants of arrest shall run "to any marshal," among other officers. *Held*, that fees earned by a marshal in serving process issuing out of a justice's court for the township in which the city is situated are chargeable to the county.

2. Section 790 contains the condition that the marshal shall receive a compensation from the city in addition to the fees and mileage received "for service of process of the courts of this state, other than the recorder's court of such city." Under the municipal corporation act the recorder may be a justice of the peace as to some matters, and a recorder as to others. When acting as a justice in criminal matters coming before him under the Penal Code, his fees are chargeable to the county. *Held* that, where the recorder is acting as justice of the peace, the marshal's fees for service of process issuing out of the recorder's court in misdemeanor cases under the statutes of the state are chargeable to the county.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by W. J. Carlisle against the county of Tulare. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. B. Howard, Dist. Atty., and T. E. Clark, for appellant. Power & Alford and W. B. Wallace, for respondent.

SEARLS, C. Action by W. J. Carlisle to recover from the county of Tulare \$518.35 as fees in criminal cases earned by plaintiff as city marshal of the city of Tulare. A demurrer was interposed to the complaint, which was overruled by the court, and, defendant declining to answer, judgment went for plaintiff. Defendant appeals.

There are some six causes of action set out in the complaint. Waiving these separate statements, we may epitomize the complaint, and present the salient points, thus: The city of Tulare is, and at all the times herein mentioned was, a city of the fifth class, organized and existing under and pursuant to an "Act to provide for the organization, incorporation and government of municipal corporations," approved March 13, 1883, and is within the county of Tulare. The plaintiff was and is the duly elected, qualified, and acting city marshal of said city of Tulare. As such city marshal, plaintiff rendered services in serving legal process, the fees for which amounted to \$518.35. Of this sum, \$276.40 was for service of process issuing out of justice's court for Tulare township, wherein the fees allowed constables for like services would amount to a like sum, and \$241.95 thereof was for service of process issuing out of the city recorder's court of the city of Tulare in misdemeanor cases under the statutes of the state, wherein constables' fees for like services would amount to a like sum. None of the process so served in any of the cases was upon charges of violating any city ordinance. Plaintiff presented in due form his several claims to the board of supervisors of the county of Tulare for allowance, and that body rejected them upon the sole ground that they were not lawful charges against the county of Tulare. There was at all the times herein mentioned sufficient funds in the treasury of said county to pay said claims, as well as to pay all other claims and demands chargeable against it. The question turns upon the liability of the county for these charges of the city marshal for services, for which, had they been performed by a constable, it may be admitted the county would have been liable.

The act of March 13, 1883, entitled "An act to provide for the organization, incorporation and government of municipal corporations" (St. 1883, p. 93), provides for the incorporation of six classes of municipal corporations. As before stated, the city of Tulare is a municipal corporation of the "fifth class." Under this statute and its amendments, among the offi-

cers provided for this class of municipal governments is a city marshal. *Id.*, p. 250, § 751. The marshal has charge of the department of police, has within the city all the powers of a sheriff in the suppression of riots, public tumult, disturbance of the peace, or resistance against the laws or public authorities in the lawful exercise of their functions, etc. "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority. It shall be his duty to prosecute before the recorder all breaches or violations of or non-compliance with any city ordinance which shall come to his knowledge." St. 1883, p. 261, § 790. The same section provides that "he shall, for service of any process, receive the same fees as constables"; and, after enumerating at some length his duties, the section closes as follows: "He shall perform such other services as this act and the ordinances of the board of trustees shall require, and shall receive such compensation as shall be fixed by ordinance." The legislature of 1893 (St. 1893, p. 299) amended section 790, *supra*, by adding after the word "ordinance," last above quoted, the words, "in addition to such mileage and fees as he shall receive in the service of process of the courts of this state, other than the recorder's court of such city, which mileage and fees shall be the same as is allowed by law to constables in the county in which such city is situated." Section 790 had been amended in some particulars in 1880 (St. 1880, p. 306), but the amendment is immaterial to the present inquiry. Section 755 of the same act provides that certain officers, among whom is the marshal, "shall receive at stated times a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election or during their several terms of office." St. 1883, p. 251. In *Pritchett v. Stanislaus Co.*, 73 Cal. 310, 14 Pac. 795, which was brought by the plaintiff to recover from the county of Stanislaus for services rendered by him as marshal of the city of Modesto, in the service of process under the laws of this state, this court held that the marshal of a municipal corporation of the sixth class was not entitled to compensation for such services unless the board of trustees of the municipality had fixed by ordinance the compensation to be paid him therefor. The statute relating to a marshal of the fifth class of municipal corporations in the act of 1883 did not differ in any material respect from that governing the sixth class, under consideration in the *Pritchett Case*, *supra*. In that case it did not appear that any ordinance had been adopted by the city of Modesto fixing the compensation of the marshal. This act, as it then stood, restricted the compensation of the marshal to "such compensation as shall be fixed by ordinance." St. 1883, p. 261, § 790. But under the amendment of 1893, hereinbefore referred to, he receives from the city such compensation as shall be fixed by ordi-

nance, "in addition to such mileage and fees as he shall receive in the service of process of the courts of this state, other than the recorder's court of such city, which mileage and fees shall be the same as is allowed by law to constables in the county in which such city is situated." It appears then: (1) That it is made the duty of the marshal to execute and return all processes issued and directed to him by any legal authority. (2) "He shall, for service of any process, receive the same fees as constables." (3) He shall receive from the city such compensation as shall be fixed by ordinance, in addition to the fees and mileage received for service of process in the state courts. Clearly, the marshal is entitled to pay for this class of services. He is not entitled to such pay from the city, for two reasons: (1) The service of process from courts other than those of the city is a matter which does not concern the city. (2) For services rendered the city he can only be paid under an ordinance, and the amendment of 1893 contemplates that he shall be paid as constables are paid for like services. It is eminently proper that he should be paid by the county. The services rendered in criminal cases other than for violations of city ordinances are county charges. City marshals are peace officers. Pen. Code, § 817. Every warrant of arrest issued in this state runs, or should run, "To Any Sheriff, Constable, Marshal, or Policeman of Said State," etc. *Id.* § 814. But it is claimed that \$241.95 of plaintiff's demand was for serving process issuing out of the city recorder's court of the city of Tulare in misdemeanor cases under the statutes of this state, etc., and hence that under the amendment of 1893 to section 790 (St. 1893, p. 299), as fees for services in the recorder's court are excepted, no recovery can be had therefor. Under the municipal act, city recorders in cities of the fifth class occupy a dual position. The recorder's court has jurisdiction concurrently with the justice's court of all actions and proceedings, civil and criminal, arising within the corporate limits of the city; and the recorder is vested with the powers and may perform the duties of a magistrate, and is entitled to such fees as are allowed by law to justices of the peace. He has exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for a breach of any ordinance of the city, and of all actions founded upon any liability or obligation created by any ordinance, and of all prosecutions for any violation of any ordinance. For his services in the transaction of the city business he is paid such salary as shall be prescribed by ordinance. In *Curtis v. Sacramento Co.*, 13 Cal. 291, the plaintiff was city recorder, with the jurisdiction of a justice of the peace, virtually the same as here. He sued to recover fees earned in criminal cases under the laws of the state. The court held, in effect, that, as to the jurisdiction conferred upon him in common with justices of the peace, he was to be treated as "really and in

fact a justice of the peace." In *Prince v. City of Fresno*, 88 Cal. 407, 26 Pac. 606, it was held that under the municipal corporation act the recorder of a city may have a dual jurisdiction and functions, and may be a justice of the peace as to some matters, and a recorder as to others; that under the municipal act he possesses the right to act as a justice of the peace, and is to all intents and purposes a justice of the peace as to all criminal matters coming before him under the Penal Code, and when acting in cases under such Code he has a right to charge the county and receive for his services such fees as are allowed by law to justices of the peace in the county for like services. By parity of reasoning it may be said that, when the legislature fixed the marshal's fees for services "other than [those earned in] the recorder's court of such city," it had in view the recorder's court as a local city court, with jurisdiction to hear and determine cases arising under city ordinances, and not to the recorder under his jurisdiction as a justice of the peace arising under the laws of the state, with all the powers of a justice of the peace and magistrate. There is no good reason why the several cities of the fifth and sixth classes should pay for the services of recorders and marshals, when, as justices of the peace and constables, they are engaged in disposing of the criminal business of the state, the cost of which devolves upon the several counties in which such cities are located. St. 1893, p. 511. In *Sonoma Co. v. City of Santa Rosa*, 102 Cal. 429, 36 Pac. 810, it was said, in substance, that it is the policy of our frame of government to localize as far as can be reasonably done, not only the power but the expense of government, so that the expense of the county government should be borne by the whole county, and the expense of the city government by the city, and that, where the language of the charter is doubtful, it ought to be construed with an eye to carrying out and maintaining this cardinal distinction. Our view in holding, as we do, that the fees in question earned by the marshal in vindication of the laws of the state in cases pending in the court of the recorder while that officer is acting as a justice of the peace are county charges, gives force and effect to the distinction enunciated in *Sonoma Co. v. City of Santa Rosa*, supra. We recommend that the judgment be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(5 Cal. Unrep. 678)

In re MEADE'S ESTATE. (S. F. 753.)

(Supreme Court of California. May 27, 1897.)

APPEAL—PARTY AGGRIEVED—APPEARANCE—AUTHORITY OF ATTORNEY—PRESUMPTION.

1. A person whom the record shows to be a party aggrieved may appeal, though he has not previously appeared in the case.

2. On appeal it will be presumed that appellant's attorney had authority to appear for him, from the mere fact that he assumes to do so.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Appeal from an order in the matter of the estate of Euthanasia S. Meade, deceased. On motion to dismiss the appeal. Denied.

Charles Clark, for appellant. Nicholas Bowden, for respondent.

PER CURIAM. This is a motion to dismiss an appeal, in which the moving party denies the right of the appellant to appeal, and the right of the attorney who gave the notice as attorney for appellant to act as such. Affidavits were filed showing that the appellant had never appeared in the probate court at all, and, of course, had no attorney of record. It does appear, however, from the record, that the appellant is a party aggrieved by the order.

We must presume that the attorney had authority to appear for and represent the appellant, from the mere fact that he assumes to do so. A person whom the record shows to be a party aggrieved may appeal, although he has not previously appeared in the case. We will not consider upon this motion whether the alleged will was such, or did, if probated, confer any rights upon appellant. These points involve the merits of the appeal. Motion denied.

(117 Cal. 226)

BUTLER v. SOULE et al. (S. F. 970.)¹

(Supreme Court of California. June 9, 1897.)

APPEAL—FILING TRANSCRIPT.

Under Sup. Ct. Rule 2, requiring appellant to file a transcript within 40 days after the appeal is perfected, when an appeal from the judgment is taken at the same time with an appeal from an order made after judgment, though both appeals may be considered upon the same transcript, the time for filing the transcript upon the appeal from the judgment is not extended until the settlement of the bill of exceptions taken upon the order appealed from.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Original motion by Butler, respondent, to dismiss appeal of Soule and others. Sustained.

Robert Ash, for appellants. Joseph Hutchinson, for respondent.

PER CURIAM. Judgment in this action was entered by default April 6, 1896. January 29, 1897, a motion to set aside the judgment was made on behalf of the defendants, and was denied February 15th. April 5th an appeal was taken from the judgment, and also from the order denying the motion to set it aside. No transcript having been filed in this court, the respondent, on May 22d, gave notice of the present motion to dismiss the appeal from the judgment for failure to file a

† Rehearing denied.

transcript within 40 days after the appeal was taken. In reply thereto the appellants have filed an affidavit, from which it appears that at the time the notice of the motion was served there was pending before the judge for settlement a bill of exceptions upon the order denying the motion to vacate the judgment. Rule 2 of this court requires the appellant to file a transcript of the record to be used upon the appeal "within forty days after the appeal is perfected and the bill of exceptions and the statement (if there be any) are settled." The practice is common, and is recognized by this court, when several appeals in the same action can be reviewed upon a single record, whether such appeals are taken separately or by the same notice, to file a single transcript upon which all of the appeals may be considered. This practice does not, however, obviate the necessity of complying with the above rule. The bill of exceptions therein referred to is that which is applicable to the matter appealed from (*Buckley v. Althorff*, 86 Cal. 643, 25 Pac. 134); and when an appeal from the judgment is taken at the same time with an appeal from an order made after judgment, although both appeals may be considered upon the same transcript, the time for filing the transcript upon the appeal from the judgment is not extended until the settlement of a bill of exceptions taken upon the order appealed from. The appeal from the judgment is dismissed.

5 Cal. Unrep. 679

WILLEFORD v. BELL. (Sac. 151.)

(Supreme Court of California. May 28, 1897.)

MINING—LOCATING CLAIM—NOTICE—OBJECTION TO EVIDENCE—HARMLESS ERROR.

1. If one first discovering a vein or lode does not make a valid location thereon, another may make such location.

2. Location of a mining claim is invalid if not "distinctly marked on the ground, so that its boundaries can be readily traced," as required by Rev. St. U. S. § 2320.

3. It being provided by Rev. St. U. S. § 2324, only what "all records of mining claims * * * shall contain," it is not necessary, in the absence of local rules or customs, for one asserting a location to prove the notice posted on the claim, but merely the recorded notice, which he may do by a copy.

4. Permitting a witness to be asked on cross-examination whether he had not, at the adjournment after his examination in chief, made a certain statement to a certain person, if error, is harmless, there having been no attempt to prove that his answer, "No," was not the truth.

5. Objection that evidence was inadmissible, not having been made when it was offered, is waived.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by C. A. Willeford against A. O. Bell. Judgment for plaintiff. Defendant appeals. Affirmed.

B. F. Myres and Ben. P. Tabor, for appellant. John M. Fulweller, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a quartz-mining claim, which is described by metes and bounds, and as being 1,500 feet long and 600 feet wide, and called the "Starlight Quartz Mine." The complaint is in the usual form, averring that the plaintiff is the owner and in possession of the said mine, and that the defendant claims some right, interest, and estate therein, but that he has no such right, title, interest, or estate whatsoever. The defendant, by his answer, disclaims having any right, title, claim, or interest in or to the land described in the complaint, except to so much thereof as is included within certain described boundaries, and called the "Northern Light Mine." The boundaries mentioned are six courses, extending from a fixed starting point to the place of beginning, and having the following lengths: 268.6 feet, 956.3 feet, 263.3 feet, 249.5 feet, 995 feet, and 288.4 feet. He then denies that plaintiff is, or ever was, the owner, in the possession or entitled to the possession of any portion of the said Northern Light Mine; and avers that he is, and at all the times mentioned in the complaint was, the owner of, in the possession of, and entitled to the possession of, all that portion of the premises described in the complaint, which is included within the boundaries of the said Northern Light Mine. Wherefore he prays that plaintiff take nothing by his suit, and that he have judgment for his costs.

At the commencement of the trial, on demand of defendant, a jury was impaneled to try special issues, and the following questions were submitted, and answers returned: (1) "Which party (if either) was the first to discover a ledge, vein, or lode bearing gold in the premises in question?" Answer: "Defendant." (2) "Did the plaintiff and his co-locators discover a ledge, vein, or lode bearing gold, within the limits of their claim, before making their location?" Answer: "Yes." (3) "Did the defendant, Bell, at any time before February 28, 1895, mark his location on the ground so that its boundaries could be readily traced?" Answer: "No." (4) "Did the defendant, Bell, prior to the location of plaintiff, discover a ledge, vein, or lode bearing gold within the limits of this claim?" Answer: "Yes." After these answers were returned, and before judgment, defendant moved the court to disregard the second and third findings of the jury, upon the grounds: (1) That the second finding is inconsistent with the first and fourth findings, and is not sustained by the evidence; (2) that the third finding is not sustained by the evidence, but is contrary thereto. The court denied the motion, and thereupon made and filed its findings of the facts involved in the case as follows: That both plaintiff and defendant were native-born citizens of the United States, and as such qualified to locate and hold mining claims on the public mineral lands of the United States. "That on the

27th day of February, 1895, the plaintiff discovered what was called by him the Starlight quartz ledge, lode, or vein bearing gold, within the limits of what is mentioned and described in the complaint as the 'Starlight Quartz Mine.' That on the 28th day of February, 1895, the plaintiff and his co-locators located the said Starlight Quartz Mine by posting notices thereon, claiming fifteen hundred linear feet of the lode and surface ground as set out in complaint, and distinctly marked the said mining claim on the ground so that its boundaries could be readily traced, and entered into the possession thereof. That prior to the 27th day of February, 1895, the defendant discovered a quartz lode or vein bearing gold on the land within the limits of what is now called the 'Starlight Quartz Mine,' and which defendant called the 'Northern Light Mine,' which said lode or vein is presumed to be the same lode or vein thereafter discovered and located by the plaintiff. That between the 10th and 15th days of August, 1894, the defendant posted a notice on the southwesterly end of what he called the 'Northern Light Mine,' near what he presumed to be the ledge, claiming fifteen hundred linear feet of the ledge and six hundred feet in width on each side of the middle of the lode, but the defendant did not distinctly mark the said claim on the ground, so that its boundaries could be readily traced, either at the time of posting said notice, or at any time prior to the 28th day of February, 1895, or before the plaintiff located the said Starlight Quartz Mine." And as conclusions of law the court found that on the 28th day of February, 1895, the plaintiff was, and ever since has been, the owner, in possession and entitled to the possession, of the quartz-mining claim described in the complaint; that the adverse claim of defendant in and to the said land and premises was without any right whatever; and that plaintiff was entitled to have his claim and right to the said premises quieted as against the defendant. A judgment and decree was accordingly entered as prayed for, from which, and from an order denying his motion for a new trial, defendant appeals.

The land in controversy is public mineral land of the United States, and both parties claim it under locations made by them, or attempted to be made, under and in accordance with the provisions of the United States statutes. No local rules or customs were shown to exist, and the principal question is, was the defendant's location, which was prior in time to plaintiff's, sufficient to meet the requirements of the law? The statute provides, among other things, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located" (Rev. St. U. S. § 2320); and also that: "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All rec-

ords of mining claims hereafter made shall contain the name or names of the locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." Id. § 2324.

1. Appellant contends that the findings of the jury and court as to the discovery of the vein or lode by the plaintiff before making his location, and as to the failure of the defendant to distinctly mark his location on the ground so that its boundaries could be readily traced, were not justified by the evidence, and hence his motion for new trial should have been granted. Without reviewing and setting out the testimony bearing upon these questions, we deem it enough to say that the evidence introduced and relied upon by the plaintiff was, in our opinion, quite sufficient to justify and sustain the findings complained of. And, though this evidence conflicted with that introduced by defendant, the well-settled rule in such cases must control in this court. It should be noted, however, in this connection, that the notice of location posted and filed for record in the county recorder's office by defendant was not so drawn as to afford any assistance to one seeking to trace out the boundaries of the location, since it stated that defendant had located and claimed "fifteen hundred linear feet along the course of this lead, lode, or vein of mineral-bearing quartz, and six hundred feet in width on each side of the middle of said lead, lode or vein," etc., while the location, as described in the answer, was less than 1,000 feet long and less than 600 feet in width.

2. Appellant further contends that during the progress of the trial the court committed several errors of law which were prejudicial to his side of the case. The first point made under this head is that the court erred in refusing to disregard the second finding of the jury, upon the ground that it was inconsistent with the first and fourth findings. Waiving the question whether, under the issues raised by the answer, the verdict of the jury was merely advisory to the court, and could be adopted or disregarded at its pleasure, or whether it could only be set aside on motion for new trial, still we fail to see any irreconcilable inconsistency in the findings referred to. The fact that defendant "was the first to discover a ledge, vein, or lode bearing gold on the premises in question," and that he made this discovery "prior to the location of plaintiff," was not inconsistent with the fact that plaintiff and his co-locators discovered "a ledge, vein, or lode bearing gold within the limits of their claim before making their location." Both parties may have discovered the same lode, but in different places; and the testimony tended to show that they did so discover it. Under the statute it can make no difference which party made the first discovery, so long as it was in fact made before plaintiff made his location. Besides, appellant was not ag-

grieved by the finding complained of, since, though he was the first to discover the lode, he failed to make a valid location thereon, and left it subject to location by any other competent person.

The next point is that the court erred in giving to the jury an instruction which reads as follows: "The jury are instructed by the court that the mining claim of the defendant, in order to be valid, must have been distinctly marked upon the ground so that its boundaries could be readily traced, on or before the 28th day of February, 1895. The law requires this marking of the claim upon the ground to be done in such a manner that any person of reasonable intelligence may go upon the ground, and readily trace the claim out, and readily find the boundaries and limits of the claim without instructions, advice, or information from any one or thing other than the marking upon the ground, and it is not necessary or required that such a person shall have a copy of the notice of location or necessarily use it in the tracing the boundaries of the claim, but where such notice is posted upon the claim, and constitutes a part of the marking of such claim upon the ground, it may be used as a part of the means by which the boundaries of the claim can be traced; and if you believe from the evidence that the defendant prior to the 28th day of February, 1895, failed to so mark his claim upon the ground so that any person of reasonable intelligence could go upon the ground, either with or without a copy of the notice of location, and readily trace the claim out, and find its boundaries and limits, your verdict should be to the effect that his claim was not so marked on the ground that its boundaries could be readily traced." We see no error in the instruction as given. It seems to state the law applicable to the question in hand quite clearly and correctly.

The next point is that the court erred in overruling defendant's objection to the introduction in evidence of a copy of plaintiff's recorded notice of location, as a copy of the notice posted on the claim, upon the ground that the original should have been produced, or its loss or destruction shown. It was admitted by counsel for defendant that plaintiff's location was properly staked out, and it was proved that the notice was posted on the claim, and recorded. The statute provided only as to what "all records of mining claims hereafter made shall contain," and, as no local rules or customs were shown to exist, it was not necessary to introduce or prove the posted notice. It was proper, however, to prove the recorded notice, and for that purpose the copy was offered and received; and in this there was clearly no error.

The next point is that the court erred in admitting certain evidence offered by the plaintiff in rebuttal. The evidence objected to tended to contradict to some extent the evidence introduced by defendant to show his prior discovery of gold in the ledge or lode in

controversy. We think the evidence offered was admissible in rebuttal, and that the objection to it was properly overruled.

The next point is that the court erred in allowing plaintiff to introduce evidence for the purpose of impeaching Benjamin Bell, a witness for defendant. The witness had testified as to the discovery of gold in the Northern Light Mine, and the location thereof by defendant. A day or two later he was recalled, and asked by counsel for plaintiff if he did not, immediately after the adjournment of court upon that day, at a time and place named, make a certain statement to Mr. J. W. Bigelow, and answered, "No, sir." He was then asked if he did not, right away after the adjournment, make a certain statement to Mr. Willeford. To this last question counsel for defendant objected, upon the ground that it was irrelevant, immaterial, and not in cross-examination, and was an attempt to impeach the witness in regard to an immaterial and collateral matter. The court overruled the objection, and the witness answered, "No, sir." Afterwards, in rebuttal, plaintiff called Bigelow as a witness, and proved by him, without any objection or exception, so far as the record shows, that Bell did make the statement to him which he had denied having made. In all this we see no material error. There was no attempt to prove that Bell did not answer truly as to the statement which it was assumed he had made to Willeford, and, if the evidence sought to be elicited as to the statement made by him to Bigelow was deemed inadmissible, it should have been objected to at the time it was offered. No such objection having been made, the point that it was inadmissible cannot now be considered.

The other points raised and discussed by counsel do not require special notice. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

117 Cal. 195

TULARE COUNTY v. KINGS COUNTY.

(Sac. 221.)

(Supreme Court of California. May 28, 1897.)

COUNTIES—DIVISIONS—APPORTIONMENT OF DEBT—REMEDY.

1. Const. art. 11, § 3, providing that every county created out of another county shall be liable for a just proportion of the existing debts of such county, does not empower the courts to determine such proportion; but it is for the legislature to do this, or determine the basis therefor.

2. Civ. Code, § 1432, providing that a party to a joint obligation, who satisfies more than his share of the claim, may require contribution from the others, does not authorize a county, on paying its bonds, given before another county was created out of it, to compel contribution by the other county; no duty to pay or contribute to ex-

isting indebtedness being imposed on the other county by the act creating it.

3. A county is not surety for a county created out of it, as to bonds given by it before such creation, so as to make applicable Civ. Code, § 2847, relating to the obligation of a principal where the surety satisfies the obligation.

4. Civ. Code, § 3523, declaring that for every wrong there is a remedy, does not permit of a remedy through the courts when it is with the legislature.

Commissioners' decision. Department 1. Appeal from superior court, Kings county; Stanton L. Carter, Judge.

Action by Tulare county against Kings county. Judgment for defendant. Plaintiff appeals. Affirmed.

Power & Alford and Lamberson & Middlecoff, for appellant. M. L. Short, for respondent.

CHIPMAN, C. This is an action brought by plaintiff against defendant to enforce a claim for a portion of the bonded debt of plaintiff. The complaint alleges that, by act of the legislature (St. 1875-76, p. 26), plaintiff was authorized to issue, and did issue, \$75,000 of bonds to build a courthouse, and by another act (St. 1877-78, p. 198) it was authorized to issue, and did issue, road bonds to the amount of \$31,000; that by act of the legislature (St. 1893, p. 176) the county of Kings (defendant) was created wholly out of Tulare county (plaintiff), and was fully established May 29, 1893; that on this last date there were outstanding \$22,000 of said courthouse and \$5,000 of said road bonds; that between May 29, 1893, and September 18, 1895, plaintiff paid on account of said bonds \$14,472.46; that, taking the assessment rolls of the two counties as a basis of computation, the amount or proportion due from defendant was \$4,615.22, which, with interest added, would make \$5,049.61 due on October 11, 1895; that, on the last-named day, plaintiff presented its claim to the board of supervisors of Kings county (defendant) for said sum, which was rejected on November 7, 1895, and on November 23, 1895, plaintiff commenced this action to recover said sum. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, which demurrer the court sustained, and, plaintiff declining to amend, gave judgment for defendant for costs, and plaintiff appeals from this judgment. Plaintiff presents several points on which it relies, which will be noticed in the order presented.

1. The defendant is liable under the constitution, and this liability is absolute.

The act creating Kings county (St. 1893, p. 176) made no provision concerning the debts of Tulare county existing at the time of division. It is claimed, however, that by section 3, art. 11, of our state constitution, the law of the state was established, fixing the amount which a new county should pay of the indebtedness of the old county, and that this provision of the constitution is self-executing. The section reads as follows: "Every county which

shall be enlarged or created from territory taken from another county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken."

The contention of plaintiff is that, by the supreme law of the state, it has been declared that the new county shall pay a just proportion of the debts of the old county, and it is left with the courts to determine what that just proportion may be in a case presented. In other words, it is denied that the legislature has any power to apportion the indebtedness, but that the question as to how much this just proportion will amount to is purely judicial. On the other hand, defendant contends that the sole question is whether the action will lie against defendant, the legislature having failed to provide in the act creating Kings county for the apportionment of the public property and debts of the county of Tulare. If it be true, as plaintiff contends, that the constitution has exhausted the legislative function, in declaring that the new county shall pay its just proportion of the debts of the old county, and that it remains only for the courts to ascertain this proportion, I can see how the complaint might state a cause of action. But is this true? The provision, in my opinion, is nothing more than a restriction upon the legislative power to compel it to provide for the payment of a just proportion of the debt of the old by the new county whenever in its judgment such payment should be made. We had no such provision in the old constitution, but the legislature frequently exercised the power, and it was upheld. *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316, and cases cited. The power to subdivide counties, or to create new counties, resides in the legislature, and nowhere else. The exercise of this power in the case before us is not questioned. In adopting the new constitution the people undertook to place certain limitations upon this power. Section 3 of article 11 provides that: "No new county shall be established which shall reduce any county to a population of less than eight thousand; nor shall a new county be formed containing a less population than five thousand; nor shall any line thereof pass within five miles of the county seat of any county proposed to be divided. Every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken." There is here no enlargement or grant of power. That was not necessary. The purpose of the provision, on the contrary, was intended, I think, as restrictive of, and a limitation upon, the power. But the power still remained with the legislature. No part of it was intended to be devolved upon the judicial department. The question of adjusting the debts of the old county was one involved in the very act of creating the new. The whole subject of the wisdom and expediency of creating the

new county is a matter addressed to the legislature. The question of what, if any, proportion of the debts of the old should be paid by the new county, with all other questions concerning division, is with the legislature. If the legislature deemed it just that some proportion of the debt of the old should be paid by the new county, and could not itself fix that proportion, it could provide the machinery by which this proportion could be ascertained by the courts or by commissioners, and the basis upon which to make the computation. The complaint shows that certain sums were paid out by plaintiff in three different years, and for each year the proportion of defendant's liability is fixed by taking the assessed valuation of the property of each county for that year, and charging defendant a proportion of the whole amount paid on the debt, in the ratio the assessment in the new county bears to that of the old. So far as any authority for taking this basis of settlement is concerned, it is arbitrary, and without any constitutional or legislative warrant. A large part of the debt was incurred for building a courthouse which remained in Tulare county. The legislature may have thought it inequitable to place any portion of this burden on the new county, as it would have to build one for its own uses. Possibly the road bonds were for expenditures on roads wholly within the remaining territory of Tulare county. These considerations, with all others bearing upon the question of county division, it must be presumed, were brought to the attention of the legislature.

In the case of *Bristol v. New Chester*, 3 N. H. 534, speaking of the power to divide towns, it was said that the power is strictly legislative, and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is in its nature purely legislative. In the case of *Commissioners of Laramie Co. v. Commissioners of Albany Co.*, 92 U. S. 307, the principle stated in the case last cited is approved, and it is further held "that, if the legislature omit to make any provision as to the property and the debts of the old county, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay without any claim for contribution"; citing numerous cases. See, also, *Dill. Mun. Corp.* § 188. Again, the constitution does not state to whom the liability for a just proportion of the debts of the old county shall be payable. It does not state when the liability shall begin or end, so as to guide the courts in determining what liabilities are to be deemed existing. It does not declare any rule by which to establish a basis of apportionment, whether upon an assessment for the year preceding the division,

or the year of the division, or some subsequent assessment to be made for that special purpose. It provides no machinery by which any such basis could be ascertained by the courts. It leaves the consideration of the value of the public property remaining in the old county entirely out of view, and this consideration alone might fully justify the imposition of the entire debt of the old county on that county alone. It would seem to me, if the courts should undertake to determine this question upon the authority of the constitution alone, they would have neither compass nor rudder by which to be guided. Since the new constitution went into effect, there have been five new counties created, viz. Glenn, Madera, Riverside, Orange, and Kings. In the acts creating three of these counties, to wit, Glenn, Madera, and Kings, no provision was made for payment of any part of the debts of the old counties. In the other two, provision was made. Here is a legislative construction given to the constitution, which, while not binding upon this court, contributes to the correctness of the position taken in this opinion.

But I think the very question has been settled by this court in *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316. Plaintiff seeks to avoid the result of that case by declaring it to be dictum in so far as it construes section 3, art. 11, of the constitution. In this position counsel are, I think, wholly mistaken. The point was not so directly raised there as it is here, and yet its decision seems to me to have been naturally, if not necessarily, involved. The act under which Orange county was carved out of Los Angeles provided that the debts of the old county existing on the day the act took effect should be ascertained by commissioners, and paid proportionately to the assessed value of the property of the respective counties of a certain year. Los Angeles county claimed certain sums for expenditures after that date, March 11, 1889, and up to the date of the organization of the new county, August 2, 1889. Payment was refused when the claim was presented to the board of supervisors, and the action followed. The trial court sustained a demurrer to the complaint, and the judgment was affirmed here. The learned justice, in delivering the opinion of the court, called attention to the established rule that, where no provision is made by the legislature as to the debts of the old county, they remain with the old county. He then takes up the constitutional provision in question, and says: "The mode of determining the 'just proportion' of the debts and liabilities for which the new county shall be liable is not prescribed in the constitution, but is left to the determination of the legislature in each particular case." He points out that the legislature did provide a mode of ascertaining the "just proportion" of the debts, by the appointment of commissioners, and limited the liabilities to those existing at the time the act took effect, and he says: "As the legislature could divide the public property and assets

of the county in such mode as it might choose, it was competent for it to fix upon a date which it might select as the time for ascertaining their amount and value, as well as determining in connection therewith the 'just proportion' of the debts and liabilities to be assumed by the new county. In the present instance the legislature fixed the time when the act took effect as the proper period for ascertaining the amount of these assets and liabilities, and it cannot be held that the constitutional provision was violated in selecting that as the point of time at which to properly determine what would be a 'just proportion' of the debts and liabilities to be assumed by the new county." The expenditures for which the claim was made were incurred in the new county prior to its organization, but after the date of the act, and the commissioners had reported these separately, with the remark "that, as a matter of equity, the amount should be refunded by Orange county to Los Angeles county." The opinion upon this point continues: "The legislature may have considered that it would be necessary for the county of Los Angeles to expend money for municipal purposes within this territory; and, as it was within its discretion to determine that it should bear the burden of any of the expenditures which it might thus make, the fact that it has made no provision for its reimbursement is indicative that it was not its intention that it should be reimbursed therefor." Now, this was just such a claim as counsel for plaintiff insists must be heard and determined by the judicial arm of government, and that over it the legislature has no jurisdiction or power whatever. It seems to me the decision necessarily settles the very question here,—that it is a legislative, and not a judicial, function. Upon plaintiff's theory, it was the duty of the court to overrule the demurrer, and proceed to hear and determine what the "just proportion" of the debt of Los Angeles county was that should be borne by Orange county; but the court found no cause of action stated, because the legislature had disposed of it, and because it was a legislative function, and not a judicial one. See, also, *Orange Co. v. Los Angeles Co.*, 114 Cal. 390, 46 Pac. 173.

2. Plaintiff claims that the indebtedness was a joint obligation to the extent that both counties were liable to the bondholders for that portion of the bonds justly chargeable to the territory comprising Kings county, although plaintiff admits that Tulare county is not relieved, and the bonds may be enforced against Tulare county (citing *Hughes v. Ewing*, 98 Cal. 414, 28 Pac. 1067; *Bates v. Gregory*, 89 Cal. 387, 26 Pac. 891); and it is claimed that Tulare county is entitled to contribution from Kings county (citing section 1432, Civ. Code, which provides that "a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with

him"). This section presupposes some contractual relations between the parties, but no relations existed here except such as were created by the act authorizing the division of the counties. None were created by which a duty was imposed upon Kings county to pay directly, or to contribute to, the existing indebtedness.

3. Plaintiff also claims a right of action under section 2847, Civ. Code, relating to the obligation of a principal where the surety satisfies the obligation. I can see no application of the principle of that section to this case. Tulare county was not surety for Kings county in any legal sense.

4. Plaintiff further claims that the court has power to grant the relief under section 3523, Civ. Code, and section 187, Code Civ. Proc. The Civil Code section declares that for every wrong there is a remedy. This may not be questioned. The remedy in this case is with the legislature, as we have found, and not with the courts. The section of the Code of Civil Procedure cited provides that when jurisdiction by the constitution, or this Code, or by any other statute, is conferred on a court, all the means necessary to carry it into effect are also given, and if, in the exercise of its jurisdiction, the course of proceeding be not pointed out specifically, any suitable process or mode of proceeding may be adopted by the court which may seem most conformable to the Code. To make this section available, we must assume that the statute law or the constitution confers jurisdiction in such a case as this upon the courts. But we have found no such jurisdiction to exist, and hence the section does not apply, and it becomes unnecessary to notice the very numerous cases cited by plaintiff which its counsel have collected. Those nearest in point are cases where the legislature did in fact provide a mode of ascertaining the several liability of the two counties, and the courts were appealed to in aid of the remedy. Numerous citations of state constitutions with similar provision to ours in the matter of county division are given, but counsel admit their failure to find any case reported where the facts were like those here. I find no error in the conclusion reached by the trial court, and it is recommended that the judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

SEARS v. FLODSTROM.

(Supreme Court of Idaho. May 18, 1897.)

REVIEW ON APPEAL—PROMISE TO PAY DEBT OF ANOTHER.

1. Where the sole question in a case is one of fact, and the evidence is conflicting, the finding of the jury will not be disturbed.

2. Plaintiff was the proprietor of a meat market. Defendant was the owner of a board-

ing house, which he rented to a tenant, who was a woman, and a stranger to plaintiff. Defendant introduced his tenant to plaintiff, and requested him to let her have such meats as she required, and charge the same to him. *Held*, that defendant was liable for balance of account for meats so delivered to the tenant of defendant, the promise being an original one, and not within the statute of frauds.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; Alex. E. Maybaw, Judge.

Action by J. R. Sears against Louls Flodstrom. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Woods and A. G. Kerns, for appellant. Hand & Samuels, for respondent.

HUSTON, J. This is an action commenced in justice's court for the recovery of a balance of account claimed to be due from the defendant to plaintiff. The plaintiff recovered in the justice's court. An appeal was taken by the defendant to the district court, where the case was tried *de novo* to a jury, and the plaintiff again recovered. From the latter judgment, as well as from the order of the district court denying a new trial, this appeal is taken.

The facts may be briefly summarized as follows: The plaintiff in 1890 was running a meat market in the town of Gem, Shoshone county, Idaho, for the firm of Barger & Sears. At this time the defendant was the owner of a miners' boarding house in the said town, but was himself employed in the mines, and was renting his boarding house to different persons,—it would seem mostly, if not entirely, to women, who, being strangers in the camp or town, were without credit; and the defendant was in the habit of taking them to the market of said Barger & Sears, and introducing them, telling said Barger & Sears to deliver them what they wanted, and charge the same to him (the defendant). It seems that various girls, as the record states, became tenants of the defendant during the years 1890 and 1891. In the early part of 1891, one Betsey Johnson became the tenant of defendant, and was by the defendant introduced to said Barger & Sears, with the like statement that the account made by her should be charged to him. Monthly payments were made upon the account by said Betsey Johnson up to the time of her departure from the camp, and thereafter payments were made thereon by the defendant to the amount of some \$85, leaving a balance of \$160.17 due plaintiff as assignee of said Barger & Sears, and it is to recover this sum that this proceeding was instituted.

While there is considerable conflict in the evidence, the jury found—and, we think, properly—in favor of the plaintiff; and, as is conceded by the appellant in his reply brief, the only question involved is the liability of defendant upon his promise, as an original undertaking. That question being found by the jury, we are not inclined to disturb their find-

ing. We have examined carefully the somewhat numerous exceptions presented by the appellant, but are unable to say that any error appears in the record which would justify a reversal. The order and judgment of the district court are affirmed, with costs.

SULLIVAN, C. J., and QUARLES, J., concur.

On Rehearing.

(June 9, 1897.)

QUARLES, J. On original hearing we gave this case more than ordinary consideration. The petition for rehearing presents nothing new, and the matters therein reiterated were fully considered by the court in the former opinion. Upon the only question of importance, the request of the appellant to Barger & Sears to furnish Betsey Johnson meats, and charge to himself,—an original promise, accepted and acted upon by Barger & Sears, and upon the faith of which the goods were sold and delivered,—there was conflicting evidence, and the jury found for plaintiff. Under such circumstances, no other prejudicial error appearing, we will not disturb the verdict of the jury. A rehearing is denied.

SULLIVAN, C. J., and HUSTON, J., concurring.

(5 Idaho, 371.)

In re **RIDENBAUGH.**

(Supreme Court of Idaho. June 2, 1897.)

MUNICIPAL ORDINANCES — VALIDITY — LICENSING GAMBLING.

1. Section 2, art. 12, Const., prohibits municipal ordinances in conflict with the general laws of the state.

2. The charter of Boise City and amendments thereto authorize only such ordinances as are in harmony with the general laws of the state.

(Syllabus by the Court.)

Application by John Ridenbaugh for discharge on writ of habeas corpus. Denied.

Alfred A. Fraser, for petitioner. Atty. Gen. McFarland, for the State.

SULLIVAN, C. J. This is an application for a writ of habeas corpus. The petitioner was convicted of the crime of conducting the gambling game of "faro," in Boise City, Idaho, under the provisions of an act entitled "An act to prohibit gambling, and to provide for the punishment thereof, and for other purposes," approved March 8, 1897 (Sess. Laws 1897, p. 53). On the trial the petitioner relied on a license procured from the corporate authorities of Boise City. After the state had proved that the defendant had been conducting said gambling game, the defendant offered to introduce in evidence license numbered 225 of said city, which is as follows: "No. 225, Boise City License. Granted May 8, 1897, State of Idaho. Expires Aug. 7, 1897. This license is granted to Thos. Constance for faro, in Boise City, Ada coun-

ty, state of Idaho, having paid the city clerk the sum of fifty dollars for one-quarter thereof, conformably with the laws of said state and Ordinance No. 155 of Boise City, passed and approved Jan. 7, 1895. [Signed] H. E. Neal, City Treasurer. [Countersigned] Arch Cunningham, City Clerk,"—as his justification for conducting said gambling game. The court rejected said offered evidence as immaterial and no justification, to which ruling the defendant then and there duly excepted. The defendant then offered in evidence Ordinance No. 155 of said city, which is entitled "An ordinance licensing banking games at cards and the game known as 'American Tan,'" which proffered evidence was rejected by the court, for the reason that it was immaterial and no justification. Said ordinance is as follows: "Section 1. There shall be levied and collected by the city auditor, as tax collector, licenses as follows: Sec. 2. From each and every person who keeps or runs, or in whose saloon, house or place of business is kept or run, in Boise City, Idaho, any faro, monte, American tan or twenty-one game, or any other banking game or games at cards, dice or other device, must pay a license of fifty dollars per quarter, or any less time, for each and every game."—approved January 7, 1895. Said ordinance contains two other sections, not necessary to be set forth here. The defendant then offered in evidence an act of the state legislature entitled "An act to amend sections three, five and eleven of an act incorporating the city of Boise," approved Jan. 11, 1896, being sections 130, 132, and 138 of the Special and Local Laws of Idaho. Said first-mentioned act was approved March 12, 1897. The particular part of said act offered in evidence is as follows: "The mayor and common council shall have full power and authority within Boise City * * * to regulate and restrain, in their discretion, upon special application, to license and tax: * * * Gaming and gambling houses." The court rejected said offered act as immaterial, to which the defendant excepted. The defendant then rested. Thereupon the cause was adjourned to the following day, and the court on that day found the defendant guilty as charged in the information, and sentenced him to pay a fine of \$200, and, in default of payment thereof, to be confined in the county jail one day for each \$2 of said fine. The fine not being paid, the defendant was thereupon confined in the county jail. He thereafter made application to be released on habeas corpus.

It is conceded by counsel that the decision of this case depends upon the provisions of the constitution and laws of this commonwealth. The city of Boise was incorporated by a special act of the legislature, approved January 11, 1896. See Special & Local Laws Idaho 1893-97, p. 22. By the fourth subdivision of section 5 of said act, the mayor and common council are empowered to license gambling

houses. By the thirtieth subdivision of said section 5, the city council is empowered to make all needful by-laws, ordinances, and regulations not repugnant to the constitution and the laws of the United States, or of this state. The authority of the city council, by ordinance, to license gambling houses, continued, at least, to the 8th day of May, 1897, at which date a general law prohibiting gambling went into effect. Said act prohibiting gambling went into effect on May 8, 1897, and expressly repeals all acts or parts of acts inconsistent with the provisions of said act. Sess. Laws 1897, p. 53. It is also conceded that the only question for decision in this case is: Did the general law prohibiting gambling repeal that provision of the city charter empowering the city council to license gambling? Section 19 of article 3 of the constitution provides that the legislature shall not pass local or special laws in certain enumerated cases, one of which is for the punishment of crimes and misdemeanors. While it is true the legislature has not attempted to pass a local or special law against gambling, or for the punishment of an act made a crime by said anti-gambling law, yet, if that law be so construed as to make an act lawful in one part of the state which is in another part made a misdemeanor, the result would be a local or special law. The legislature would then be enabled to do indirectly what it is prohibited from doing directly. But the legislature did not intend that said anti-gambling act should apply to only part of the state. It was intended as a general law applying equally to the entire state. Section 2 of article 12 of our constitution is as follows: "Any county or incorporated city or town may make and enforce within its limits, all such local, police, sanitary and other regulations as are not in conflict with its charter or with the general law." This provision of the constitution authorizes the council of Boise City to make and enforce ordinances that are not in conflict with the general laws, and forbids the making and enforcing of any ordinance in conflict with the general laws. The act amending sections 3, 5, and 11 of the charter of Boise City, approved March 12, 1897, provides that the city council may pass ordinances not repugnant to the constitution and laws of the United States, or the laws of this state necessary or convenient for carrying the powers and authority granted into effect. See Sess. Laws 1897, p. 85. Thus, it is shown by the original charter of Boise City, also by section 2 of article 12 of the constitution, and the act amending the charter of Boise City, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state. The cardinal rule in construing constitutional, as well as statutory, provisions, is to discover and enforce the intention of those who made them. Said provision of the constitution, as well as the provisions of the original charter

of Boise City, and as amended, are too plain to require construction. It was not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict the ordinance must give way. The ordinances authorized by the charter of Boise City must be in harmony with the general laws of the state. On the point involved in this case, see *Black, Interp. Laws*, 116 et seq.; *Heinssen v. State* (Colo. Sup.) 23 Pac. 995; *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757. The petitioner relies upon the authority of *Davis v. State*, 2 Tex. App. 425; *State v. Clark*, 54 Mo. 17; 1 Dill. Mun. Corp. § 54; *Chamberlain v. City of Evansville*, 77 Ind. 542; and other authorities. If any of the said authorities are under a constitution like ours, or a charter like that of Boise City, we are not disposed to follow them. Some of said authorities are not under constitutions or laws like those of this state; hence are not in point. The judgment of this court is that the discharge of the petitioner is denied, and he is remanded to the custody of the sheriff of Ada county.

HUSTON and QUARLES, JJ., concur.

POTTER et al. v. TALKINGTON.

(Supreme Court of Idaho. May 18, 1897.)

APPEAL—FINAL JUDGMENTS—TRANSCRIPT—DUTY OF CLERK—FEES.

1. A final judgment is one that fully settles the rights of the parties to the action. A judgment or order of court determining the law applicable to the issues of an action, but leaving questions of fact unsettled, is not a final judgment, or such judgment as is reviewable on appeal.

2. The clerk of a district court could not be required, at the time the controversy herein arose, to certify a transcript on appeal from his court, unless the legal fees for copying and certifying such transcript provided by law should be tendered to him.

(Syllabus by the Court.)

Appeal from district court, Idaho county; W. G. Piper, Judge.

Submission of controversy between Carrie M. Potter and others and A. W. Talkington. From a judgment for plaintiffs, defendant appeals. Dismissed.

James E. Babb, for appellant. James W. Reid, for respondents.

QUARLES, J. A question arose between the parties to this proceeding as to the fees allowable by law to the appellant as clerk of the district court below, and the matter was submitted by stipulation, without action. The judgment of the lower court is in words and figures as follows: "In the above-entitled action, the parties having submitted the controversy to the decision of the court upon a statement of facts agreed upon by and between them, Jas. W. Reid appearing as counsel for

the plaintiffs, and W. N. Seales as counsel for the defendant, and the court having considered the same, and being fully advised in the premises, it is ordered, adjudged, and decreed, and the court doth hereby order and adjudge, that the plaintiffs pay to the defendant the fees allowed by law to clerks of court for a seal and certificate, to wit, the sum of fifty cents, and, in addition thereto, a reasonable fee for the time and labor required by the defendant in comparing said transcript with the original papers and certifying as to their accuracy. The said reasonable fee is hereby adjudged to be at the rate of five dollars per day for each day of seven hours—business hours—actually required in comparing said transcript with said original papers, and such pay of fifty cents and five dollars per day is in lieu of all other compensation for certifying said transcript. Dated this 10th day of October, 1896. W. G. Piper, District Judge." "Said judgment filed Nov. 10, 1896, and entered same day in Judgment Book No. 1, p. 278." The aforesaid judgment purports to settle the law applicable to the pending controversy erroneously, we think, but does not determine the facts involved, or fix absolutely the amount of fees due the appellant. No execution or final process could issue on said judgment; hence it is not a final judgment, and for that reason no appeal will lie therefrom. But, as the parties are proceeding informally, and are seeking to ascertain what the lawful fees of the clerk for certifying a transcript on appeal which has been prepared by the appellant are, we express the opinion that in such case the clerk is entitled to the full fees allowed by law for copying and certifying such transcript. To lessen the costs of appeals, this court has adopted a rule which permits the appellant to prepare the transcript on appeal, and present it to the attorney for the respondents, and the attorneys of the respective parties may then certify to such transcript. Under said rule, if the respondent's attorney fails to certify the transcript, the respondent is liable to the appellant for the cost of procuring a certification of such transcript, and it is incumbent on this court to see that the rule is enforced. Under the law as it existed when this controversy arose the clerk could not be required to authenticate any record except such as should be made by him, and then only on payment of the fee allowed for making and certifying the transcript, and this was true although the transcript should have been made by some one else. *Edmondson v. Mason*, 16 Cal. 387; *Chambers v. Appleton*, 47 N. Y. Super. Ct. 524; *State v. Kelsey*, 44 N. J. Law, 1; *Morrison v. Rodes*, 7 T. B. Mon. 20. As to the fees allowable to a clerk in such cases since the adoption of the act of March 12, 1897, we express no opinion. The appeal herein is dismissed, with costs to respondents.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(June 9, 1897.)

HUSTON, J. Appellant has filed a petition for a rehearing in this case, as he states in his petition, "only on a point not made by counsel, but raised of the court's own motion, and decided without argument." We would suggest to counsel that the appellate court is not confined in its investigations to the limits of the briefs of counsel or to their oral arguments for rules of law or authorities. We have examined the cases *McMenomy v. White* (Cal.) 47 Pac. 109, and *Gregory v. Gregory* (Cal.) 36 Pac. 364, and are unable to see their applicability. They simply decide that when a case is heard on an agreed statement of facts no findings of fact are necessary. But that question is not involved in this case. The proceeding was brought under the provision of chapter 2, tit. 3, of "Summary Proceedings" (Code Civ. Proc.) Rev. St., which prescribes how actions of this kind may be brought in the district court. Section 5070 provides: "The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to an appeal." As we have repeatedly decided, there can be no appeal where there is no final judgment. In this case there is no judgment; nothing to appeal from. If the only purpose was to get the opinion of the court upon a disputed question of practice, then counsel are not within the provisions of the statute, as that only applies to a controversy that is real, and is brought in good faith to determine the rights of the parties; and until the rights of the parties have been settled by a judgment of the district court, the appellate jurisdiction of this court cannot be invoked. The constitution fixes both the original and appellate jurisdiction of this court, and such jurisdiction cannot be extended by stipulation of litigants, nor by the laches of respondents in not raising the question. Petition for rehearing is denied.

SULLIVAN, C. J., and QUARLES, J., concur.

STATE ex rel. GREAT FALLS WATER-
WORKS v. MAYOR, ETC., OF CITY
OF GREAT FALLS et al.

(Supreme Court of Montana. May 17, 1897.)

MUNICIPAL CORPORATIONS — POWERS — DEBTS —
LOANS OF CREDIT — CONSTITUTIONAL LIMITATION
— CONTRACTS — VALIDITY — ACCEPTANCE — WAIVER
— ESTOPPEL — TAXES — MANDAMUS — WHEN LIES —
RECORDS — PLEADING — WATER COMPANIES — LICENSE.

1. Comp. St. 1887, § 345, forbidding a mayor to be interested directly or indirectly in the profits of any city contract entered into while he is in office, does not apply to a mayor who was not interested in a contract made with the city, but who agreed, after the contract was accepted and filed with the proper official, to take stock in a corporation succeeding to the rights of the original contractors.

2. Where contractors with a city for a water supply did not file their acceptance within the time prescribed by the ordinance, but the city, without objecting, allowed them to erect the works and supply water for several years according to contract, it waived any defect in acceptance.

3. A city granted an exclusive right to supply water for a term of 15 years, at fixed hydrant rates. The grantees erected waterworks, issued and sold bonds, and supplied the city with water according to contract for 7 years, when the city repudiated that part of the contract fixing rates, and insisted on a continued supply at lower rate. *Held*, on mandamus by the grantees to compel the levy of a tax to pay contract rates overdue, that the city could not be heard to say that the contract was void because the grant was exclusive, or for an unreasonable length of time at fixed rates, or unwise on the part of the city.

4. A city, in contracting for waterworks to supply itself and its inhabitants with water, exercises its business or proprietary powers, as distinguished from its legislative powers; and hence the fact that the contract is to run for a long term of years does not render it void, as restricting the future legislative powers of the city council.

5. Laws 1889, p. 185, § 16, amending Comp. St. § 415, so as to provide that the amount of taxes to be levied in any one year in any city or town for water purposes shall not exceed one-half of 1 per centum, etc., became part of an ordinance contract for a water supply, made and accepted while it was in force, so that the contractors had a right to insist that, so far as necessary to pay rentals due them according to contract, a special tax should be levied annually, not to exceed the specified limit.

6. In view of Laws 1889, p. 185, § 16, amending Comp. St. § 415, so as to provide that the amount of taxes to be levied by a municipality for water purposes shall not exceed a certain per cent., etc., and thereby making liabilities of municipal corporations for water rentals under contracts with water companies payable out of a special fund, such liabilities are not debts, within the constitutional limitation.

7. An agreement of a city in a contract with a water company to pay to the company's bondholders the money due or to become due from hydrant rentals, or as much as necessary to pay interest on the bonds, and the signing on behalf of the city of a certificate to that effect on the back of the bonds, is not a loan of credit by the city, in violation of Act Cong. 1886, § 2 (Comp. St. Mont. p. 32).

8. Code Civ. Proc. 1895, § 1961, provides that mandamus may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; and section 1962 provides that the writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. *Held*, that mandamus was the proper remedy to compel a city to levy a special tax to pay ascertained water rentals due under a valid contract for a water supply, which contract the city had repudiated.

9. The city could not dispute its records as to the number of hydrants for which rentals were due under the contract, in the absence of an averment in the return laying a foundation therefor.

10. In the absence of an averment in the return to support its admission, evidence that the water company had no license to carry on its business was also properly excluded.

11. Where a city repudiates a contract with a water company providing for payment of hydrant rentals semiannually, but still uses the water furnished by the company, and insists that the supply be continued regardless of the contract, a command in a writ of mandamus, that the city levy sufficient taxes to pay, not only the six months' water rentals already due, but also those that will become due for the remaining six months of the year, is proper.

Appeal from district court, Cascade county; Dudley Du Bose, Judge.

Mandamus by the state, on the relation of the Great Falls Waterworks, against the mayor and city council of the city of Great Falls, and the city of Great Falls. A peremptory writ issued, and from an order granting a new trial relator appeals. Reversed.

On March 26 and 27, 1889, while Montana was a territory, Ordinance No. 17 of the city of Great Falls was passed and approved. It embodied the terms of a contract between said city and one T. E. Collins and others for the construction of a waterworks system. It granted to said parties and their associates and assigns the exclusive right of laying pipes and mains in the said city, and of supplying water by means thereof to it and to its inhabitants for a period of 20 years. It gave the city the option of purchasing the waterworks plant at any time after the expiration of 15 years, and before the termination of 20 years; and, in the event that no purchase thereof should be made by the city, it provided that the contract should be renewed for an additional period of 20 years. It designated a certain point in the Missouri river from which water should be taken. It required the laying and maintenance of 7 miles of mains, with 75 hydrants at the outset, and extensions of mains and pipes in such streets as the city council might direct from time to time, with an additional hydrant for each one-tenth of a mile of extended mains. The city reserved the right to govern by ordinance the general use of all hydrants, and the right of such reasonable control thereof as might be necessary to a beneficial use of water for fire and sewerage purposes. It provided that, upon a failure of the parties contracted with and their assigns to repair any hydrants within 24 hours after notice of the necessity of repairs, the city could proceed to do so, and might deduct the cost thereof from the next water rental to be paid by the city. It was agreed that the city should pay for the first 75 hydrants at the rate of \$100 per annum for each, and for each hydrant ordered and placed thereafter at the rate of \$60 per annum. Payments were to be made semiannually, on May 1st and November 1st. It contained this language: "A sufficient tax shall be levied and collected annually upon all taxable property upon the assessment roll of said city subject by law to such tax, to meet the payments under this ordinance when and as they respectively mature, during the existence of any contract for hydrant rental, which tax shall be irrepealable from and after the passage of this ordinance." Section 27 of the ordinance provided that, if Collins and his associates and assigns should issue any bonds secured by mortgage or trust deeds on the waterworks, the money due or to become due for any hydrant rental, or as much thereof as might be necessary, should be appropriated to the payment of the interest on said bonds, and authorized the mayor and city clerk to

sign a certificate on the back of any such bonds to that effect. The ordinance also provided for the filing of a written acceptance of the terms of the contract by said Collins et al. within 10 days after its approval.

Collins and his associates, after a compliance with the terms of the ordinance, so far as was requisite, organized a corporation known as the "Great Falls Water Company," on March 27, 1889, and assigned to it all their rights and franchises. One of the stockholders in this corporation was Paris Gibson, the mayor of the city at the time the ordinance was passed. The city was formally notified and acquiesced in this transfer. The Great Falls Water Company put in a water plant pursuant to the contract. The city accepted it, and paid the rentals agreed upon as they fell due. On or about May 1, 1891, the corporation issued and disposed of bonds to the extent of \$150,000, securing the same by a trust deed on all its property. These bonds were duly indorsed by the city officials pursuant to section 27 of the ordinance supra, and the money realized from the sale thereof was expended upon and in connection with the water plant. The company operated the waterworks until the 1st day of May, 1893, when it transferred all its franchises and property to the Great Falls Waterworks, a corporation organized for the purpose of operating the waterworks. Again, the city council was notified, and duly accepted this corporation as the assignee and successor in interest of the Great Falls Water Company. On May 1st the new corporation issued bonds payable in 20 years, to the extent of \$500,000, securing the same by a trust deed executed to the Illinois Trust & Savings Bank, a corporation. Again, the city officials, pursuant to section 27 of the ordinance supra, duly indorsed these bonds. Of this last issue of bonds, \$150,000 were used for the purpose of retiring the bonds issued by the Great Falls Water Company. Another \$150,000 worth of these bonds was also disposed of. Prior to November 1, 1895 (as shown by the minutes of the city council), under the direction and acceptance of the city council, the water mains had been extended to such an extent that there were 251 hydrants in the city. On May 1, 1896, the city council duly allowed and paid the presented claim of the Great Falls Waterworks for the six months' rental of 251 hydrants, at the rates prescribed in the ordinance contract, namely, \$90 each for the first 75 hydrants, and \$60 each for the remaining 176. On May 13th the council duly enacted an ordinance as required by the laws of the state, in which, among other sums to meet the current expenses of the city, there was appropriated the sum of \$17,390 for water and fire purposes. In August, 1896, at the time prescribed by law for the levying of its taxes, the city, through its council, levied a two-mill tax only for water purposes. On or

about October 2, 1896, the water company presented to the city an itemized bill for the rental of the 251 hydrants which would be due for the six months ending November 1, 1896. At a meeting of the council held on October 5, 1896, the bill was considered and acted upon. Its auditing committee, to whom it was referred, presented the following report upon the claim: "We find the following to be the facts: The assessed value of the city property, taken the current year, is \$5,541,103. The limit of indebtedness, as allowed under the present law, is three per cent. of that amount, or \$166,333. According to your books, the outstanding indebtedness amounts to approximately \$200,000, a sum in excess of the limit set by law. Accordingly, the council will be limited in its annual expenditure to the amount of cash on hand, plus the amount received from annual receipts from taxes and licenses. Applying this principle to the claim on hand, we find cash in the treasury, available for water fund purposes, \$540.93; taxes not yet collected, but approximately correct and probable, \$11,082.20,—total to be expended during the year ending May 1, 1897, for water purposes, \$11,623.12. We, your committee, acting upon this information, and believing the council has no right to expend money which it does not possess, or has no reasonable expectation of possessing, do recommend that the above-named sum be divided into two equal parts, the first half to be paid upon the present bill, and the remainder to be paid on the first day of May, 1897. The conditions of payment are embodied in the resolution herewith presented: Resolved, that the claim of the Great Falls Waterworks for six months' hydrant rental, ending Oct. 31st, 1896, be disallowed in the sum of \$2,245.47, and allowed in the sum of \$5,811.56, and that a warrant be issued on the city treasurer, payable out of the water fund, for said \$5,811.56, and be tendered to said Great Falls Waterworks, as payment in full for said six months' hydrant rental." The said report of the auditing committee and the resolution contained therein were adopted by the city council. Subsequently, on November 2, 1896, the water company having again presented its bill for hydrant rentals due for the six months' period ending November 1st, the council took identically the same action it had taken upon the same bill at the prior meeting; its auditing committee having reiterated its previous report thereon, and having recommended the identical resolution in reference thereto previously adopted.

On November 4, 1896, the Great Falls Waterworks, on affidavit of its president, applied to the district court of Cascade county for a writ of mandamus to be directed to the city council of Great Falls. An alternative writ of mandamus was issued, which recited many of the facts heretofore stated, and also contained other allegations. The writ

commanded the city council at its first regular meeting to audit and allow the claim of relator for the rental of 251 hydrants from May 1, 1896, to November 1, 1896, at the rate specified in said Ordinance No. 17, and directed that the mayor thereupon should issue a warrant to said relator for the sum of \$8,655 and interest, payable out of the water fund only. It also commanded that the city council should levy and collect sufficient taxes to pay for the rental of said 251 hydrants for what was due thereon, and what would be due for the fiscal year commencing the first Monday in May, 1897, and ending the first Monday in May, 1898. The writ required cause to be shown on November 16, 1896, why its commands should not be obeyed. No demurrer was interposed.

The return or answer of defendants to this alternative writ admitted that water mains, original and extended, had been laid in the city by relator and its predecessors under the orders and directions of the city council to the extent alleged. It denied that the amount of money had been expended which the writ alleged had been expended in and about relator's water plant, and averred that a much less amount of money than was expended would have sufficed for the construction and expenses connected with said plant. It alleged that the stock in the Great Falls Waterworks Company had not been paid in full by the holders thereof. It denied the allegation of said writ that the amount of money which would be received by the relator on account of water furnished private consumers for the year 1896 would be insufficient to meet and discharge the interest on the outstanding bonded indebtedness of the relator and its operating expenses. Defendants further denied that there had been placed, in connection with the water plant and system, 251 hydrants prior to the 1st day of November, 1895; denied that any such number of hydrants had been accepted or since maintained by the relator; and alleged that the total number of hydrants placed upon or in connection with said water system on or prior to the 1st day of November, 1895, was 250 hydrants. The answer further averred that 3 of said 250 hydrants were placed and had been maintained wholly outside of the limits of the city of Great Falls without authority. It alleged that, of the remaining 247 hydrants, 6 were placed in an addition to the city of Great Falls, under an express agreement with the city that no charge should be made for the same prior to the 1st day of May, 1897. It also alleged that, of the 241 remaining hydrants, 13 had been placed below the surface of the ground, so as to be inaccessible for fire purposes. It averred that prior to May 1, 1896, relator had been ordered to place said 13 hydrants in proper condition, but had failed and refused to do so. It averred that in the spring of 1896, for a period of 60 days, relator had failed to furnish, to the inhabitants of the city, water fit and suitable for domestic use, and had made no provision

at periods of high water in the Missouri river for furnishing private consumers with wholesome water. It alleged that, at the time the contract was entered into, the future of the city was most promising (setting forth in detail the reasons therefor), and that at such time the city could have entered into a more favorable contract than the one contained in Ordinance No. 17. It set forth that the city of Great Falls had exceeded the limit of indebtedness permitted by the constitution of the state, and had no authority to levy and collect the taxes for water rentals as prescribed by Ordinance No. 17. It alleged that an agreement had been entered into by the persons named as grantees in the ordinance and Paris Gibson, at that time mayor of the city, whereby each of said persons, including said mayor, should be an equal owner of the franchises, privileges, and contract rights to be granted, and should organize a corporation to which should be transferred all the said rights, etc. It alleged that Collins et al. and the mayor, Gibson, influenced the city council to pass the ordinance aforesaid, and that the same was approved by its mayor, Gibson, while an interested party. It averred that the various members of the city council who had allowed and paid the hydrant rentals to relator and its predecessors had done so without any knowledge on their part of the said agreement on the part of Gibson, and of his interest in the original water contract. It alleged that, by reason of the facts aforesaid, as well as upon other grounds, the said original water contract was void. It averred inability on the part of the city to allow relator the amount claimed for hydrant rentals, and at the same time operate its city government, setting forth in detail the expenses necessary for the operation of its government. It denied the allegation that the only reason for disallowing the claim presented by relator was the fact that the city had not sufficient money in the water fund to pay the full amount of hydrant rentals prescribed by the ordinance, and alleged that, in allowing a portion of said claim and disallowing a portion thereof, the council had acted in good faith, in the belief that the amount allowed for water furnished was a full and adequate compensation for the same, and was all that the relator was legally entitled to receive. It further alleged that under the terms of the bonds issued and secured by trust deed to the Illinois Trust & Savings Bank, a corporation of Illinois, it (the city) was required to pay to said last-named corporation any sums due for hydrant rentals to the relator on the interest account of said bonds, and averred that interest due thereon in excess of what relator claimed to be due from the city had not been paid by relator. It further alleged that there was a defect of parties plaintiff to the action, in that the Illinois Trust & Savings Bank was a necessary party to the action.

The cause came on for trial on the 7th day of December, 1896. The district court (Judge Benton presiding), on December 21, 1896,

found in favor of relator, both as to the law and facts, on all issues on which evidence was admitted, and ordered a peremptory writ of mandamus as prayed. Subsequently, the defendants moved to set aside the findings of the court, and for a new trial, upon the following ground: "Errors of law occurring at the trial, and excepted to by the defendants at the time." The motion was made on a bill of exceptions. It appears from the bill of exceptions that, upon the trial of the suit, the defendants objected to the introduction of any evidence in support of the alternative writ of mandamus—First, because of a defect of parties; second, because no cause of action was stated for a writ of mandamus; third, because the relator had a plain, speedy, and adequate remedy at law, by suit against the city; fourth, because it appeared on the face of the writ that the claim of relator had been already audited and disallowed; fifth, because it did not appear on the face thereof that the claim sued on for water rent had ever been presented to the council for allowance, in accordance with the provisions of section 4808, Pol. Code 1895, requiring that "no money must be paid to any person claiming under a contract with the council, until such person has first filed with the clerk a statement, under oath, disclosing the names of all persons directly or indirectly interested in the contract, or the proceeds or profits thereof, and declaring that no persons other than those named are interested in the same"; sixth, because, the business of relator being a business that cannot be lawfully conducted except under a license first issued therefor, the alternative writ is insufficient in not alleging that the relator, at the time of the furnishing of the water, was or is now entitled to conduct the business of furnishing water to the city, or to any one else, because it does not appear that the relator had been licensed to conduct the business of a water company either under the city ordinances or the statutes; seventh, because, upon the facts stated in the alternative writ, it appears that Ordinance No. 17 is void, because to give it effect would be to create a monopoly and an exclusive right and privilege; eighth, because it further appears from the allegations of said writ that Ordinance No. 17, in so far as it purports to confer the right upon the grantees therein named, their successors and assigns, to compensation for the period named for hydrant rental at the rates fixed, is and was ultra vires, and beyond any express or implied power on the part of the city council to enact it. Defendants also moved to dismiss the alternative writ upon the ground "that the record now shows that there is a controversy between the Great Falls Waterworks and the city of Great Falls, over the question of the amount of money due for water furnished, and concerning other facts essential for the council to determine when acting as an auditing body in allowing and disallowing the claim." These objections and this motion were denied by the

court. An objection of defendants was overruled, and an exception saved to the admission in evidence of the minutes of the council, for the purpose of showing that the city council had accepted 251 hydrants.

At the trial, the defendants offered to show by the records of the minutes of the city council that at a meeting held on April 12, 1889, the acceptance in evidence was brought up for consideration, and that, on motion, the acceptance was received and placed on file. An objection to this evidence as immaterial was sustained. Defendants then offered to amend their answer so as to allege that the grantees did not file their acceptance provided for in said ordinance until the 12th day of April, 1889. Leave to amend was denied. As shown by the bill of exceptions on which defendants moved to set aside the findings of fact and for a new trial, the only issue upon which the district court allowed defendants to introduce evidence at the trial was that as to the participation of Mayor Gibson in the procurement of the water contract from the city while an interested party. It also appears that the defendants attempted, on cross-examination, to show that relator had no license, city or county, to carry on its business. The answer contained no allegation as to whether relator had a license or not. An objection, being interposed, that the evidence sought to be introduced in respect to a license was not proper cross-examination, was sustained. The motion for a new trial was heard by Judge Du Bose, who, after taking the matter under advisement, on February 19, 1897, granted a new trial. The reasons assigned therefor in his written opinion were in substance that mandamus was not the proper remedy to be invoked by relator, inasmuch as it had a plain, speedy, and adequate remedy at law, and that the city council, in disallowing the claim, acted within the scope of its authority. The appeal is from the order made by Judge Du Bose granting the new trial.

John B. Clayberg, B. P. Carpenter, W. W. Phelps, I. Parker Veazey, and W. T. Pigott, for appellant. Sam Stephenson and Cullen, Day & Cullen, for appellees.

BUCK, J. (after stating the facts). Winnowing the grain of this controversy,—distinguishing the substance from the shadows of law invoked,—the vital issues are less numerous than the many questions elaborately discussed in brief and argument seem to indicate. It is apparent from the record that, in the refusal of the city council of Great Falls to allow relator's claim for hydrant rentals, the actual motive was to repudiate the water contract, because it had grown burdensome, through changed financial conditions. It is also manifest that the district court which granted the motion for a new trial acted solely on the theory that relator's remedy for its alleged wrong was not mandamus. While it is true as a general proposition that a correct

decision or ruling will not be disturbed on appeal, even if the reason announced for the same is erroneous, nevertheless an appellate court is under no compulsion to grope in speculation for a possibly good reason. Therefore, in the determination of an appeal, a reason explicitly given for its ruling or decision by an inferior tribunal is always entitled to more consideration than mere possibly good reasons subsequently conceived or urged. If a false reason is given, the sound one supporting it should be clearly apparent and readily supplied. Were it otherwise, ingenuity in mere idle argument would result, and doubt would be encouraged for the sake of mere doubt. Hence we propose to deal very briefly with many of the objections raised.

Was the water contract void for fraud in its inception? The judge who tried the case found that Paris Gibson, the mayor of the city of Great Falls, at the time Ordinance No. 17 was passed and approved, was not interested in the water contract, and there was evidence to support the finding. The fact that Gibson, while mayor of the city, had agreed (after the acceptance of the contract filed with the proper city official, on April 9, 1889) to take shares of stock in the corporation succeeding to the rights of the original parties contracted with, did not render this contract void, under sections 345 and 347, Comp. St. 1887, forbidding a mayor or alderman to be a party to any city contract, or to be interested in the profits of any such contract entered into while he was in office. Now, whether the city of Great Falls might be affected by any breach of trust on the part of its mayor in connection with such a contract, or any violation of law declared by statute to be a breach of trust, it is unnecessary to discuss. The allegations in the answer as to Gibson's connection with the passage and approval of the ordinance are indefinite in character. It is averred that Ordinance No. 17 was caused to be passed by Collins et al. and Gibson, and that, through their united influence, the city was induced to enact the same. It is not averred that Gibson as mayor voted for the ordinance. Under the statutes in force at the time, he would not, as mayor, have had a vote in the proceedings of the council, unless there had been a tie. The defendants offered to prove by the minutes of the city council that the acceptance of the ordinance (which was admitted by the answer to have been filed within time, but which, upon the trial, was shown to have been filed two days later than the time prescribed by the ordinance) was not considered by the city council until April 12th, at which meeting the acceptance was received and placed on file. Objection was made on the ground of immateriality and sustained. The defendants then offered to amend the answer by alleging that the grantees in the ordinance did not accept its provisions until the 12th day of April, 1889. The court refused to allow this amendment. It is true that the city might at the time have objected that the

acceptance had not been filed within the 10 days prescribed, but it did not do so. It allowed the construction of the waterworks in accordance with the terms of the ordinance, and proceeded to use and enjoy the water furnished thereby. For a number of years the ordinance was treated as valid and binding in every respect. There was no suggestion in connection with the evidence offered that Gibson had or could lawfully have voted as to the acceptance at the meeting held on April 12th. Under these circumstances, there was a waiver of any defect so far as the acceptance was concerned.

Was the contract void because it granted an exclusive right or fixed the hydrant rates for an unreasonable length of time? It is to be borne in mind that there is no one in this proceeding claiming under any right conflicting with relator's to supply the city of Great Falls and its inhabitants with water. The attitude of the city is simply this: It desires and contemplates a continuance of the use of the water supplied by relator, but insists upon such use upon its own terms, regardless of the original contract. The situation is entirely different from what it would be were the exclusive or unreasonable feature of the franchise being attacked prior to the performance of the terms of the contract. Contracts establishing fixed rates of payment, or granting exclusive rights for a long term of years to supply the needs of cities, should be always closely scrutinized by the courts when directly attacked, before substantial rights have vested through performance. It is true, the question for what length of time a city council may lawfully enter into such contracts depends largely for its answer upon the facts and conditions involved in each particular case. Respondents contend that, for the last-mentioned reason, the trial court should have allowed them to show the promising future of the city at the time the contract was entered into, and the probability that a much more favorable water contract could have been obtained. But what if it had been shown that the city officials acted unwisely as to the terms of the contract? Rights have vested through the performance of many of said terms. No fraud is alleged, or even suggested, on the part of the members of the city council, other than the mayor, in entering into this contract. From March 27, 1889, up to August, 1896, for a period of more than seven years, no objection was raised (so far as the record discloses) in any manner to this contract. Bonds had been issued on the water company's plant, and money realized from the sale of bonds expended thereon. There was no error in the exclusion of this evidence.

Respondents urge: "Counsel for appellant seem to contend that we cannot now raise the defense of unreasonableness of contract. If this were a proceeding for the payment of past hydrant rentals alone, there would be some force in the proposition. But this is more. This proceeding is brought to obtain,

and the trial court granted, a mandamus to compel not only an allowance of the claim for past-due rentals, but also to compel the levy of a tax and an appropriation of sufficient money to pay rentals maturing for the year ending May 1, 1898. If this is to be upheld, it is only on the theory that the contract is valid for the entire period of time covered by its terms." The city in this proceeding is not seeking to use water to be supplied by other means than the relator's plant. It neither contemplates nor suggests the supply of water to it by other means; and no rival in the water business, seeking the patronage of the city, attacks this contract under a right or privilege antagonistic to it. The city virtually accepts the results of this contract in part,—so far as they are beneficial to it,—even while protesting that it is void ab initio. In *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, it was held that an ordinance of the city of Helena was void because it granted the exclusive right to supply said city with water for fire and sewerage purposes at fixed rates for a period of 20 years. The court granted a perpetual injunction at the prayer of certain taxpayers, to prevent the carrying out of the terms of the ordinance. But this was done before any work had been commenced under the contract embodied in the ordinance. For special reasons in that case, it was not determined whether the Helena ordinance was severable in respect to what was valid and what invalid in its provisions. We do not deem it necessary to decide, under the existing condition of facts presented by this appeal and the law applicable thereto, whether the exclusive 15-year privilege granted in Ordinance No. 17 is void or not, either on the ground of monopoly or unreasonableness of time in prescribing fixed hydrant rentals. The city is estopped in its individual capacity by its present attitude from availing itself of this defense. Nor is it necessary to determine any question which may arise in the future as to whether the relator can insist upon a renewal of the ordinance contract at the expiration of the 20 years prescribed therein, if the city of Great Falls does not purchase this water plant. We must decide the controversy only on the phase of it as presented at this time.

The law as announced in the case of *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, is peculiarly applicable in many respects to the present case. We quote from it the following applicable language: "Moreover, the city is in no position in this case to insist upon the invalidity of the exclusive character of this grant, if that could avoid its entire contract. The city is not endeavoring to construct waterworks or to lay pipes in its streets in violation of its exclusive grant to the gas company, nor is any one attempting to do so under its license or by its permission. No one seeks to infringe this exclusive grant. In practical effect it stands unchallenged, and may ever continue to be so. Until it is challenged by the

act or endeavor of some one who seeks to infringe it, its validity or invalidity is a moot question, on account of which the courts ought not to, and will not, avoid any part of the contract. No one who does not infringe or threaten to infringe the exclusiveness of the grant in a contract made by a municipality can, after the substantial performance of the contract by the grantee, be heard to say that the contract or the grant is void on account of the exclusive character of the latter. [Authorities cited.] But it is insisted that this contract is beyond the powers of this city, and void, because it grants the right to use the streets of the city to the water company, and promises to pay rental for the hydrants, for twenty-one years. The proposition on which this contention rests is that the members of the city council are trustees for the public; that they exercise legislative powers; and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition cannot be successfully maintained in this case: First. It ignores the settled distinction between the governmental or public and the proprietary or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers: The one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise, it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But, in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants; and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. [Authorities cited.] In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. Second. The powers granted to this city by the legislature of the state of Kansas to contract for and procure waterworks are plenary and unlimited, save by the duty to exercise them with reasonable discretion; and it is not the province of a court to contract

or clip the legislative grant." We are satisfied that these reasons apply generally to this appeal.

The case of *Davenport v. Kleinschmidt*, supra, refers to the distinction between the character of a city considered in its individual and its governmental capacity. See page 534, 6 Mont., and page 256, 13 Pac. The court expressly refused to hold the Helena ordinance void, because it restricted the future legislative powers of the city council. Appellant says, in its brief: "In the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, the court distinguishes the cases of *Burlington Water Co. v. Woodward*, 40 Iowa, 59, and *Grant v. City of Davenport*, 36 Iowa, 401, and uses the following language: 'In all of the water cases arising in the state of Iowa, we are met with a general statute which authorized all cities to contract for the erection of waterworks, and to pay for the water used by special fund, raised by a special annual tax, not to exceed five mills on the dollar; and such contracts with water companies were held not to create a debt against the cities, because the water companies would never have any general claim against the cities, but were held to look to the special fund alone for the satisfaction of their demands.' After the decision in this case, and in the year 1889, the legislative assembly of the territory of Montana passed the act hereinbefore quoted, conferring upon cities the power to levy and collect a tax not to exceed five mills on the dollar for fire and water purposes."

The act of the legislature referred to (See Sess. Laws 1889, p. 185, § 16), is as follows: "That section four hundred and fifteen, as amended by 'An act to amend an act relating to the formation of municipal corporations,' be amended so as to read as follows: 'Section 415. The amount of corporation taxes to be assessed and levied in any one year on the taxable property of any city or town for general municipal or administrative purposes shall not exceed three-fourths of one per centum, and for fire and water purposes one-half of one per centum on the assessed valuation of such property and such special assessments as may be levied from time to time as provided for under chapter twenty-two, fifth division of Compiled Statutes of Montana, and the amendments thereto.'" This law was in force when Ordinance No. 17 was passed, approved, and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with the rates prescribed in the ordinance contract, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five-mill limit. The contract was entered into in contemplation of a special fund

being created by the city to meet liabilities incurred thereunder; and the legislature, in said act, contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose. The case of *Davenport v. Kleinschmidt*, supra, does not disapprove the Iowa cases holding that, because a general law provided for payment from a special fund, a liability incurred by a city to supply its inhabitants with water was not a debt, in the sense of the term as employed in the constitution of Iowa, forbidding cities to incur debts in excess of a certain proportion to their assessable property. It was under different conditions of law and fact that the supreme court of the territory of Montana held in *Davenport v. Kleinschmidt* that the liability incurred by the city of Helena under its ordinance contract was a debt. This appears from a careful reading of the case.

Respondents urge: "The provisions of section 27, containing the agreement of the city to pay the hydrant rentals to the bondholders, and requiring a certificate of such agreement on the back of each of the bonds, is an attempt to loan to the company the credit of the city, in violation of Act Cong. 1886, § 2 (Comp. St. Mont., at page 32)." This section referred to is as follows: "That no territory of the United States now or hereafter to be organized, or any political or municipal corporation or subdivision of any such territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association or borrow any money for the use of any such company or association." We hold that the act of congress was not violated by section 27 of the ordinance, and the action of the city thereunder as to its certificate on the bonds.

It follows, in this view of the case, that neither under the organic act of the territory of Montana, nor the constitution of the state of Montana, is or was the liability incurred by the city of Great Falls under Ordinance 17 a debt in the sense prohibited. After rights had vested under the act of the legislative assembly passed in 1880, supra, neither the legislature nor the people of Montana, by adopting a constitution, could have impaired the contract obligation attaching. The constitution of the United States forbids this. See *Wolff v. New Orleans*, 103 U. S. 358, and *Von Hoffman v. City of Quincy*, 4 Wall. 535.

Does the alternative writ contain allegations showing a cause of action which would entitle relator to a writ of mandamus? Yes. Did relator have any plain, speedy, and adequate remedy in the ordinary course of law? It did not. Mandamus was clearly the remedy. Mandamus, even in the common-law view of it, long ago ceased to be a prerogative writ,

and became gradually, both in the English and American courts, to be regarded and interpreted as a writ of right. Since the breaking down by the Codes of so many of the formal barriers between equity and law, the remedy by mandamus, however different its legal history from the writ of injunction, is none the less elastic and adaptable within its proper sphere, as the latter is within its sphere. The function of each is by summary legal intervention to prevent wrongdoing. The one sets the law in motion to compel the doing of what should be done; the other prevents or checks threatened or actual wrongdoing. Each serves the ends of justice practically. Each is a developed remedy, adapted to modern needs and ideas; and, when the proper occasion demands either, the writ should be issued readily, without regard to any mere lifeless distinctions of past history.

Sections 1961 and 1962 (relating to mandamus), Code Civ. Proc. Mont. 1895, are as follows:

"Sec. 1961. It may be issued by the supreme court or the district court, or any judge of the district court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

"Sec. 1962. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested."

Under said section 1961, the issuance of the writ does not depend upon the exercise of a mere discretion on the part of the court or judge, regardless of the question of whether there exists a plain, speedy, and adequate remedy in the ordinary course of law. The discretion should be exercised in connection with the answer to that question. But, under section 1962, if there is not a plain, speedy, and adequate remedy in the ordinary course of law, then there is no discretion. The court or judge must issue the writ.

Had the city of Great Falls anything before it to be determined or decided when relator's claim for hydrant rentals was acted upon, on October 5 and November 2, 1896? No. The question of the number of hydrants had been decided months previously, and payment had been made for 251 hydrants up to May 1, 1896. The answer itself concedes that the mains to an extent requiring 251 hydrants had been laid under the direction of the city government. The city's own records establish the fact, and the trial court found, that 251 hydrants had been placed and accepted along these mains. The evidence offered to prove that 3 of these hydrants were outside of the city limits, and that 6 others were in an addi-

tion to the city, and maintained under a special agreement, and that 13 others were below the surface of the ground, and therefore inaccessible for fire and sewerage purposes, was all properly excluded. There was no averment in the answer laying any foundation for evidence to contradict the city's own records, kept presumably in accordance with the law requiring them to be kept. If the city is dissatisfied by reason of defects in any hydrants, it certainly, under the terms of its contract, can remedy the same. So far as the three hydrants outside of the city limits are concerned, they may be so near the city limits as to be necessary at those points for the protection of the city.

The evidence offered to show that relator had no city or county license was also properly excluded on the trial. There was no allegation in the answer to support its admission, and it was improperly sought to be elicited on cross-examination.

The offer to show that impure and unwholesome water had been furnished the inhabitants of the city was wholly immaterial. The point from which the water was to be taken by the relator had been expressly agreed upon in the ordinance, and there was no issue as to the quality of the water furnished.

The objection that there was a defect of parties, averred in the answer, and sought to be maintained on the trial, came too late. No advantage was taken of any defect by demurrer, as the Code of Civil Procedure provides it shall be taken. To prevent any possible injustice to the city in this respect, however, proper provision can be made in the writ which we shall direct to be issued. Relator was clearly beneficially interested in the enforcement of the ordinance.

The objection that the alternative writ fails to contain any allegation in compliance with section 4808, Pol. Code Mont., requiring an affidavit reciting certain facts as to the interests of the parties in the claim presented, is without merit.

The conclusion is unavoidable that the sole and only reason prompting the city council to reject the claim of relator on October 5 and November 2, 1896, was to repudiate the contract; and the other possible reasons suggested to uphold its action are without merit. We cite *Wood v. Strother*, 76 Cal. 545, 18 Pac. 763, in this connection; also, *People v. Supervisors of Otsego Co.*, 51 N. Y. 401.

As to the question of whether or not the city was properly commanded to levy sufficient taxes for the year ending May 1, 1898, our view is as follows: The city had announced that it repudiated the water contract, but still clung to the use of the water furnished by the relator's plant. Under these circumstances, the command was a proper one. It is clear to us that relator, under all these conditions we have set forth, had no plain, had no speedy, and had no adequate, remedy in the ordinary course of law. The judge who granted the new trial should not

have done so, and the same must be set aside. The cause is remanded, with directions to the lower court to grant a peremptory writ of mandamus as prayed, but to direct therein that any warrant drawn on the water fund of the city be delivered into court, to be held there, and not turned over to relator, until the written consent of the Illinois Trust & Savings Bank has been obtained.

PEMBERTON, C. J., and HUNT, J., concur.

BOARD OF COM'RS OF LAKE COUNTY v. STANDLEY.

(Supreme Court of Colorado. Jan. 18, 1897.)

COUNTIES—FUNDING BONDS—INCREASE OF INDEBTEDNESS—ISSUE OF SERIES—INVALIDITY OF PART—LIMITATION OF INDEBTEDNESS—ASSESSMENT—VALIDITY OF WARRANTS—BURDEN OF PROOF—VARIANCE.

1. The issuance of funding bonds by a county in exchange for outstanding valid warrants is not the creation of a debt.

2. Where a county, under authority of the funding act of 1881, issued a bond in exchange for outstanding valid warrants, its validity could not be affected by the fact that other bonds in the same series, issued in exchange for invalid warrants, were unauthorized and void.

3. Under a constitutional limitation as to the amount of its indebtedness, based on its assessed valuation, a county's power to incur indebtedness is measured by the assessment for the current fiscal year, till the succeeding assessment is revised by the state board of equalization, and the necessary changes and corrections are made and certified to the clerks of the respective counties.

4. Where a warrant was issued after a county had reached the constitutional limit of its indebtedness, the county must show, if it would avoid the warrant, that it was issued for a debt then incurred, and not one incurred before the limitation was reached.

5. Where a series of refunding bonds was issued in excess of the constitutional limitation on the county's indebtedness, and the validity of the several bonds depended on the validity of the warrants exchanged for them, a holder of a part of the bonds may sue at law, and show the validity of the original warrants exchanged for his bonds.

6. The fact that, while the cause of action is based on the bonds themselves, their validity must be established by evidence showing the validity of the original warrants, does not constitute a variance.

Appeal from district court, Lake county.

Action by Joseph Standley against the board of commissioners of Lake county. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action brought by the appellee against the appellant, upon certain coupons aggregating the sum of \$6,400, and being for interest on certain bonds issued by Lake county on the 2d day of January, 1882. The complaint in substance avers: That on the 1st day of January, 1882, one Thomas Corbett was the owner and holder of certain warrants of the county of Lake, which were in amount, number, and date as follows: No. 484, for the sum of \$589.12, dated July 17, 1879; No. 578, for the sum of \$2,500, dated September 1, 1879;

No. 590, for the sum of \$800, dated October 2, 1879; No. 599, for the sum of \$1,100, dated October 9, 1879; No. 601, for the sum of \$1,000, dated October 9, 1879; No. 603, for the sum of \$1,000, dated October 9, 1879; No. 605, for the sum of \$1,000, dated October 9, 1879; No. 994, for the sum of \$347.50, dated October 9, 1879. That said warrants were duly issued for and on account of indebtedness incurred and contracted a long time before the issuance thereof, to wit, on April 26 and on May 3, 1879, and on dates subsequent thereto, and before the valuation of the property of Lake county had reached the amount of \$1,000,000. That they had been presented and registered in accordance with the statutes in such case made and provided. That said warrants were valid, and evidenced an indebtedness within the constitutional limitation. That the assessed value of the property in Lake county for the year 1877 was \$364,511.40, and for the year 1878 \$603,858.92. That on the 1st day of January, 1882, there was due on the warrants above mentioned, for principal and interest, the sum of \$10,232.70. That on that date the county of Lake, in compliance with the provisions of the statute in such case made and provided, proceeded to fund the indebtedness of said county, and issued therefor funding bonds of said county, with interest coupons attached, and thereupon delivered to said Corbett 10 bonds for \$1,000 each, in exchange for the said warrants above mentioned. These bonds were numbered as follows: 185, 186, 187, 188, 189, 190, 193, 194, 195, and 196,—which were duly sold, transferred, and assigned to this plaintiff, who is now, and ever since has been, the owner and holder of said bonds and the coupons thereto attached. That the county of Lake paid all the coupons upon each of said bonds up to the coupons following the date of July 1, 1885. That since that time the county of Lake has failed, refused, and neglected to pay any of said coupons, and that there is now due from said county, on each of said bonds, 16 coupons, of \$40 each, for and on account of interest on the bonds above mentioned. A demurrer to the complaint was interposed and overruled. Thereupon the defendant answered, specifically denying and admitting certain allegations of the complaint, and, among other affirmative defenses, averred that, at the time the indebtedness evidenced by said warrants and bonds accrued (except the sum of \$589, due July 17, 1879), the assessed valuation of said county exceeded \$1,000,000; and that the aggregate amount of the indebtedness of said county, exclusive of the debts contracted before the adoption of the constitution, exceeded at that time the sum of \$6 on each \$1,000 of said valuation. Defendant further averred that the assessed valuation of the county of Lake for the year 1879 was the sum of \$3,485,628, for the year 1880 the sum of \$11,426,189, for the year 1881 the sum of \$16,423,403, subsequently and in the year 1882 rebated to \$5,017,000; that the floating indebtedness of said county for the year 1879 was \$86,146.81, and

for the year 1881, exclusive of the bonded indebtedness, was the sum of \$312,562.58; for the year 1881, up to and including the 6th day of September, 1883, the floating indebtedness of said county (exclusive of its bonded indebtedness, then amounting to \$55,000) was \$500,000; that the amount of indebtedness of said county which the board of county commissioners could alone have funded, and the question of funding which could have been submitted to the lawful voters of said county at the election of 1881, was the sum of \$15,000 (assuming said bonded indebtedness to be void); yet the board of county commissioners of said county, wrongfully and unlawfully, issued bonds to the amount of \$500,000, of which the bonds of plaintiff were a part. Plaintiff, by replication, specifically denied the material averments of the answer.

Upon the trial, the following agreed statement of facts was admitted in evidence: "For the purposes of trial of this action, the following facts are hereby stipulated and agreed upon, and the same are to be admitted in evidence, so far as they are relevant, competent, and material under the issues joined: First. It is agreed that the warrants mentioned in the complaint herein, as having been presented by Thomas Corbett for the purpose of exchange into bonds, were in numbers, amounts, and dates as stated in said complaint. Second. That said warrants and the interest thereon were converted into bonds as a part of the bond issue of Lake county, amounting to \$500,000 in 1882; and said warrants were exchanged for bonds of that issue, which were afterwards, and have been, duly numbered 185, 186, 187, 188, 189, 190, 193, 194, 195, and 196, and that the preceding bonds, numbered from 1 to 184, inclusive, had been issued before that time, and were for \$1,000 each; the whole being a part of said bonded issue of \$500,000, all of which were issued practically at the same time, in 1882. Third. It is agreed that the said Joseph Standley is the owner of said bonds, and acquired such ownership before the commencement of this suit, and without notice as to their invalidity, except implied notice, arising from the face of said bonds, the statutes, records, and proceedings leading up to the issuance of said bonds, and in exchange for said warrants, paying a valuable consideration therefor. Fourth. That, at the time and before the commencement of this suit, the said coupons were in default; that is to say, were unpaid. Fifth. It is agreed that the assessed valuation for Lake county for the years 1877 and 1878 was as stated in the complaint when completed. Sixth. That the assessed value of said Lake county for the years 1879, 1880, 1881, 1882, and 1883 was as stated in the answer when completed. Seventh. As no statement is contained in the pleading as to the amount of indebtedness during the years 1878 or 1879, it is agreed that the amount shown by the books kept by the county clerk of said county may be used in evidence for the purpose of

showing such amounts. Eighth. That, as to the semiannual statement of indebtedness, said books may be used for the purpose of showing amounts, but not for the purpose of showing any publication of such amounts. Ninth. Either side may object to the competency, materiality, or relevancy of the above facts, or any of them, and may introduce other testimony to support the issues, in addition to the facts above mentioned.' Plaintiff introduced in evidence certain record entries from the journal of the county commissioners of Lake county for the year 1879, from which it appeared that on April 25, 1879, the bid of George E. King for the iron work on the county jail was accepted, for the sum of \$10,000. On May 3, 1879, the bid of A. E. Jones, for the construction of buildings, was accepted, for the sum of \$6,250. On October 9, 1879, warrants were ordered to be drawn on the county fund for the following amounts: "George E. King, jail, \$500; George E. King, jail, \$700; George E. King, jail, \$650; George E. King, jail, \$1,413." On September 1, 1879, on motion, George E. King was allowed the sum of \$2,500, in part payment for the county jail, and warrant ordered drawn for the same. On July 8, 1879, George E. King and A. E. Jones were ordered to proceed with the work for the construction of the jail. Plaintiff also introduced in evidence the tax levy for the fiscal year 1879, being on pages 80 and 81 of said record, and page 47 of the record, dated July 23, 1879, showing various changes and corrections in the assessed valuation, made by the board of equalization. The defendant then introduced the following evidence: "Pages 8, 9, 10, and 11 of the bond register of Lake county, showed a registry of bonds Nos. 67 to 129, inclusive, dated July 31, 1880; also, bonds numbered 55 to 56, inclusive, dated December 30, 1879, constituting a total issue of bonds in the sum of \$50,000." The defendant then offered in evidence, from the bond register, bonds, series A, B, and C, funding bonds of Lake county, aggregating \$500,000, and numbered from 1 to 710, showing the parties to whom the bonds were issued; the assessment roll of Lake county for the year 1879, certified to by the assessor on July 18, 1879, and showing the total valuation of property in the county for that year \$3,485,087; also a certified copy of the official abstract of the assessment made by the clerk and recorder of Lake county for 1879, bearing date of August 18, 1879, showing the value of assessed property for that year to be \$3,485,087. It was admitted by counsel for plaintiff that on the 2d day of October, 1879, the indebtedness of Lake county amounted to \$56,966.47. And the register of county orders also showed that on August 11th the debt was \$45,984.97; on September 9th it was \$55,020.72; on January 1, 1880, it was, exclusive of road warrants, \$95,891.63; that for the year 1880 the indebtedness, exclusive of the bonded indebtedness, amounted to \$312,586.82. Counsel for plaintiff admitted that the debt up to December,

1879, was \$86,146.81. The cause was tried to the court; findings in favor of plaintiff; motion for new trial overruled; and judgment rendered for the sum of \$4,800. The county brings the case here on appeal.

Thomas, Hartzell, Bryant & Lee, for appellant. Teller, Orabood & Morgan, for appellee.

GODDARD, J. (after stating the facts). Numerous errors are specified, but they present but two important questions, upon the solution of which the right of plaintiff to maintain this action depends, to wit: Whether the original warrants for which the bonds in suit were issued and exchanged were valid and enforceable obligations against the county, and, if so, can a recovery be had on these particular bonds, notwithstanding the entire issue is not valid; that is to say, some of the same series being invalid? And can such recovery be had in an action at law? It is broadly asserted by counsel for appellant that the entire series of bonds of which plaintiff's bonds are a part has been held absolutely void by this court in *People v. May*, 9 Colo. 404, 12 Pac. 838, and by the supreme court of the United States in *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, and *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, and that these cases decide every proposition involved in this case, and are conclusive upon all questions at issue herein. In making this assertion, counsel evidently overlooked the matters in issue in those cases, and misconceived the purport of those decisions. In the *May* and *Rollins* Cases the court had under consideration the validity of certain warrants issued for ordinary expenses of the county, not being obligations voluntarily incurred and admitted to have been issued after the constitutional limitation as to debt had been reached. The question at issue, therefore, was whether such obligations constituted an indebtedness, within the constitutional limitation, or whether the limitation applied only to debts voluntarily incurred; and it was held that compulsory, as well as voluntary, obligations, were within the inhibition, and that, on the admitted facts, the warrants there in controversy were void. While it is true that in the *Graham* Case certain bonds of the same series as those now under consideration were held invalid, yet that decision was based upon an agreed statement of facts very different from those presented by the pleadings and evidence in this case. From this statement it appeared that the claimed indebtedness funded by the bonds sued on therein was incurred after the limitation prescribed by the constitution had been reached and exceeded by the county. At page 676, 130 U. S., and page 654, 9 Sup. Ct., the court say: "There is also in the record an agreement between the parties that if section 6 of article 11 of the constitution of the state of Colorado be construed to be a limitation upon the power of the defendant county to contract any and all indebtedness, includ-

ing all such as that sued upon in this action, then it is admitted that the claimed indebtedness sued on herein was incurred after the limitation prescribed by said constitution had been reached and exceeded by the said defendant, the county of Lake; and in the event of such a construction by the circuit court, or the supreme court of the United States, then, and in that case, and for the purposes of the action, it is also admitted that the defendant is entitled to judgment thereon, unless the defendant is estopped from making such defense by the recitals contained on the face of the bonds and coupons sued on in this action. In the case of *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, we have set forth said section 6, and have decided that it does impose 'a limitation upon the power of the defendant county to contract any and all indebtedness.' That decision disposes of the first condition in the agreement recited above. It only remains to decide whether the county is estopped from making such defense by the recitals contained on the face of such bonds and coupons." And, after setting forth a copy of the bonds and coupons and the section of the statute under which the bonds were issued, the court further say: "The recitals of the bonds were merely to the effect that the issue was 'under and by virtue of, and in full compliance with,' the statute; 'that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond'; and that the issuing was 'authorized by a vote of the majority of the duly-qualified electors,' etc.—no express reference being made to the constitution, nor any statement made that the constitutional requirements had been observed. There is therefore no estoppel as to the constitutional question, because there is no recital in regard to it." It is manifest that this decision settles the invalidity only of such of the bonds as were issued to fund warrants evidencing an indebtedness, whether voluntarily or involuntarily incurred, beyond or in excess of the constitutional limitation, and does not in any way pass upon the validity or invalidity of those issued and exchanged for warrants representing an indebtedness within such limitation. Nor can it be inferred, from the reasoning of the court, that because a part of the series is invalid, for the reasons stated in that opinion, the whole issue is void. While it is true that, when an issue of bonds is based upon an indivisible contract which creates an indebtedness in excess of the constitutional limitation, the whole series is void, for the reasons stated in *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71, and kindred cases, yet it is readily observable that the same reasons do not exist in case of funding bonds. Hence the rule announced in those cases is not applicable to this class of obligations. The issuance of a funding bond in exchange for valid warrants is in no sense the creation of a debt. It is but the substitution of new evidence for a pre-existing debt. It

changes the form, but does not increase the indebtedness. *Opinion of the Justices*, 81 Me. 602, 18 Atl. 201; *Hotchkiss v. Marlon*, 12 Mont. 218, 29 Pac. 821; *Board of Com'rs of Marlon Co. v. Board of Com'rs of Harvey Co.*, 26 Kan. 181; *Blanton v. McDowell Co.*, 101 N. C. 532, 8 S. E. 162; *Miller v. School Dist. (Wyo.)* 39 Pac. 879; *City of Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764; *Sioux City v. Weare*, 59 Iowa, 95, 12 N. W. 786; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Powell v. City of Madison*, 107 Ind. 106, 8 N. E. 31.

The funding act of 1881 authorized the issuance of bonds in exchange, at par, for the warrants of the county. When, in compliance with its provisions, the county issued a bond in exchange for outstanding valid warrants, its validity could in no wise be affected by the fact that other bonds in the same series, issued in exchange for invalid warrants, were unauthorized and void. The validity of each bond, therefore, must be tested by the character of the indebtedness for which it is exchanged. It is an independent contract, and, when issued for pre-existing indebtedness, it becomes a valid, enforceable obligation against the county. *Francis v. Howard Co.*, 50 Fed. 44; *Francis v. Howard Co.*, 54 Fed. 487; *Citizens' Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003; *Davless Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Aetna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329; *McPherson v. Foster*, 43 Iowa, 48; *Sioux City & St. P. R. Co. v. Osceola Co.*, 52 Iowa, 26, 2 N. W. 593; *Stockdale v. Wayland School Dist.*, 47 Mich. 226, 10 N. W. 349; *Catron v. Lafayette Co.*, 106 Mo. 659, 17 S. W. 577. *McPherson v. Foster*, supra, was a suit to restrain the county treasurer from collecting taxes for the payment of certain bonds and interest thereon, upon the ground that the bonds were illegal, because issued in excess of the constitutional limit. Inter alia, the court say: "As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of \$2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the nonexistence of a valid debt therefor. But this restriction does not extend to the sum of \$2,057.50, for which the district had power to issue its bonds. That sum is a valid debt. The bonds to that extent are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure a lawful debt, they are valid. So far as the debt is unlawful, they are invalid." The same rule is announced in the other cases, and we find no case that questions its correctness. We understand counsel for appellant concedes this to be the doctrine of these decisions, but they insist that the su-

preme court of Iowa, in a later case, has substantially reversed its earlier ruling, and that the supreme court of the United States, in the case of *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, has expressly reversed the circuit court upon the same proposition. We do not so understand the decisions in those cases. In the *Doon Tp. Case*, bonds to the amount of \$20,000 were issued, while the constitutional limit of indebtedness was \$6,551.00; and, although funding bonds, they were to be sold, and the proceeds used to discharge an indebtedness part of which was valid and part invalid. They were sold, and but a small portion of the proceeds properly applied. Judgment was rendered in favor of plaintiff in the court below, and, on appeal to the supreme court, this judgment was reversed by a divided court, solely upon the ground that the bonds were sold, and not exchanged for the outstanding obligations. Mr. Justice Gray, speaking for the majority of the court, says: "There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative, of exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative, by which the treasurer is authorized to sell the new bonds, and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased." There is no intimation in this opinion that the supreme court disapproved the reasoning of Judge Shiras so far as it upheld the validity of funding bonds issued in exchange for an existing and enforceable debt, but substantially approved it. In the case of *Anderson v. Insurance Co.*, 88 Iowa, 579, 55 N. W. 348, the bonds in question were not refunding bonds, and were issued at a time when the county was indebted far in excess of the constitutional limit. These bonds were sold, and the proceeds were used in part to pay outstanding bonds; and the court, after quoting from *Doon Tp. v. Cummins*, say: "The opinion in that case contains some reasoning as to the application of the proceeds of the sale of the bonds, and the consequence to result from a failure of the officers to do their duty in that respect, which we do not find it necessary to approve or disapprove, because in this case the situation is such that there is no pretense of knowing, or being able from the record to know, that any part of the proceeds of the bonds in question (that is, those affected by the judgment in this case) were ap-

plied, or intended to be applied, to any legal indebtedness of the county. * * * Under the facts as they appear in this case, the bonds are to be treated as void." *Shaw v. School Dist.*, 62 Fed. 911, also cited by counsel for appellant, was a case where refunding bonds were issued in excess of the constitutional limitation, and those sued upon had been issued to take up an invalid indebtedness. The court say: "If it appeared that the bonds bought by the plaintiff were in fact used to retire or refund a pre-existing, enforceable indebtedness of the district, then it might be true that they would be valid, even though they exceeded the limitation. From the evidence it appears that they were issued to O. W. Rollins in exchange for other bonds held by him, but it does not appear that the latter bonds were valid in his hands, but, on the contrary, it appears that they were part of a fraudulent series." Upon a careful reading of these cases, we think it will be seen that we are fully sustained in the view we have expressed, and that the rule therein announced in no way contravenes the doctrine laid down in the numerous cases we have referred to, viz. that a part of a series of funding bonds issued in exchange for an outstanding indebtedness may be valid, notwithstanding others of the series are invalid.

This brings us to a consideration of the first proposition: Were the warrants for which the bonds in suit were exchanged valid obligations against the county? The facts disclosed by the record that are material on this branch of the inquiry are as follows: On the 8th day of February, 1879, the present county of Lake was created out of a part of the old county of Lake, which originally included, in addition thereto, the territory now comprising the county of Chaffee. The old county had an assessed valuation of \$603,858.92 for the year 1878; and the assessed valuation of the present county for the year 1879, when completed, was \$3,485,628. It also appears that the floating indebtedness of the county was on the 11th day of August, 1879, \$45,984.74; September 9th, \$55,020.22; October 2d, \$56,968.47; and on the 1st day of December, \$86,146.81. The bonds sued on are a part of a series of 500,000 issued by the county under and in pursuance of the funding act of 1881, to fund its floating indebtedness, evidenced by outstanding warrants. These particular bonds were exchanged for warrants, the earliest of which was dated July 17, 1879, and the latest October 9, 1879, which are alleged to have been issued for debts contracted April 25 and May 3, 1879, to the amount of \$5,763, and for other indebtedness contracted before the assessed valuation of the county reached \$1,000,000. The limitation prescribed by section 6 of article 11 of the constitution, in force at the time this indebtedness was incurred, applied only to counties having an assessed valuation of \$1,000,000 or more; and

since the county of Lake, organized February 8, 1879, had no assessed valuation prior to 1879, unless we accept the valuation made by the old county upon the property included within the new county, which was less than \$1,000,000, and its assessed valuation in 1879 when completed, amounted to upward of \$3,000,000, it becomes necessary to determine which assessment measured its power to incur indebtedness at the time the foregoing debts were contracted. Counsel have ably and exhaustively discussed this question, and with much force have presented persuasive reasons in support of their respective views; counsel for appellant insisting that the assessment roll, as certified by the assessor on the 25th day of June, 1879, should control, while counsel for appellee claim that the assessment of the preceding year must govern during the fiscal year ending November 30, 1879. While the reasons advanced in support of the latter view have much force, we think the weight of authority is to the effect that the assessment of the preceding year fixes the valuation that is to be taken as the criterion, until the succeeding assessment is revised by the state board of equalization, and the necessary changes and corrections made, and certified to the clerks of the respective counties; that, when so completed, it supersedes the preceding assessment, and furnishes the valuation that must determine the power of the county to contract future indebtedness. *Buchanan v. City of Litchfield*, 102 U. S. 278; *Childs v. City of Anacortes*, 5 Wash. 452, 32 Pac. 217; *Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059; *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781; *Johnston v. County of Becker*, 27 Minn. 64, 6 N. W. 411.

By the provisions of the statute then in force, the assessor was required to complete and deliver the assessment roll to the county clerk on or before the 25th day of June, and the state board of equalization was required to meet at the capitol of the state on the second Monday of August in each year, to equalize the rate of assessment in the various counties, and the auditor to transmit on or before the 1st day of September to the clerk of each county a statement of the changes and corrections made by the board in the assessment. Accepting, then, the 1st day of September as the time when the assessment of 1879 was completed and became the test by which the power to incur future indebtedness was limited, the validity of the warrants in question would not be affected, since it in no way appears from the evidence that any of the indebtedness for which they were exchanged was incurred at a subsequent date. The presumption being, in the absence of proof to the contrary, that the indebtedness was valid, and the burden resting upon the county to show its invalidity if it would evade liability on the warrants, we must conclude, from aught that appears in the record before us, that the war-

rants for which the bonds in suit were exchanged constituted an existing and valid indebtedness against the county. *Childs v. City of Anacortes*, supra; *Commissioners v. Oliver*, 7 Colo. App. 515, 44 Pac. 362; *Austin v. District Tp.*, 51 Iowa, 102, 49 N. W. 1051; *Mulnix v. Insurance Co. (Colo. Sup.)* 46 Pac. 127; *Aetna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329. In the latter case Judge Shiras says: "In suits, therefore, upon refunding bonds representing prior indebtedness, it is necessary, in order to sustain the defense of invalidity, to show that the indebtedness merged in and represented by the refunding bonds was itself invalid and non-enforceable, either in whole or in part." This case, among others, is cited by counsel for appellant in support of their contention that an action at law cannot be maintained upon the bonds themselves, but that all the holders of the series of bonds must unite in a proper proceeding in equity against the county, to determine for what amount the county can be held liable. That was also an action at law on interest coupons of refunding bonds. The issue was largely in excess of the constitutional limitation, but a part of which was valid, and represented judgments and other enforceable debts against the county. The evidence failed to show whether the bonds owned by the plaintiff fell within that category, and it was argued that the bonds would be valid until the amount needed to refund the enforceable debt had been reached, and that it will be presumed that the bonds were sold in the order of their number. Judge Shiras held that such presumption could not be indulged in under the facts of that case, and said: "In this action at law, between one owner of part of the bonds and the county, it is beyond the power of the court to hear and determine the question of the order in which the series of bonds was sold, or the application of the proceeds realized from the sales thereof, and whether the facts are such that a certain number of the bonds can be held valid at law, or whether it should not be held that each owner of a bond is equitably entitled to demand his share of the total sum which may be adjudged to be collectible from the county,"—and concluded that in these circumstances a resort must be had to equity to determine that question. The case is clearly distinguishable from the one at bar. The very proof that was lacking there to support a recovery in an action at law is supplied in this case. This same distinction was made in the case of *Francis v. Howard Co.*, supra, wherein it was held that, when the pleadings and the proof warranted it, a court of law would give judgment in such cases. Judge Maxey, after quoting from the opinion of Judge Shiras in *Aetna Life Ins. Co. v. Lyon Co.*, supra, and other cases of like purport, sums up as follows: "This court fully concurs in what is said in the cases cited. But the rulings in those cases were predicated upon the particular facts of each case. While in this suit the court entertains serious doubts as to the propriety of entering

judgment in behalf of plaintiff, yet, after giving the question careful consideration, I am impressed with the conviction that such a judgment would be warranted by both the pleadings and proofs; and perceiving no insuperable objection, in a case of this kind, to the rendition of a judgment in a suit at law, my conclusion is that plaintiff should recover the amount found due, with legal interest and costs of suit." This judgment was affirmed by the circuit court of appeals. 4 C. C. A. 460, 54 Fed. 487. It seems to us clear, both upon principal and authority, that an action at law may be maintained upon bonds of this character, upon a state of facts such as is disclosed by this record. And, although the question of their validity involves an investigation of the validity of the original indebtedness for which they were exchanged, we can perceive no difficulty in making that inquiry in such an action. Nor does it follow, as contended by counsel for appellant, because in the ascertainment of that fact resort must be had to evidence showing the validity of the original warrants, that such evidence constitutes a variance from the allegations of the complaint, in that it shows a right to recover upon the warrants, if at all, and does not support the cause of action based upon the bonds themselves. It can as well be said that if, in an action upon a promissory note, the want of consideration be alleged, evidence of the fact that the note was given for a valuable consideration would constitute a variance from the allegations of the complaint, because it tended to show another and an additional cause of action to that predicated upon the note. The primary question at issue is the validity of the bonds upon which the interest sued for had accrued. Their validity depends upon the consideration received for them. If the consideration was a valid indebtedness, the bonds are valid; otherwise, they are void, and the plaintiff may not recover upon either the bonds or the original warrants. On the other hand, if the warrants were valid for which the bonds were substituted, proof of that fact establishes the validity of the bonds, and supports the cause of action set forth in the complaint.

After careful consideration of all the objections urged by counsel for appellant, our conclusion is that, when tested by the principles governing this class of obligations, the particular bonds to which the coupons sued on belong were valid obligations against the county; and a recovery upon the coupons was clearly warranted, under the pleadings and proof. The judgment of the court below is accordingly affirmed. Affirmed.

On Rehearing.

(June 1, 1897.)

PER CURIAM. A rehearing in this case was allowed because of the important questions involved, and in view of the fact that counsel for appellant were inadvertently pre-

vented from arguing them orally when the case was formerly before us. Briefs have been filed and oral arguments heard; and, upon a thorough reconsideration of the questions involved, we are satisfied that our former decision correctly announced the law applicable to the facts as disclosed by the record.

While there is ground for questioning the correctness of our inference that the testimony disclosed that the warrants set out in the complaint covered all of the \$5,763 allowed to King in part payment of his jail contract, such conclusion was a very reasonable one, in view of the fact that the warrants were issued the same day those allowances were made, and most of them being for an even amount, and in such a sum as one who held a large indebtedness against the county would naturally prefer to have the same divided. But, however this may be, under the view we then took, and now take, as to where the burden of proof lies, it does not alter the conclusion that, under the stipulated facts and the evidence introduced, the validity of the warrants was unimpeached.

Counsel now concede that a warrant is *prima facie* evidence of a valid indebtedness, and that the burden of proving it was issued for an illegal indebtedness rests upon the county, but insists that that burden is met by showing that the warrant was issued subsequent to the date when the constitutional limitation had been reached, since the presumption then attaches that the warrant was issued for an indebtedness then contracted, and not for an antecedent debt. That such a presumption cannot be safely indulged in is shown by the facts in this case, as it appears that on October 9, 1879, the date of the warrants described, claims were allowed and warrants ordered to issue for an indebtedness that was contracted in May and April preceding. We think the presumption that the consideration for which a warrant issues is valid obtains until it is shown that such consideration is illegal; and, if illegal because incurred after a certain date, it devolves upon the county to show that fact. In this view, therefore, it becomes immaterial whether we were technically correct in saying that a major part of the indebtedness for which the warrants were issued was shown by the testimony to have been contracted anterior to the time the constitutional limitation was reached, since it in no way appears from the record that any portion of the indebtedness evidenced by these warrants was incurred at a subsequent date.

In regard to the other particulars wherein the correctness of our former decision is challenged, we see no reason to change our views. All the questions now raised were thoroughly argued in the original briefs, and were considered by us in the light of all the authorities when the case was then before us. Except as modified by changing our finding that the warrants for which the bonds were exchanged "were issued for debts contracted April 25

and May 3, 1879, to the amount of \$5,763," to the statement that "they were alleged to have been so issued," and also by withdrawing the further statement that the major part of the indebtedness for which the warrants were issued is shown to have been contracted long anterior to the 1st of September, our former opinion will be adhered to.

FISHER et al. v. SEYMOUR et al.

(Supreme Court of Colorado. Feb. 3, 1897.)

PRINCIPAL AND AGENT — FRAUD OF AGENT — EFFECT ON THIRD PARTIES—LOCATION OF MINE.

1. Where one undertook to sell a mineral claim for another, at an agreed price, the relation of principal and agent was thereby established.

2. An agent for the sale of a mineral location, within two days after his appointment, in the absence and without the knowledge of his principal, contracted with the owners of another claim, which conflicted with a portion of that for which he was agent, to patent for them such conflicting claim in consideration of a one-half interest therein, and thereupon relocated such conflicting claim under a different name, so changing its boundaries as to include therein a greater portion of the claim for which he was agent, and obtained the patent therefor, in the meantime corresponding with his principal respecting her property as though interested in her behalf. *Held*, that such conduct on the part of such agent constituted a fraud in law.

3. The fraud perpetrated by the agent on his principal did not affect the rights of the co-tenants of such agent, as between them and such principal.

4. The discovery of a vein of mineral on a claim with a portion of which another claim conflicts, before a relocation of such conflicting claim, constitutes the same a prior location to that of the conflicting claim.

5. Where the question of the priority of two conflicting mineral claims, one of which had been relocated, was in issue, evidence that such relocated claim was based on a discovery within a prior, valid, subsisting location was admissible (though such claim as relocated had been patented) for the purpose of showing that the original location of such patented claim was void, as not having been made on the unappropriated public domain.

Campbell, J., dissenting.

Appeal from district court, Lake county.

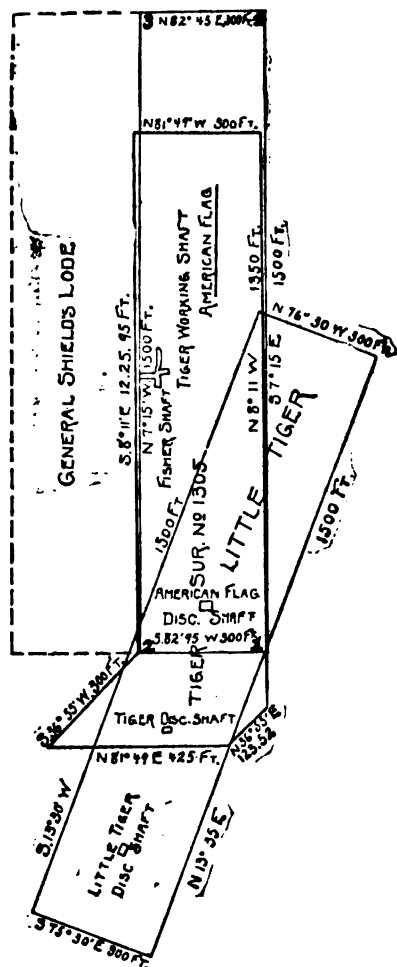
Action by Jennie A. Fisher and another against Frank A. Seymour and others to declare and enforce a constructive trust. From a decree in favor of defendants, plaintiffs appeal. Reversed as to defendant Seymour, and affirmed as to the other defendants.

This action was brought to declare and enforce a trust. This is the second time it has been before this court. Upon the first trial the controverted questions of fact were submitted to a jury, and findings returned in favor of these appellants, upon which a decree was rendered, also in their favor. This decree was reversed upon the first appeal by reason of a defect in the pleadings. *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240. In that opinion is found a succinct statement of the issues raised

by the pleadings, and a summary of the evidence produced at the first trial. That the present discussion may more readily be understood without necessitating a reference to that case, even though it is restating what is concisely set forth there, we briefly indicate the nature of this controversy, as it was originally presented to the district court. The action was to declare and enforce a constructive trust, said to arise out of the acts and conduct of the defendant G. M. Seymour, whereby, while occupying a fiduciary relation to Mrs. Fisher, one of the plaintiffs, concerning the American Flag lode, owned in part by her, he was, in violation of said trust, instrumental in securing for himself and associates a patent to the Tiger lode mining claim, included within which was a portion of the territory situate within the boundaries of the American Flag. Upon the first appeal the decree was reversed, and the cause remanded. When the remittitur was sent down, the plaintiffs were granted leave to, and did, file an amended and substituted complaint, in which, in somewhat fuller form, were embodied the allegations of the original complaint, and, in addition thereto, were expressed averments of an appointment by Mrs. Fisher, one of the plaintiffs, of the defendant G. M. Seymour as her agent to sell and look after her interests in the American Flag lode, and his acceptance of the agency, and its continued existence at the time of the commission of the frauds complained of. This additional averment was necessitated under the prior ruling of this court, that the complaint, as originally framed, did not contain an allegation of this agency. In conformity with the further suggestion made in the reported opinion, the district court ordered that there be made parties to the action Ilgenfritz, Bloss, and Herbert (in whose favor at the first hearing it rendered a decree for an undivided one-half of the premises). As against these three defendants, the substituted complaint alleged that, with full knowledge of Seymour's fiduciary relations with plaintiffs, they conspired and confederated with him to perpetrate a fraud upon the plaintiffs. In this substituted complaint, then, the particular fraudulent acts of the defendant Seymour are said to be that while he was acting as the agent of Mrs. Fisher to sell the American Flag lode, and to look after her interests therein, by purposely misrepresenting and concealing from her and her co-owners all knowledge of the patent proceedings which he instituted to obtain a patent for the Tiger lode, he thereby prevented the plaintiffs from obtaining knowledge thereof within such time as would have enabled them thereby to adverse the patent application, and thus get a patent for their senior location. As against the other defendants, the specific charges are that they, as the locators of the Little Tiger lode (of which the Tiger lode was but a relocation), conveyed to Seymour all their rights therein, with an agreement by him to procure a patent therefor, and then to reconvey to them

one-half of the lode; and that during all of this time they knew of Seymour's fiduciary relations with the plaintiffs, and conspired and confederated with him in the fraudulent acts aforesaid, and with the design to defraud the plaintiffs of their rights. In addition to this charge of a conspiracy, between them and their co-defendant Seymour, there is an additional charge against the defendants Ilgenfritz, Bloss, and Herbert, to the effect that they are estopped by their conduct to set up any claim to the conflicting territory as against the plaintiff Mrs. Fisher, because they advised and encouraged her to purchase a large portion of her interest in said Tiger lode, which she did, relying upon the representations made by them to her that the American Flag was the senior location; and that, while it conflicted with the Little Tiger lode, or Tiger lode, as it was afterwards called, they, as the owners and locators of the latter, would not assert or claim any rights as against the superior rights of the prior location. Answers were filed by the different defendants, denying all the material allegations of this amended and substituted complaint. Trial upon the issues thus joined was had before the court, which submitted certain questions of fact to a jury. Some of these questions were answered favorably to the defendants; as to others, the jury were unable to agree. Thereafter the court passed upon all controverted issues in the case, confirming the findings of the jury where they reported an agreement, and making new findings upon all other issues of fact, and rendering judgment in favor of the defendants. In substance, these findings are that the Tiger lode was a valid and subsisting location prior and superior to the American Flag lode; that Seymour never agreed to look after Mrs. Fisher's interests in the American Flag, though he said to her that he thought he could sell her interest in said property to the company, and that he consented to assist her in making such a sale thereof; that there was no fiduciary relation between Seymour and Mrs. Fisher in relation to the American Flag lode at or during the time patent was being applied for on the Tiger lode, though he agreed with her that he would see that she was fairly treated as to her interests in another lode, known as the "Shields Mining Claim," so long as he was the manager of the Shields Mining Company, which owned the other interests therein; that neither Seymour nor any of the other defendants did anything to prevent Mrs. Fisher from advertising the application by Seymour for a patent to the Tiger lode; that no conspiracy to defraud her was entered into by the defendants, as alleged in the complaint; that Bloss, Ilgenfritz, and Herbert did not make to Mrs. Fisher the statements which she alleges they did as to the relative seniority and rights of the Little Tiger and American Flag lodes, nor state to her that the American Flag was the senior location, and that they would not make any claim to the territory in conflict between the two. The findings of fact are attacked by

appellants. The diagram of the claims, which was introduced in evidence, is here given, as it will serve to better illustrate the controversy:



J. W. Taylor (A. P. Rittenhouse, of counsel), for appellants. A. J. Sterling and S. D. Walling, for appellees.

HAYT, C. J. (after stating the facts). We cannot read the evidence in this case without being impressed with the fact that a gross fraud has been perpetrated upon plaintiff Fisher and her children, the heirs of Thomas Fisher, deceased. The American Flag was discovered on June 11, 1879, and located June 12, 1879; the location certificate being placed upon record on June 24, 1879. The location certificate of the Little Tiger lode, which was recorded June 12, 1879, recites that the lode was located and claimed on that date. Upon October 14, 1880, the Little Tiger was relocated under the name of the Tiger lode. By such relocation much of the territory of the American Flag claim was included in the Tiger claim. In October, 1879, Thomas F. Walsh, one of the owners of the American

Flag claim, for a valuable consideration, deeded to Thomas Fisher, the husband of plaintiff, an undivided one-eighth interest in the American Flag lode, and, in the month of March following, Fisher purchased from another one of the locators a one-fifth interest in that claim. Shortly after this last purchase, Fisher sickened and died. The day before his death, and on April 9, 1880, he executed and delivered to his friend, Nicholas Finn, one of the appellants, a deed, conveying to Finn, in trust for Fisher's wife and children, all the right, title, and interest held by Fisher at the time in the American Flag lode, together with a one-eighth interest in the General Shields lode, an adjoining claim, which was at that time a steady producer of mineral. Previous to his demise, Fisher did a large amount of work upon the American Flag lode. He sank one shaft, known as the "Fisher Shaft," to the depth of 40 or 50 feet, and another shaft to the depth of 25 feet. In the month of June following the death of her husband, Mrs. Fisher came to Colorado with her family. She then visited Leadville for the purpose of looking after her interests, and that of her children, in the American Flag and General Shields claims. Upon this visit, Mrs. Fisher spent several months at Leadville, during which time she made diligent inquiries to ascertain the exact condition of the title to the American Flag claim, and the probable value of the property. At this time, Thomas Walsh, one of the original owners of the property, was anxious to secure a bond upon the Fisher interests at the rate of \$10,000 for the entire property. Knowing nothing of mines herself, Mrs. Fisher inquired of others, including the defendants Bloss, Herbert, and Ilgenfritz, as to the value of this property, and procured an examination and opinion of experts. She swears that at this time she inquired particularly with reference to conflicts, and was then assured by all the then owners of the Little Tiger claim that there would be no conflict and no litigation with that property. This conversation the owners deny, but the fact that Mrs. Fisher, as the result of her examinations, was induced to purchase the outstanding interests in the American Flag claim, at the rate of \$10,000 for the full claim, strongly tends to corroborate her testimony upon this point. It was upon this visit that Mrs. Fisher first became acquainted with G. M. Seymour, who was at the time the general manager for the General Shields Mining Company, which company owned all the General Shields mine except the one-eighth interest held by the heirs of Thomas Fisher, and represented by Mrs. Fisher. There is much conflict in the evidence with reference to the conversations between these parties. It is sufficient to say that, in the fall of the year, Mrs. Fisher, being about to return East, was anxious to sell her interests in both the General Shields and the American Flag locations, and offered her interest in the General Shields mine for \$7,000, and her interest in the Amer-

ican Flag for \$10,000, Seymour agreeing to assist her in making a sale at these figures. On or about the 3d or 4th day of October, Mrs. Fisher left Leadville with her family, and returned to her home, in Memphis, Tenn. After her return, some correspondence passed between Seymour and Mrs. Fisher with regard to the sale of these properties.

The court below, while resolving most of the conflicts in the evidence in favor of the defendants, nevertheless made a finding that Seymour was the agent of the heirs for the purpose of selling the American Flag mine. While such agent, and as soon as Mrs. Fisher had left the state, Seymour entered into an agreement with the owners of the Little Tiger claim (Bloss, Herbert, and Ilgenfritz), by the terms of which agreement he was to patent that mining claim, receiving for so doing a one-half interest therein. Although this agreement was made on the 6th day of October, 1880, Seymour does not appear to have moved in the matter of obtaining a patent until the January following, at a time when the property in controversy was covered with snow. Seymour relocated the Little Tiger claim, under the name of the "Tiger." In making this relocation, he moved the claim north some 500 feet, thereby leaving the original discovery shaft outside of the new surface boundaries, and 300 feet south of the same. By this relocation, he took in a greater portion of the valuable part of the American Flag location; and the question of his right to do this is the principal controversy in this case.

Plaintiff seeks to have appellees, Seymour and others, declared trustees as to this property, claiming that she is the equitable owner, and has the prior right to that portion of the premises formerly included in the American Flag location. Seymour having the patent title from the government, the plaintiff, to maintain the action on her part, must show that she had a valid and subsisting location prior, and therefore superior to that with which it conflicted, to wit, the Tiger, and that the fraud of the patentee kept her in ignorance of the patent proceedings. "If these questions be affirmatively answered, plaintiff may recover the ground in conflict." *Seymour v. Fisher*, supra. Mrs. Fisher swears that she placed the property with Seymour for sale for \$10,000, and that she was to pay him a commission if such sale was effected. Seymour admits that such a conversation took place; admits that he agreed to assist Mrs. Fisher in the sale of the property; that the price fixed was \$10,000; but denies that he was to receive any commission in case the sale was effected. Upon this evidence, the court below found that Seymour did undertake to assist Mrs. Fisher in the sale of the American Flag lode, but also found that he was not her agent to look after the property, and that in fact, no fiduciary relation existed between the parties as to the American Flag claim. The question with reference to a fiduciary relation upon the facts is one of law that

is challenged upon this review, and it being conceded that Seymour undertook to sell the property for Mrs. Fisher, at an agreed price, the relation of principal and agent was certainly established. It is apparent, we think, that Seymour never intended to act in good faith in the matter, for, within two days after the agreement with Mrs. Fisher, he relocated the Little Tiger under a new name, and, by such relocation, took in a large part of the American Flag claim owned by his principal, amending his location record accordingly. The property affected by these acts was the most valuable portion of the American Flag lode, and included the last shaft made by Mr. Fisher. In this shaft, mineral of commercial value was found, this being the only ore at that time disclosed upon either of the claims. We have no doubt, from the evidence, that Seymour, in doing as he did, was largely influenced by information communicated by Mrs. Fisher at a time when she reposed in him confidence as her agent.

The law requires the utmost good faith on the part of an agent when dealing with his principal, and it is well settled that an agent to sell cannot purchase the property for himself, unless he makes known to his principal that he is such purchaser, and acquaints him with all the facts. Whart. Ag. § 231; Story, Ag. (8th Ed.) § 210; Ewell's Evans, Ag. § 213; Hunter v. Hunter, 50 Mo. 445; Porter v. Woodruff, 36 N. J. Eq. 174; Murray v. Beard, 102 N. Y. 505, 7 N. E. 553. Applying this necessary and salutary rule to Mr. Seymour in his dealings with Mrs. Fisher, his right to purchase the American Flag claim from her must be denied. If he could not purchase, he certainly could not "jump" the property, and thereby, without consideration, deprive Mrs. Fisher and her children of the property. Seymour's conduct in remaining silent until Mrs. Fisher had left the state, and afterwards lulling her into fancied security, by corresponding with her with reference to the property, without acquainting her with the facts, although he was in the very act of procuring an adverse title, constituted a fraud in law. "He * * * could not acquire a title to the land valid against the equity which he had acknowledged in the complainants." *Ringo v. Binns*, 10 Pet. 269. The district court found, and Seymour admits, that he was an agent to sell. This sufficiently establishes such a fiduciary relation between the parties as requires the utmost good faith on the part of the agent; but as the other defendants, Bloss, Herbert, and Ilgenfritz, owed no duty to Mrs. Fisher, they do not stand in the same relation to her as did Seymour. They might have applied for a patent to the Little Tiger or to the amended Tiger lode, and, had Mrs. Fisher failed to have filed an adverse, she would have lost her rights, under the provisions of section 2326 of the United States Revised Statutes. *Seymour v. Fisher*, supra. It is true that plaintiff also claimed that Bloss, Herbert, and Ilgenfritz were estopped by their

conduct to question plaintiff's title; but it is also true that the district court found the fact to be against plaintiff's contention in this behalf, and thereby eliminated this issue from our consideration.

It is urged that the fraud of Seymour is immaterial, because of the finding of the court that the Little Tiger lode and the amended location thereof, as the Tiger lode, was a valid and subsisting location prior and superior to the location of the American Flag lode. This is a mixed finding of law and fact. It was stipulated for the purposes of the first trial that the American Flag location was the prior location, and that such location was in all respects valid. Upon the last trial this stipulation was withdrawn. The uncontradicted evidence shows that the American Flag was in all respects a valid claim if a vein in place was exposed at the time of the location. The preponderance of the evidence seems to be in favor of the discovery of such mineral; but conceding, as we do, the force of the finding to the contrary, made by the district court, upon conflicting evidence, we are to determine whether or not such finding is controlling in this case. An examination of the transcript shows the fact to be established by competent evidence, and undisputed, that a vein of mineral was discovered upon the American Flag claim, prior to the relocation of the Little Tiger lode, under the name of the Tiger lode, and this is sufficient to validate the American Flag location from the date of such discovery. It is claimed that such relocation, omitting, as it did, the original discovery shaft of the Little Tiger lode, did not relate back, and make that lode a valid location from the time of the original location of the Little Tiger lode. In any event, the rights of the American Flag had attached prior to the amended location of the Tiger lode; hence the relocation was made subject to such intervening rights. Moreover, the evidence shows that the discovery upon which the Little Tiger location was based was not upon the public domain of the United States, but within a prior, valid, subsisting location, known as the "Golden Curry Mining Claim." Upon objections interposed by the defendants, much of the evidence offered by plaintiffs upon this matter was rejected. In this ruling of the court there was error, for, although it was not proper to allow the introduction of evidence for the purpose of impeaching the patent, this evidence was proper, in order that the court might ascertain whether the owners of the American Flag or of the Little Tiger made the first valid location upon the unappropriated public domain. In other words, it was competent to show that the American Flag claim was prior in point of time, and superior in right, to the Little Tiger location of the ground in conflict, unless the Tiger location relates back to and acquires priority of right by reason of the location of the Little Tiger claim. For the purpose of showing that the location of the Tiger could

not so relate back, it was competent for the plaintiff to show that the location of the Little Tiger was void, as not having been made on the unappropriated public domain. The evidence received sufficiently establishes such invalidity.

This cause has been before the courts for many years. It has been most carefully considered by this court upon two occasions. As said in the outset of this opinion, the record discloses that Seymour practiced a gross fraud upon the heirs of Thomas Fisher, deceased; and we think that he should neither be allowed to profit by such fraudulent conduct, nor the heirs be deprived of their inheritance thereby. We are prevented from interfering with the one-half interest held by Bloss, Herbert, and Ilgenfritz, for the reasons already given; but as to the remaining one-half, held by Seymour, the same reasons do not exist, and, it appearing that this title was procured in fraud of Mrs. Fisher's rights, the title so obtained should be declared to be held by Seymour in trust for Mrs. Fisher. The judgment of the district court is accordingly affirmed as to Bloss, Herbert, and Ilgenfritz, and reversed as to Seymour, with directions that judgment against Seymour be entered in accordance with this opinion. Judgment modified.

CAMPBELL, J. (dissenting). As will be seen from the last sentence of the foregoing opinion, the judgment is reversed in part, and partly affirmed. For this reason, alone, I should at least indicate in what part of the judgment I am unable to agree, and state the grounds upon which the dissent is based. In affirming the judgment as to Bloss, Herbert, and Ilgenfritz, I concur; in reversing it as to Seymour, I dissent.

1. The evidence does not impress me as it does my brethren, nor can I agree with the application of the law as made by them to the facts of the case. After a careful reading of the record, Seymour's conduct does not, in my judgment, warrant the severe characterization to which the opinion subjects it. The trial court found that Seymour "told Mrs. Fisher that he thought he could sell her interest in said property to the company, and that he would do what he could to assist her in making the sale of said property; and he further agreed then and there to look after her interest in said Shields mine, and see that she was fairly treated in relation thereto so long as he was manager there; * * * that said Seymour did not agree to look after Mrs. Fisher's interest in the American Flag." After Mrs. Fisher left Leadville, and went to Tennessee, there was correspondence between her and Seymour relative to an offer of purchase of the American Flag lode made by Sabin, as the president of the company of which Seymour was manager. Among other things, Seymour informed her that he must decline to act as her agent as to the Shields mine, and Mrs. Fisher then asked his opinion

as to selling the Shields, and what he thought of the American Flag. She referred him to Finn, the executor, and Col. Curry, as her agent at Leadville, to whom Seymour might give information concerning her inquiries. Concerning Sabin's offer of purchase, she later wrote that she had referred the matter to Mr. Finn, and that, before she left Leadville, she had given him a power of attorney to act for her, and so she left the matter entirely with him. Upon this and other evidence, the court made a finding as follows: "I therefore find that G. M. Seymour was not the agent of Jennie A. Fisher in regard to the American Flag lode; that the only relation or understanding between them was that G. M. Seymour consented to assist her in selling her interest therein; and that there was no fiduciary relation existing between G. M. Seymour and Mrs. Jennie A. Fisher in relation to the American Flag lode at or during the time patent was being applied for on the Tiger lode." In my judgment, the court was warranted in making this finding; and I am satisfied from the record, even if Seymour had been appointed the agent of Mrs. Fisher before she left Leadville, that it is apparent from her own letters, as well as the evidence and letters of Seymour, that neither of them supposed, after Mrs. Fisher left Leadville, that Seymour sustained any fiduciary relation towards her with relation to the American Flag, or was her agent for its sale.

2. I am unable to agree with the conclusion of the court that the evidence was uncontroverted that a vein of mineral was discovered upon the American Flag lode prior to the relocation of the Tiger lode. As I understand the record, there is a substantial conflict in the evidence upon this point; and under the well-known rule of this court in such cases, which precludes us from substituting our judgment for that of the trial court sitting as a jury, we ought not to set aside the finding of the latter that "the said Little Tiger lode and the amendment thereof, the Tiger lode, was a valid and subsisting location prior and superior to the American Flag lode."

3. I do not understand that, by the opinion in this case, there is intended any departure from the doctrine laid down when the case was first before this court; but when it is said that the plaintiffs, under the issues joined in this case, may establish the invalidity of the Little Tiger location, by showing that its discovery shaft was not upon unappropriated public domain, but within a prior valid location, it would appear that the prior announcement is shaken, if not altogether overthrown. To say that this kind of evidence is improper to impeach the patent of the Little Tiger lode, but still admissible and competent for the purpose of determining whether it or the American Flag is the senior location, is to attempt to draw a distinction between the two cases, where, in principle, none exists. The very fact which plaintiffs here, by this evidence, seek to establish, was something which they

might have shown before the land office, or in a suit in support of an adverse claim filed by them against the application for a patent by the owners of the Little Tiger location; and when they failed seasonably to protest, or to bring an adverse suit, they should be conclusively estopped, in this action, from setting up the invalidity of the patent location of the Little Tiger lode for either of the purposes named. Further than this, I do not consider that, in the present state of this record, the order should be to enter a judgment against Seymour. If the judgment is reversed, it ought to be for a new trial as to his interest in the property.

STANLEY v. CITIZENS' COAL & COKE CO.

(Supreme Court of Colorado. May 3, 1897.)

CHattel Mortgages — Failure to Take Possession at Maturity — Priority — Interest of Mortgagee.

1. Under the statute of frauds, providing that every sale or assignment of goods not accompanied by immediate delivery, and followed by actual and continued change of possession, shall be conclusively presumed fraudulent as against the vendor's creditors, where, on maturity of a chattel mortgage, the mortgagee neglects to take possession of the property, he loses the priority of his lien against a creditor who took a subsequent mortgage with notice.

2. The subsequent mortgagee's interest in the property is limited to the amount of the claim secured.

Error to court of appeals.

Action by E. M. Stanley against the Citizens' Coal & Coke Company. A judgment in favor of plaintiff was reversed by the court of appeals (40 Pac. 693), and plaintiff brings error. Reversed.

Stuart & Murray, for plaintiff in error.

HAYT, C. J. This is a contest between two mortgagees, claiming practically the same property, under different instruments. The cause was first tried before a justice of the peace, who gave plaintiff in error, Stanley, a judgment for \$185. From this judgment, defendant in error, the Citizens' Coal & Coke Company, appealed to the county court. A trial in that court resulted in a judgment in favor of Stanley for \$275. Thereupon the cause was appealed to the court of appeals, and the judgment of the county court was reversed. 6 Colo. App. 181, 40 Pac. 693. From this latter judgment the cause is brought into this court by Stanley, upon a writ of error.

We are in full accord with the court of appeals upon all the questions passed upon by it; but one of the important, and, as we think, the controlling, questions in the case, seems to have escaped the attention of that court, to wit, the effect of the delay by the Citizens' Coal & Coke Company in taking possession of the mortgaged property after the maturity of its mortgage. A brief statement of the facts will be necessary to a full

understanding of the manner in which this question arises. On and prior to the month of December, 1892, one W. F. Mitchell was carrying on a coal and feed business in the city of Denver. Upon the 12th day of December, plaintiff in error, Stanley, became a partner in this business by purchase. Stanley and Mitchell continued to carry on the business together until the 24th day of the following month of January, at which date, finding that the business was not sufficient to support both, Stanley sold out to Mitchell, who thereupon became the sole proprietor. The consideration agreed upon for this sale was \$215.35. Of this amount, a promissory note was given by Mitchell to Stanley for \$200, due 120 days after the date thereof, with interest at 8 per cent. per annum. This note bears date February 6, 1892, and is secured by a chattel mortgage in due form, upon the property in controversy. At the time of this sale, the co-partnership was owing the Citizens' Coal & Coke Company \$200. The company, becoming alarmed with reference to this claim, agreed to take, and did accept, the individual note of Mitchell for this amount, dated February 3, 1893, and payable one day after date. This note was secured by a chattel mortgage upon the property in controversy, described in the mortgage as follows: "One horse, grey; brand, horse head on the left hip; weight, about twelve hundred; eight years old. One single transfer wagon. One set single harness; heavy. 1 set scales; Fairbanks, No. 11½. One coal stove. Fork & shovel. Stock on hand at time of expiration. Insurance on stock, &c., as per policy 373,117, Union Insurance Co." The mortgage to Stanley was not made expressly subject to the mortgage given to the coal company, although that mortgage is excepted in the warranty of title therein; and we shall assume that Stanley had notice of the prior mortgage. But, when the mortgage to the Citizens' Coal & Coke Company matured, that company made no effort to take possession of the mortgaged property, but allowed the same to remain in the hands of the mortgagor, who continued to carry on the business as theretofore, until the 2d day of the following month. On March 2d, Mitchell, finding that he could not make the business pay, surrendered the business and mortgaged property to Stanley, who took possession, under his chattel mortgage. Stanley had been in possession but a few hours when a representative of the Citizens' Coal & Coke Company appeared at the store, and demanded that the property be turned over to that company, basing this demand upon the prior mortgage. Stanley refused to surrender possession, and the agents of the coal company took possession of the property by force.

In these circumstances, which of these two parties had the better right to the property in controversy? It is apparent from the

foregoing statement that the coal company's mortgage fully matured on the 4th day of February. The evidence shows that the property mortgaged was situate but a few blocks from the coal company's place of business. No attempt, however, was made to take possession of the property until nearly one month had elapsed after the maturity of the mortgage; and we have searched the record in vain for any excuse or explanation for this delay, which, we think, under the settled law of this state, is fatal to the claim of defendant in error. After default in payment of the note, and upon maturity of the mortgage, the relations of the mortgagor, Mitchell, and the coal company, to the property, are governed by the rule applicable to the relations between vendees and creditors. *Atchison v. Graham*, 14 Colo. 217, 23 Pac. 876. The statute of frauds of this state provides that "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith; and this presumption shall be conclusive." 1 Mills' Ann. St. § 2027. This statute does not permit a sale of personal property without delivery and actual and continued change of possession to be explained in a suit by a creditor, as may be done in some other states under dissimilar statutes. Here the presumption is conclusive that such a sale is fraudulent and void. The defendant in error, having neglected to take possession of the mortgaged property upon the maturity of the note, and having waited an unreasonable time thereafter, lost the priority of his lien, and his conduct in taking the property forcibly from the possession of plaintiff in error was unlawful. *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226; *Atchison v. Graham*, 14 Colo. 217, 23 Pac. 876; *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966; *Cook v. Mann*, 6 Colo. 21.

The county court rendered judgment for \$275, this amount being the adjudged value of the property. As shown by the court of appeals, it was error to render judgment for so large an amount, as Stanley's claim was only for \$208, principal and interest, and he is only entitled to have his claim satisfied out of the property. In this particular the judgment of the county court must be modified, and, as so modified, it should be affirmed. The judgment of the court of appeals is accordingly reversed, and the cause remanded, with directions to proceed in accordance with this opinion. Reversed.

PEOPLE ex rel. BAXTER v. COURT OF APPEALS.

(Supreme Court of Colorado. June 1, 1897.)

FINDINGS OF FACT—REVIEW—COURT OF APPEALS—SUPREME COURT—SUPERVISORY POWER.

1. When the question is properly presented, the court of appeals may review the evidence to determine whether the trial court or jury has misconceived its force and effect.

2. Should the court of appeals make a mistake in estimating the weight of evidence, the supreme court has no right to interfere under the guise of its supervisory power over subordinate judicial tribunals.

Petition by the state, at the relation of Joseph N. Baxter, for writ of certiorari to remove a case from the court of appeals. Denied.

John C. Fitnam, for petitioner.

GODDARD, J. This is an original proceeding instituted for the purpose of removing from the court of appeals into this court the record in case No. 1,105, entitled "Joseph N. Baxter v. William Deutsch." The application is based upon the ground that the court of appeals exceeded or abused its jurisdiction in reversing the judgment of the trial court. The facts alleged in support of this claim are, in brief, as follows: The suit was originally commenced in the district court of Arapahoe county by petitioner, Baxter, as assignee of Braun & Bochow, to recover certain commissions alleged to be due them, as agents of Deutsch, in negotiating a sale of certain real property to Oscar Reuter; such commission to be one-half of all forfeited payments. It appears that Reuter paid Deutsch \$1,000, to be forfeited in case he did not complete the purchase. The purchase was not completed, although it further appears that Reuter tendered the balance of the contract price, which being refused, he brought suit for specific performance. Pending that litigation the \$1,000 was refunded to Reuter, and thereupon the suit was dismissed. The amount sought to be recovered in the present action was the one-half of the \$1,000, upon the ground that the same had been forfeited. The defenses interposed were that Braun & Bochow were acting in a double capacity, being at the same time agents for Reuter; and, further, that the \$1,000 had not been forfeited. The trial court having determined these issues in favor of plaintiff upon conflicting testimony, it is claimed that the court of appeals was precluded from disturbing such finding by the well-settled rule, so frequently announced by this court and also by the court of appeals, to the effect that an appellate court will not, upon review, disturb the conclusion of the trial court upon the facts, when based on conflicting evidence, unless it be manifestly against the weight of evidence, and that in reversing the conclusion of the trial court upon these issues the court of appeals exceeded its jurisdiction. This claim, we think, is wholly

untenable. Notwithstanding the rule is as stated, it is always the province of a court of review, when the question is properly presented, to review the evidence, and determine whether the trial court or jury has misconceived its force and effect; and if, in the exercise of its prerogative in this respect, the court of appeals was mistaken in estimating the weight of testimony, it amounted, at most, to an error of judgment, and not an unwarranted exercise of jurisdiction. It had exclusive jurisdiction of the appeal, and the power to review and revise the judgment of the court below, and if satisfied, from an examination of the record, that an error in weighing the facts or applying the law had been committed, to reverse and remand the cause for a new trial. We cannot for a moment admit that if, in the performance of its duty, it should commit an error in respect to the matter now complained of, this court would have any right to interfere under the guise of its supervisory power over subordinate judicial tribunals. We have so far spoken of this proceeding, assuming it to be true, as claimed by petitioner, that the court of appeals did disregard the rule relied on in reversing the judgment of the district court, but an examination of the opinion of that court (*Deutsch v. Baxter*, 47 Pac. 405, 9 Colo. App. 58) satisfies us that no ground for complaint in this regard exists. The writ will therefore be denied, and proceeding dismissed. Denied.

ROBINSON v. DENVER & R. G. R. CO.

(Supreme Court of Colorado. May 3, 1897.)

RAILROADS—LIVE STOCK ON TRACK—NEGLECT—
—EVIDENCE—INSTRUCTIONS—COURT OF APPEALS
—WRIT OF ERROR—ASSIGNMENTS—WAIVER

1. In an action for the killing of a mule on a railroad track, where the only evidence of defendant's negligence were statements made by its engineer to the effect that the train might have been stopped within 500 or 600 feet, and that on the night of the accident he could see an object 400 feet ahead of him, plaintiff failed to make out a case.

2. It appearing that defendant's right of way was fenced at the place where the mule was killed, an instruction was given which assumed to define defendant's duty with respect to the appropriateness of fences with which it voluntarily inclosed the track. There was no evidence that defendant built, maintained, or exercised control over the fences. *Held* reversible error.

3. A writ of error from the supreme court lies to review a judgment of the court of appeals rendered on an appeal from the county court.

4. On error from the supreme court to the court of appeals, the parties will be confined to the propositions maintained by them in the court of appeals, unless they pertain to the court's jurisdiction as to the subject-matter; and hence a failure to object there to a bill of exceptions not signed during term time is a waiver.

Error to court of appeals.

Action by R. G. Robinson against the Denver & Rio Grande Railroad Company. A judgment in favor of plaintiff was reversed by the court of appeals (40 Pac. 840), and plaintiff brings error. Affirmed.

Patrick & Essex, for plaintiff in error. Wolcott & Valle, for defendant in error.

PER CURIAM. The plaintiff in error, Robinson, sued the Denver & Rio Grande Railroad Company to recover damages for the loss of a mule which was run over and killed by a train of the defendant company. The action was begun before a justice of the peace, and was afterwards appealed to the county court of El Paso county, where there was a judgment for the plaintiff. It was then appealed by the railroad company to the court of appeals, where the judgment below was reversed. 40 Pac. 840. The cause is now brought here upon a writ of error sued out by the plaintiff to review the judgment of the court of appeals.

As there are no written pleadings, we must look to the evidence for the grounds of the action. It appears therefrom that the defendant's liability is predicated upon the alleged negligence of the engineer in not stopping his train before running over the mule, and upon the negligence of the company in fencing its track where the injury occurred in such a way as to constitute the inclosure a trap for enticing animals therein, from which escape is impossible. Our examination of the record before us shows that the court of appeals reversed the judgment for error of the county court in instructing the jury. The learned writer of the opinion properly said that the action should have been dismissed at the close of the plaintiff's evidence; but added that error could not be predicated upon the refusal of the court to grant the nonsuit asked by the defendant because the latter proceeded to introduce testimony in its own behalf from which the jury might infer negligence upon the part of the engineer which contributed to the injury charged. That part of the testimony from which it is said such inference might be drawn is found in a statement by the engineer in his testimony that the train might have been stopped within 500 or 600 feet. As he also testified that on the night in question he could see an object 400 feet ahead of him, it is said that, had he seen this mule when he ought to have seen it, he might have stopped the train before striking it. It is conceded that from the testimony before the jury the exact limit within which the train might have been stopped was not fixed or given, but that it was left indefinite. When, therefore, it is considered that the burden of proving negligence is upon the party alleging it, and that it is not to be presumed from the mere fact of killing, it seems to us that the plaintiff's cause was not at all aided by this statement of the engineer, and that it was the duty of the plaintiff to make clear, either by cross-examination of this witness, or by other evidence, what such limit was, and until this was shown, and the further fact that the engineer did not stop his train within such limit, the case of the plaintiff, in so far as it rested upon the alleged negligence of the engineer, was not

made out; and that there should have been a reversal of the judgment upon the ground of the insufficiency of the evidence. If, however, this conclusion be not sound, the giving of instruction numbered 9 by the lower court, as held by the court of appeals, was error. See *Railroad Co. v. Robinson*, 6 Colo. App. 432, 40 Pac. 840. This instruction assumed to define the duty of the railroad company with respect to the appropriateness of fences with which it voluntarily inclosed the track. The instruction in question, as will be seen from an examination of the foregoing opinion, stated merely a naked legal proposition; and, besides, unless there was testimony in the record that the company built, maintained, or exercised control over these fences, the instruction was improper, and misleading. A careful examination of the evidence in this case satisfies us, as it did the court of appeals, that there was nothing in the record upon which this instruction could be based.

The foregoing sufficiently disposes of all the questions which plaintiff in error is entitled to raise at this time, and it requires an affirmance of the judgment of the court of appeals. Certain other propositions advanced in this court by the respective counsel demand some further consideration, inasmuch as some of them pertain to questions of practice that should be settled. The one of the defendant in error that this court has not jurisdiction to entertain this appeal has already been resolved against it, and may be summarily dismissed merely by referring to the cases. *Live-Stock Co. v. Godding*, 20 Colo. 71, 36 Pac. 884; *Crawford v. Brown*, 21 Colo. 272, 40 Pac. 692; *Bank v. Dole* (Colo. Sup.) 48 Pac. 1044.

There may be no reported decision of this court of the questions presented by plaintiff in error, though the practice has uniformly been contrary to his contention; and we proceed briefly to consider them. They are of a character which might appropriately have been urged in the court of appeals as reasons for affirming the judgment below. They are to the effect that there was no exception by the defendant to the final judgment of the county court; that no sufficient exceptions were taken or preserved to the instructions and other rulings complained of; that the bill of exceptions was not signed during term time, and no order extending the time was made, or, if made, that it was not preserved as a part of the record; and that the purported bill of exceptions was not properly authenticated. There are some other propositions of like character. None of these was brought to the attention of the court of appeals, either by way of argument or otherwise. This is conceded, but it is said that the case is brought here for review as if "originally taken there,"—that is, to this court,—and that the objections, though made for the first time in this court, are jurisdictional, and may be raised at any time. The phrase above quoted is from section 15 of the court of appeals act (Sess. Laws 1891, p. 121), but it applies to a cause transferred to this

court by the court of appeals before, and not after, determination by the latter. It is contrary to good practice, and would be manifestly unfair to the court of appeals, for a party in that court to conceal from it, or fail to bring to its attention, such matters as are now urged before us, and which might have necessitated a conclusion by the court of appeals different from that reached by it had they been presented in apt time, and then permit the negligent party for the first time to urge them in this court. Unless such considerations pertain to the court's jurisdiction as to the subject-matter, the failure to raise them in the court of appeals operates as a waiver of them here; and parties thus delinquent should be confined to the propositions maintained by them upon the first review. Upon full consideration this court has hitherto held that, while a bill of exceptions may not be signed after the adjournment of the term, unless during the term an order to that effect has been made, and such order is properly preserved, nevertheless a party, by his conduct in negligently failing to take advantage in apt time of such omission, waives the point. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384. Certainly none of the questions raised by the plaintiff in error in this court is of graver importance than this, and the plaintiff in error, by not raising them in the court of appeals, has lost his right to have them considered here. In addition to this, if a party, in any circumstances, could raise such questions in this court in a case brought up as this one is, it could be done only by a compliance with the rules of this court. Under rule 41, where a review of the judgment of the court of appeals is sought, a new assignment of errors must be filed by the plaintiff in error. While that has been done in this case, they are only four in number, no one of which, by any possible rule of construction, can be so stretched as to cover the matter which plaintiff in error now urges to secure a reversal of the judgment of the court of appeals. That judgment should be affirmed, and it is so ordered. **Affirmed.**

(23 Nev. 432)

STATE v. VIRGINIA & T. R. CO. (No. 1,485.)

(Supreme Court of Nevada. June 3, 1897.)

RAILROADS—TAXATION—VALUATION.

The value of a railroad for the purposes of taxation must be determined mainly by its net earnings, capitalized at the current rates of interest, taking into consideration any immediate prospect for an increase or decrease in the earning capacity of the road.

Appeal from district court, Storey county; C. E. Mack, Judge.

Action by the state of Nevada against the Virginia & Truckee Railroad Company, a corporation, to recover taxes. From a judgment for plaintiff, defendant appeals. Reversed.

W. E. F. Deal, for appellant. F. P. Langan, Laugan & Knight, F. M. Huffaker, George S. Noel, Dist. Atty., and James R. Judge, Atty. Gen., for the State.

BELKNAP, C. J. This is an action to recover taxes due for the year 1895, amounting to the sum of \$6,353.50, together with penalties and costs. Defendant valued its railroad in Storey county at \$70,787, and delivered to the assessor the statutory statement to that effect. The officer declined to accept the valuation, but assessed it at the sum of \$127,070. The board of equalization sustained the officer, and in due time this action was commenced. At the trial a verdict was rendered in favor of the state for \$6,353.50, together with penalties and costs. From the judgment, and an order refusing a new trial, defendant appeals.

In the case of *State v. Virginia & T. R. Co.* (Nev.) 46 Pac. 723, it was decided that the value of this railroad, for the purposes of taxation for the year 1895, must be determined mainly by its net earnings, capitalized at the current rates of interest, taking into consideration any immediate prospect for an increase or decrease in the earning capacity of the road. In that case the only evidence to support the verdict was that of the assessor. He testified that, in his judgment, the railroad in Washoe county was worth the amount assessed. It was shown that he had no knowledge of the business of the road; that he had not examined the reports of the company filed in compliance with law in the office of secretary of state; and that, if he had known of any decrease of its earnings, that fact would not have influenced his valuation of the property. It was held that this evidence was insufficient to create a substantial conflict in the evidence when the undisputed facts were that, according to the correct method of valuation, the assessment was too high. That case is sought to be distinguished from this, upon the ground that in this case there is a substantial conflict in the testimony, and therefore this judgment should be affirmed. In this case the only witness upon the part of the state touching valuation was the deputy assessor. His testimony was substantially the same as that of the assessor in the case from Washoe county. Some testimony was introduced tending to show that the superintendent of defendant had admitted the correctness of an assessment made in the year 1893, but it was also shown that in that year the business of the road was exceptionally prosperous, the yearly statement made June 30th showing \$102,341.50 as net earnings. We are unable to make any distinction in principle in the respect mentioned between the cases. The remaining portion of the testimony is substantially the same in each case. It was shown that the net earnings for the year 1895 were \$27,449.53. That sum, capitalized at 8 per cent. (the rate of interest fixed by the undisputed testimony), represents \$343,119.12 as the value of the entire road.

The valuation fixed by the assessor cannot be upheld, and the case must be reversed, for the reasons given in *State v. Virginia & T. R. Co.* (Nev.) 46 Pac. 723. It is so ordered.

MASSEY, J., concurs.

BONNIFIELD, J. I concur in the opinion of the court, as expressed by Chief Justice BELKNAP, that the judgment of the court below must be reversed, for the reasons given and under the authority cited. The statute of 1895 (page 39) amends the general revenue law, and, by the amendment, defendants in tax suits are allowed to plead as a defense, among others, "that the assessment is out of proportion to and above the actual cash value of the property assessed." Before this amendment, such defense could not be pleaded, and the value of the assessed property, as fixed by the assessor and board of equalization, could not be set aside, except upon the plea and proof of fraud in the assessment, and the delinquent list was sufficient evidence to sustain the valuation so fixed. Under the statute of 1895, when the defendant introduces competent evidence showing an overvaluation, and the jury, by their verdict, find the value as fixed by the officers, without evidence to support it, other than the delinquent list, or equalized assessment roll, or the testimony of a witness or witnesses not qualified to testify under the well-established rules of evidence as to the value, this court must set aside such verdict, or ignore such defense and the statute which authorizes it. This court has no right to disregard an act of the legislature except upon constitutional grounds.

FOLSOM v. MARLETTE. (No. 1,481.)

(Supreme Court of Nevada. June 8, 1897.)

PARTNERSHIP — ACCOUNTING — BOOKKEEPING — ADVANCEMENTS — INTEREST — APPROPRIATION OF PROPERTY — VALUE — COMPENSATION FOR SERVICES.

1. On an accounting between partners, the mere fact that certain checks drawn by one of them were never entered on the books does not charge him with the amount, where the firm had an employé whose duty it was to correctly keep the books and accounts.

2. A trading firm had no capital, and had been in the habit of paying interest at its banker's on overdrafts for a long time. After it had discontinued business, and just before dissolution, one of the partners paid a certain amount to the firm's creditors. On an accounting between the partners, it did not appear that the money was not paid with the knowledge and acquiescence of the other member. *Held*, that it was an advancement for the benefit of the firm, and hence drew interest.

3. It also appeared that plaintiff had appropriated firm property, and charged himself for it. It was stipulated that a transcript of the books should be treated as correct, except as to those items designated "disputed," and such charge was disputed by defendant as being too small. *Held*, that plaintiff could show that he had charged himself more than the property was worth, and so reduce the item.

4. Defendant was entitled to interest on the

value of the property, as fixed by the court, from the date of its appropriation by plaintiff.

5. One partner cannot charge the other compensation for his services without special agreement.

Appeal from district court, Ormsby county; C. E. Mack, Judge.

Suit by G. N. Folsom against S. H. Marlette. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Modified.

Robt. M. Clarke and T. W. Healey, for appellant. Torreyson & Summerville, for respondent.

BELKNAP, C. J. This is a suit for an accounting between partners, in which each demands a balance due from the other. The partnership was formed on the 29th day of September, 1880, and continued until the 27th day of May, 1890, when it was dissolved. Its business was that of contracting for the cutting of cord wood and logs, and the sawing of timber, to which the business of merchandising was subsequently added. They were equal partners. The district court ordered judgment in favor of respondent for the sum of \$6,540.49. From the judgment and an order refusing a new trial, defendant has appealed. The assignment of errors will be considered seriatim.

1. **Wells, Fargo & Co. Account.** Between February 24, 1885, and the month of October following, checks aggregating the sum of \$1,300 were drawn upon and paid by the banking house of Wells, Fargo & Co., of San Francisco, of which the books of the firm made no mention. Appellant contends that respondent is chargeable with this amount, upon the theory that he drew the checks. Conceding, for the purpose of the case, that respondent drew the checks,—although the district court expressly failed to find the fact,—it does not follow that he is responsible to appellant for the amount. During the business season of each year, the firm employed a bookkeeper, whose duty it was to correctly keep the books and accounts. This person was not the servant of the respondent only, but of the firm, and any errors or mistakes made by him were not chargeable to one member of the firm only, unless under special circumstances, not existing here.

2. **Herbert Account.** In the month of August, 1889, appellant received the sum of \$550 in part payment of an account against one Herbert. The amount was credited to the account, and cash debited on the journal and petty ledger. Appellant contends that respondent should be charged with the sum. The failure to properly charge these payments may be attributable to some innocent cause, as no suggestion of improper conduct has been hinted at. Respondent, as before said, cannot be charged with mistakes which may have been made in bookkeeping.

3. **Valenzuela Account.** The firm sold goods to Valenzuela, and sustained a loss of about \$1,250 upon the account. It is claimed by appellant that Folsom agreed with Marlette that

the goods should not be sold to the debtor without a guaranty of a third party for the payment of the account, and that afterwards the goods were sold without such guaranty, and a loss occurred in consequence. This contention is answered by the fact that the testimony is directly conflicting, and the district judge, by disallowing the claim, must impliedly have found in favor of respondent upon this point.

4. Respondent paid to the creditors of the firm, after it had discontinued business, a short time prior to its dissolution, the sum of \$16,747.72. The district court allowed interest upon this sum amounting to the sum of \$7,224.06. The money thus paid is properly treated as an advancement for the benefit of the firm. Lindley, in his work upon Partnership, says: "An advance by a partner to a firm is not treated as an increase of his capital, but rather as a loan, on which interest ought to be paid; and, by usage, interest is payable on money bona fide advanced by one partner for partnership purposes, at least when the advance is made with the knowledge of the other partners." Volume 1, p. 390. The propriety of this charge admits of no question. The firm had no capital. It had been in the habit of paying interest at its banker's upon overdrafts for a long time. Appellant has not suggested in his testimony that this money was not advanced with his knowledge and acquiescence. Under these circumstances, the charge of interest is equitable. *Baker v. Mayo*, 129 Mass. 517; *Morris v. Allen*, 14 N. J. Eq. 44; *Berry v. Folkes*, 60 Miss. 576; *Collender v. Phelan*, 79 N. Y. 366.

5. On or about the 29th day of July, 1889, respondent, with consent of appellant, appropriated certain personal property belonging to the firm to his own use, charging himself therefor with the sum of \$7,717.17 upon the books of the firm. There had been no agreement touching the valuation to be fixed on the property, and upon the trial, under the terms of a stipulation filed in the case by counsel, appellant objected to the price so fixed by respondent. This stipulation, among other things, provided "that a transcription of the firm books that had been introduced in evidence should be treated as a correct transcription, and as to all items and all balances appearing in said transcription, opposite to which is a red cross, such items and balances are disputed by defendant, S. H. Marlette." Accordingly, appellant, Marlette, did cause an "X" in red ink to be set opposite this item; thus indicating that he contested the valuation placed upon the property by the respondent, Folsom. Evidence was introduced touching the value of the property, and the fact was also shown that respondent had charged himself with \$7,717.17 for it. Upon all of the testimony introduced, the court found as a fact that the value of the property was \$5,000, and charged the respondent with that sum in the adjustment of the accounts. Appellant claims that respondent should be concluded by the value fixed by himself upon the

books of the firm, and therefore respondent should have been charged with \$2,717.17 more than the value fixed by the finding. It must be stated, as a matter of fact, that there was no objection to the introduction of testimony tending to establish a lower valuation than the charge made by the respondent. Appellant must have expected that the district court would have placed a greater valuation than that with which the respondent had charged himself, otherwise there was no reason for the objection being taken. When the contest upon the charge was inaugurated by the appellant, under the peculiar circumstances of the case, the question of the value of the property was reopened, and respondent had the right to establish a lesser value, as the appellant to establish a greater value. He took the risk, and must abide the result. As the respondent has been allowed interest upon the advance he made for the benefit of the firm, it is only equitable that the appellant should be allowed interest upon the value of this property, fixed at \$5,000, from the date of its appropriation by respondent.

6. Wages. Appellant absented himself from the locality where the firm operated a considerable portion of the time. Respondent charged him for his services for a portion of the time. The first item of this nature was charged during the winter of 1882-83, and amounted to the sum of \$300. No contention is made touching this charge. During the year 1885, \$1,050 was charged. The court allowed this charge after having deducted the charge for wages during the month of July of that year. The general rule undoubtedly is that one partner is not entitled to charge the other compensation for his services without special agreement. There was no special agreement in this case, and the majority of the court are in favor of the enforcement of this rule. One member of the court, however, dissents from this view; holding that as these charges were made during the course of business, as the books were accessible to appellant, and a statement containing these charges was delivered to him upwards of two years prior to the dissolution of the firm, and no objection having been made then or afterwards until this proceeding was commenced, he should be deemed to have acquiesced in the charge. The charge will be stricken out. The case will be remanded to the district court, with instructions to modify its judgment by disallowing respondent the \$1,050 allowed as wages, and to allow him simple interest at the rate of 7 per cent. per annum, instead of 10 per cent. per annum, upon the advances made by him after they had ceased to do business together, and also allow appellant the same interest on the \$5,000, the value of the property, from July 29, 1889. Under the circumstances of the case, the costs in the district court should not be allowed respondent; and that court will also correct its judgment by ordering each party to pay his own costs; the judgment, as corrected, to bear legal interest from date of original entry. The

judgment thus modified and corrected is affirmed; each party to pay his own costs upon this appeal.

BONNIFIELD and MASSEY, JJ., concur.

STATE ex rel. RYAN v. CRONAN.

(No. 1,494.)

(Supreme Court of Nevada. June 3, 1897.)

QUO WARRANTO — MANDAMUS — CORPORATIONS — PRESIDENT — MEETINGS — RIGHT TO VOTE — ADJOURNMENT — ELECTIONS — VALIDITY — CONFLICT OF LAWS.

1. A superintendent of a corporation, holding at the will of the directors, does not hold an office, within Gen. St. § 3711, providing that information in the nature of quo warranto may be filed against any one unlawfully holding an office in a corporation.

2. Under Gen. St. § 3469, providing that mandamus may issue to compel the admission of a party to the enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded, and section 3470, providing that such writ shall issue when there is not a speedy and adequate remedy in the ordinary course of law, a superintendent of a foreign corporation may cause a writ of mandamus to issue for the purpose of ousting one wrongfully holding as superintendent.

3. The president of a California corporation cannot adjourn a stockholders' meeting without day, against the will of the stockholders.

4. Where, at a stockholders' meeting of a California corporation, the president attempts to adjourn the same without the consent of the stockholders, and refuses to preside, or to permit the meeting to be continued in the office of the company, the stockholders may adjourn, without him, to another room, and there hold their meeting.

5. At a stockholders' meeting of a California corporation, the president alone has not the right to determine the validity of stock, the ownership of the same, and the right of persons presenting it to vote.

6. Stockholders may transact any business at any adjourned meeting that might lawfully have been transacted at the original meeting.

7. Stockholders of a California mining corporation may elect directors, where the shares of stock stand in the names of trustees on the books of the company without the names of the cestuis que trustent being indicated, notwithstanding St. Cal. 1880, p. 131, § 2, provides that the names of the cestuis que trustent of stock shall be upon the books of the corporation.

8. In view of Civ. Code Cal. § 312, providing that an invalid election of a board of directors may be set aside by petition of stockholders in the district court, the supreme court of Nevada will regard the election of directors by a California mining corporation as valid, until annulled by the courts of California.

Original application for mandamus by the state, on the relation of Joseph R. Ryan, against James Cronan. Writ issued.

W. E. F. Deal, for relator. W. T. Baggett and Wm. Woodburn, for respondent.

BONNIFIELD, J. This is an application by relator, Joseph R. Ryan, upon due notice given, for a peremptory writ of mandamus to compel the respondent, James Cronan, to surrender and deliver to relator all the property in his possession belonging to the Hale & Norcross Silver-Mining Company, situated in Virginia City, Storey county, Nev., and to

compel said James Cronan to admit said Joseph R. Ryan to the use and enjoyment of his right and office as superintendent of said company, from which relator alleges he is unlawfully precluded by said Cronan. From the pleadings it appears, among other things, that the Hale & Norcross Silver-Mining Company is a corporation organized and existing under and by virtue of the laws of the state of California, and organized for the purpose of mining on its certain mining claim on the Comstock lode, in Virginia City, Storey county, Nev., and ever since its organization it has been, and now is, engaged in such mining; that each party claims to be the superintendent of said corporation, and claims the right to exercise the functions of said office, and to carry on said business of mining for said company, and that he is entitled to all the emoluments of said position; that on the 11th day of March, 1896, a board of directors of said company was elected for the then ensuing year, and on the — day of May, 1896, the respondent was appointed the superintendent of said company by said board, and he immediately entered upon the discharge of his duties as such superintendent, in conducting the said mining business of said corporation in said Storey county, and so continued till the 24th day of March, 1897; that on the 24th day of March, 1897, the relator served upon the respondent notice of relator's appointment as superintendent of said company, and notice of the respondent's removal therefrom, and demanded that respondent admit relator to the use and enjoyment of said office, and that he deliver to relator said property, which respondent refused to do, and that he continues to hold said office of superintendent, and, as superintendent, continues to carry on said mining business; that the relator bases his claim to the office of superintendent on an appointment made by the board of directors of said corporation, duly elected, as he alleges, on the 18th day of March, 1897; that the respondent in his answer denies the validity of the election of said board, on certain grounds named, and denies the validity of the appointment of the relator as such superintendent; and that the superintendent is at all times subject to the direction of the board of directors or the president of the company, and holds his office or position only at the will of the board of directors. Upon filing the answer of respondent, his counsel moved the court to dismiss the application of relator upon substantially the following grounds: That it is apparent on the face of the pleadings that the issue presented involves a determination as to the person properly elected to an office, or entitled to exercise its functions, and that it likewise appears that the office is already filled by an actual incumbent, exercising the functions of the office de facto, and under color of right; that mandamus will not lie to compel the admission of another claimant, nor to de-

termine the disputed question of title; and that in such case the party aggrieved, who seeks an adjudication upon his alleged title and right of possession to the office, will be left to assert his rights by the aid of an information in the nature of quo warranto, which is the only efficacious and specific remedy to determine the question in dispute between the parties.

Quo Warranto. It seems that under the common law an information in the nature of quo warranto will lie only for usurping a public office,—a substantive office,—and not merely the function or employment of a deputy or servant, held at the will and pleasure of another. In *Darley v. Reg.*, 12 Clark & F. 541, Tindal, C. J., delivering the opinion of the judges, said: "After the consideration of all the cases and dicta on this subject, the result appears to be that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the crown with consent of parliament, provided the office be of a public nature, and a substantive office,—not merely the function or employment of a deputy or servant, held at the will and pleasure of others; for with respect to such an employment the court certainly will not interfere, and the information will not properly lie." In *Reg. v. Fox*, 8 El. & Bl. 939, a rule was obtained calling on the defendant to show cause why an information in the nature of a quo warranto should not be exhibited against him to show cause by what authority he claimed to exercise the office of clerk to the justices of Newport. Lord Campbell, C. J., said: "The rule must be discharged. First, the office is held during pleasure. * * * The justices may remove their clerk * * * merely for the purpose of replacing him by a person whom they think fitter for the office. The principles laid down in *Darley v. Reg.* govern this case." *Wightman, J.*, said: "I am entirely of the same opinion. * * * The clerk holds only during pleasure." *Crompton, J.*, said: "I am of the same opinion. The clerk is removable at pleasure, and quo warranto will not lie for an office of such a tenure." High, in his treatise on Extraordinary Legal Remedies (section 632), says: "In determining upon the propriety of a quo warranto information as a corrective of the usurpation of an office or franchise, an important distinction is to be drawn between the case of a public office proper, affecting public rights and interests, and that of a mere employment or agency, having no certain tenure, but determinable at the will of the employer. And while, in a generic sense, it is true that every office is an employment, yet the converse of the proposition by no means follows; and there are many employments, even of a public nature, which are not offices. While, therefore, the jurisdiction under discussion is well established as regards the usurpations of offices of a public nature, it is never exercised in the case of a mere agency or employment

determinable at the pleasure of the employer." Spell. Extr. Relief, § 1832, is to the same effect. An act regulating proceedings upon quo warranto, and information in the nature thereof (Gen. St. § 3711), provides: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state or the laws of the late territory of Nevada. * * * Although the above act extends the remedy to any office in a corporation created under the laws of this state, the question, what constitutes an office within the rule laid down by the authorities above cited? is not affected by the statute. High (section 332) says: "And the doctrine holds good even under a statute extending the remedy to offices in corporations created by the state, since the question of what constitutes an officer is not affected by such a statute, and must be determined by the common law." Even if the Hale & Norcross Silver-Mining Company was a Nevada corporation, the facts being otherwise the same as in this case, an information in the nature of quo warranto would not lie; the position of the superintendent of the corporation not being such an office as is contemplated by the above act. In *People v. Hills*, 1 Lans. 202, the supreme court of New York held, under a statute extending the remedy to any office in a corporation created by the authority of that state, that "an action in the nature of quo warranto does not lie against the secretary and treasurer of a railroad company, holding his office as a mere servant thereof, and at the will of its directors."

Mandamus. Under section 3469, Gen. St. Nev., the writ of mandamus may issue "to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." Section 3470 of said statutes provides, "This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." The case of *State v. McCullough*, 3 Nev. 202, was an original application to this court for a writ of mandamus to compel McCullough to deliver to Curtis certain property belonging to the office of superintendent of the Overman Silver-Mining Company, a California corporation carrying on the business of mining in Storey county, Nev., and to admit Curtis to all the rights incident to the position of such superintendent; both parties claiming to be the superintendent of said corporation. This court in that case said: "The remedy by this writ, under the statutes of this state, seems much more extensive than it was at common law, and this case seems clearly to be embraced within its provisions. If the relator be the

agent of the corporation, and the defendant is depriving him of the enjoyment of the right to act for his principal, that would seem to be precluding him from the enjoyment of a right to which he is entitled. The court has complete jurisdiction of the parties, and the power to determine which of them has the right to the position claimed by the relator. Why may it not afford the relator the relief to which he shows himself entitled? Admitted that the court has no jurisdiction of the corporation; but it has of the relator, who claims the enjoyment of certain rights acquired from the corporation. No judgment can be rendered here which will bind the corporation. This proceeding is simply between individuals over which the courts of this state have jurisdiction, but who claim their rights from a foreign corporation. The source from which they derive their rights is a matter of no consequence, if the court has jurisdiction of the individuals." In that case the court further said: "We know of no other speedy and adequate means by which he [relator] may be placed in the enjoyment of the right which he claims." All of which may properly be said of the case at bar, and are applicable thereto. On the above authorities, and for the foregoing reasons, we denied the motion of respondent to dismiss this proceeding.

The case was continued to the 18th day of May, at 10 o'clock a. m., for the purpose of hearing any competent evidence either party might offer, and for argument by counsel. On that day, the evidence being closed, and oral arguments made by counsel of the respective parties, the case was submitted to the court, and time was given for the filing of briefs. The principal questions to be determined are: First. Has the relator, Joseph R. Ryan, the legal right to the position of superintendent of the Hale & Norcross Silver-Mining Company? Second. And, if he has, is the respondent unlawfully precluding him from the enjoyment of such right?

Although this court has no jurisdiction over the said corporation in this case, it has jurisdiction over the parties herein, and, so far as necessary to determine the controversies arising in this case between said parties, it has the right to, and will, inquire into the power of said corporation, and of its officers and stockholders, under the laws of the state of California, and review their acts, and pass upon the question of their validity.

On the 10th and 17th days of March, 1897, meetings of stockholders of said company were held at the office of said company, in room 3 of the San Francisco Stock-Exchange Building, 331 Pine street, in the city and county of San Francisco, state of California, for the purpose of electing seven directors of said company for the ensuing year as successors of the directors who had been elected on the 10th day of March, 1896. On the day next before the meeting of the 10th day of March, Mr. Lynch, then a director and president of the company, resigned both offices, and M. W.

Fox was elected in his stead, by the board of directors, as a director and as president of the company. The by-laws of said company provide: "The president shall preside at all meetings of the trustees and of the stockholders. He shall have the casting vote at all meetings of the stockholders and trustees." The by-laws do not specify any other powers of the president respecting the meetings of the trustees or of the stockholders.

The Meeting of the 10th Day of March. At that meeting of stockholders, M. W. Fox, the president, took the chair, called the meeting to order, and directed the secretary of the company, R. U. Collins, to "call the roll, and let it be known how much stock and proxies are here on the roll call." The roll was called, and the secretary announced the result, to wit: "Total representation, 85,278 $\frac{3}{4}$ shares; 14,765 claimed by Mr. Grayson in person; 68,853 $\frac{3}{4}$ by proxy; 1,830 shares of stock." Upon the said announcement by the secretary, W. T. Baggett, Esq., acting as the attorney of the president, Mr. Fox, and the corporation, asked R. R. Grayson several questions as to his ownership of the stock he represented. W. E. F. Deal, Esq., acting as the attorney of R. R. Grayson and the greater portion of the stockholders, advised Mr. Grayson not to answer said questions, upon the theory that it was not competent to go behind the books of the company in an inquiry as to the ownership of stock at a stockholders' meeting. Mr. Grayson refused to answer said questions. Thereupon an order to show cause and an injunction were served upon R. R. Grayson, which had been issued on the said 10th day of March by Superior Judge Charles W. Slack in an action then pending in the superior court of the city and county of San Francisco, state of California, wherein M. W. Fox was plaintiff and R. R. Grayson and 45 other persons named were defendants. As to the injunction the court's order was, to wit: "And pending the hearing and determination of this order to show cause the defendants, their agents, servants, and employees, be, and each of them is hereby, restrained and enjoined from voting any of the stock of the Hale & Norcross Mining Company, a corporation, now standing in their names as trustees on the books of said corporation, at the election of officers of said corporation to be held on the 10th day of March, 1897, or at any other time, and that they and each of them are hereby enjoined and restrained from giving to any person or persons power of attorneys or proxies to vote said shares of stock standing in their names as trustees, and that they and each of them are enjoined and restrained from voting any of said stock as proxy or representative of any other person or persons in whose names or name the said stock stands as trustee on the books of said corporation." Upon the service of the injunction the president declared, to wit: "I declare this meeting adjourned by order of the court." To this announcement of the president objections were made, and

an appeal taken therefrom by members of the meeting, all of which the president ignored, and again declared the meeting adjourned by order of the court. Then R. R. Grayson, a stockholder of the company, nominated A. J. McDonnell, a stockholder, as chairman of the meeting, and William Bowers as secretary, who were elected as chairman and secretary, respectively, by the meeting; the president not participating therein. The president again announced that the meeting was adjourned, and requested those present to go somewhere else to hold a meeting, and told them to get out of the room, and that he wanted them to understand that they would have to hold a meeting at some other place, and he refused to allow them the office of the company in which to continue further to hold the meeting of the stockholders. The meeting was then adjourned by the stockholders, to meet immediately in room 11 of the same building. Immediately after said adjournment from room 3, the stockholders met in said room 11, and, upon the roll being called, stockholders representing 86,516 $\frac{7}{8}$ shares of the capital stock answered, "Present." All of said stock, except 2,754 $\frac{1}{2}$ shares, stood on the books of said company in the names of trustees, and it was determined by the meeting that, by reason of said injunction having enjoined the voting of the stock standing in the names of trustees, no election of directors could then be held; and the meeting adjourned to meet on the 17th day of March, 1897, at 1 o'clock p. m., in said room 11.

Injunction Dissolved. In the forenoon of said 17th day of March, upon due proceedings had in said superior court in said action, said injunction was dissolved by said court, and the court ordered, to wit: "That the meeting for the election of officers of the corporation defendant be fixed for this day, at 1 o'clock p. m., at the office of said corporation."

Adjourned Meeting of the 17th Day of March. Pursuant to the adjournment of the stockholders' meeting made by the meeting on the 10th day of March aforesaid, the stockholders met in said room 11 on the 17th day of March at 1 o'clock p. m. A. J. McDonnell, who was elected chairman of the meeting as aforesaid, being absent, G. W. Grayson was elected by the stockholders present as chairman of that meeting. The roll was called, and stockholders representing 82,000 shares of said stock were present. The meeting then immediately adjourned to said room 3, the place designated by the order of the court last aforesaid as the place of meeting to elect said directors.

At Room 3. At room 3, on the 17th day of March, at the hour of 1 o'clock p. m., M. W. Fox, the president, called the meeting to order, and, the roll being called, there were found to be present stockholders, as appeared by the books of the company, representing 86,326 shares of stock. Of this number of shares answering to the roll call, 42,890 were

represented by proxies by R. R. Grayson, and 23,436 shares were represented by holders of certificates of stock, which certificates were duly indorsed. Upon the announcement of the result of the roll call by the secretary, R. R. Grayson moved that the meeting do adjourn till March 18th at 1 o'clock p. m. G. W. Grayson, a stockholder, seconded the motion. The president refused to put said motion to the meeting, and ruled it out of order. R. R. Grayson appealed from the ruling of the president. The appeal was seconded by G. W. Grayson. The president refused to entertain the appeal. The motion was renewed and seconded several times by the same parties, and the president made the same ruling, and several appeals were taken from the rulings, which the president ignored. The president finally announced as follows: "There seems to be, by the roll call, 23,436 $\frac{1}{2}$ shares of stock, and also it appears from that that there has been 62,890 $\frac{1}{4}$ by proxy. I find that the stock so presented has not been issued in accordance with the law of 1880; also, that the proxies of 62,890 shares are not in conformity with that law; and, as there is not a quorum of bona fide stockholders present, I now announce this meeting now stands adjourned." R. R. Grayson then appealed from the decision of the chair, of which the president took no notice. R. R. Grayson then moved that the meeting adjourn to meet at room 11 in the same building immediately. The motion was seconded, and, being put to the meeting by Mr. Grayson, it was carried by a vote of the stockholders representing 82,000 shares of stock. We will, further along in this opinion, note and consider the proceedings of the stockholders' meetings held on the 17th and 18th days of March at said room 11 pursuant to said adjournment.

The Powers of the President. Had the president legal authority to adjourn without day either of the meetings held on the 10th and 17th days of March, at his will alone, and against the expressed will of the stockholders there assembled? If he had such authority to adjourn the meeting held on the 17th day of March at said room 3, then the subsequent meetings and proceedings of the stockholders had in said room 11 are illegal. It is argued by counsel for respondent that the president had the right to determine whether or not the stock which was offered to be voted was such stock as could or should be voted, and that his rulings in that respect are subject to review only by the courts in a proper proceeding brought for that purpose, and that at the meetings in question, the stock presented not being issued as required by the act of the legislature of California (St. 1880, p. 131), it was the duty of the president to adjourn said meetings. In support of the above contention, counsel cites *Smith v. Railway Co.* (Cal.) 47 Pac. 583. But that case is not in point or authority upon the question of the power of the president to adjourn stockholders' meet-

ings at his will, as that question was not raised and was in no manner involved in that case. Section 312 of Deering's Civil Code of California provides: "* * * Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if, for any reason, there is not present a majority of the subscribed stock, or members, or no election had. * * *" But no statute and no by-law has been cited which authorizes the president to adjourn a stockholders' meeting without day, or to a day, against the expressed will of the stockholders when in meeting assembled. We hold that the acts of the president in adjourning or attempting to adjourn said meetings were illegal; that, when he refused to preside further at said meetings, the stockholders had the right to proceed with the business of the meetings without him; that, when the president refused to permit the meetings to be continued in the office of the company, the meetings had the right to adjourn from room 3 to room 11, and conduct their business in the latter room. To hold otherwise would be recognizing in the president of the stockholders' meetings a right to prevent the annual election of the directors of the company, and a right to perpetuate in office indefinitely, at his pleasure, himself and the board of directors of which he was chosen a member. He has no such right, under any rule of law, or under any decision of the courts. The statutes of California vest in the stockholders the right to annually elect a board of directors of said company. This right cannot be divested by any act of the directors themselves,—much less by the president. *Elkins v. Railroad Co.*, 36 N. J. Eq. 467. No elective officer has a right to do any act which would prevent the election of his successor at the time fixed by law for such election. *State v. McCullough*, *supra*. Further citation of authority in this connection need not be made. We find nothing in the opinion of the court in said case in 47 Pac. that supports the contention of counsel to the effect that the president, M. W. Fox, was the sole judge, so far as the stockholders' meetings were concerned, of the validity of the issue of the stock, of the ownership of the stock, and of the right of persons presenting or representing it to vote the same. In that opinion it is shown that a protest was made in the meeting of stockholders, by some member or members, against receiving certain votes representing certain stock, upon the ground that the persons in whose names the stock stood on the books of the company were not bona fide stockholders. The chairman sustained the protest, and the proffered votes were excluded at the election of the board of directors. No objection was taken at the meeting to the ruling of the chairman on said protest, and his ruling must be considered as the ruling of the meeting. An election of directors having been held, the aggrieved stockholders brought their action under the provisions of section 315 of the Civil Code. Evi-

dently their contention in that case was not based on the ground that the votes were rejected by the chairman, but upon the ground that they should not have been rejected at all by anybody. The superior court certainly did not hold that the votes were illegally excluded because they were rejected by the chairman, but because, in the opinion of that court, the persons in whose names the stock stood on the books were bona fide stockholders. And to our mind it clearly appears that the supreme court did not reverse the judgment of the superior court on the ground that the chairman had the right to exclude the votes, but on the ground that, in the opinion of the court, the persons in whose names the stock stood were not bona fide stockholders. The question as to the power of the chairman to determine the legality of stock, or the ownership of stock, or the right to vote it, is not discussed or considered in the opinion of the court. No other case is cited in support of this contention. In *State v. Chute*, 34 Minn. 135, 24 N. W. 353, there was involved the question of the right of the president of a corporation, or chairman of the stockholders' meeting, to determine the right to vote for directors of the company at the stockholders' meeting. The president had determined that certain stock offered should not be voted, and the chairman excluded the votes offered. The court said: "We find nothing in the charter or by-laws authorizing the president of the corporation or chairman of the meeting to determine such questions." "No other provision being made, it was for the meeting, by a vote of the stockholders, to determine, until revised by the courts, the right claimed." The court held that the opinion expressed by the president as to the right to vote the stock was of no more effect or binding force than would have been a similar opinion expressed by any stockholder, and that the person claiming the right to vote should have presented his claim to the meeting of stockholders. We find no statute of the state of California, and no by-law of the company, vesting in the president any such power as counsel claims for him.

Adjourned Meetings. Pursuant to the adjournment made from room 3 to room 11 on the 17th day of March, the stockholders met. G. W. Grayson presided at the meeting, and William Bowers acted as secretary. On the roll being called, stockholders representing 86,307½ shares, as the same appeared on the books of the company, were present; and the meeting adjourned to meet on the 18th day of March, at 1 o'clock p. m., at said room 11. Pursuant to said last-named adjournment, the stockholders met at the time and place named. G. W. Grayson acted as chairman, and William Bowers as secretary, of the meeting. The chairman announced the adjourned meeting to be for the purpose of electing a board of directors of the Hale & Norcross Silver-Mining Company for the then ensuing year. The roll of stockholders was called and 88,

311½ shares of stock were present, of which 60,937½ shares were represented by proxies, 20,949 in person, and 6,425 in stock. Thomas Cole, A. Herman, William Bowers, A. W. Moore, G. W. Grayson, F. S. Butler, and R. R. Grayson, all being stockholders, were placed in nomination for directors of said corporation, and elected by the unanimous votes representing the 88,311½ shares of stock. Of the said shares voted, certificates of stock representing 56,236 shares were present, duly indorsed, and voted by the holders thereof. This meeting, as well as all of the others named, was attended by a large number of stockholders, and the right of any person to vote, who answered the roll calls at the several meetings, as the representative of any stock, in person or by proxy, as the stock appeared on the books of the company, was not questioned by any other person claiming to be the owner of, or claiming the right to represent the same; and, so far as we have been able to find from the evidence, no such right was questioned by any stockholder, except the president, M. W. Fox, who represented 210 shares of his own stock, and Frank Mahon, who had 5 shares of his own.

Legal Methods. We are of opinion that the stockholders pursued legal methods in all of their said meetings, under the facts and circumstances disclosed by the evidence; that they regularly convened and regularly adjourned said meetings, and that they had the legal authority to transact any business at the adjourned meeting held on the 18th day of March that they might lawfully have transacted at the original meeting held on the 10th day of March in room 3, had not the injunction been served; or that they might so have transacted in room 3 at the meeting held on the 17th day of March after said injunction had been dissolved by the court, and the court had ordered the election of directors to be held on that day at the office of the company. "An adjourned meeting is but a continuation of the meeting which has been adjourned; and when that meeting was regularly called and convened, and duly adjourned, the stockholders may, at the adjourned meeting, consider and transact any business that might lawfully have been transacted at the original meeting." 1 Cook, Stock, Stockh. & Corp. Law (3d Ed.) § 601, and cases cited.

Provisions Concerning Elections. With reference to stockholders' elections, counsel for relator cites sections 12 and 14 of article 12 of the constitution of California, and several sections of the Civil Code. Said section 12 provides: "In all elections for directors or managers of corporations every stockholder shall have the right to vote in person or by proxy, the number of shares owned by him for as many persons as there are directors or managers to be elected." Said section 14 provides: "Every corporation, other than religious, educational or benevolent, organized or doing business in this state, shall have and maintain an office * * * where transfers

of stock shall be made and in which shall be kept * * * books in which shall be recorded * * * the names of the owners of its stock and the amounts owned by them respectively. * * * Of the sections of the Civil Code cited, section 307 provides: "All elections must be by ballot, and every stockholder shall have the right to vote in person or by proxy the number of shares standing in his name as provided in section three hundred and twelve of this Code for as many persons as there are directors to be elected." Section 312 provides: "At all elections, or votes had for any purpose, there must be a majority of the subscribed capital stock, or of the members represented either in person or by proxy in writing. Every person acting therein, in person or by proxy or representative, must be a member thereof, or a bona fide stockholder, having stock in his own name on the books of the corporation at least ten days prior to the election. Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent, or any, stockholders, or members, and may be set aside by petition to the district court of the county where the same is held. * * *" Section 315 provides: "Upon the application of any person, or body corporate, aggrieved by any election held by any corporate body, the district court of the district in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice."

The Right to Vote. Counsel for relator contends, in substance, that, under the above provisions of the constitution and Code, every person whose name appears upon the books of the corporation as a stockholder must be allowed to vote by the stockholders' meetings at all elections, when present in person or by proxy in writing, and offering to vote, and that if there is a claim that such person is not the real owner of the stock which he has voted, or is not a bona fide stockholder, any party aggrieved by such vote must assert such claim and seek his remedy in the mode prescribed by section 315 of the Civil Code, and that he cannot do so otherwise. Counsel cites several authorities to support his contention. Counsel for respondent argues that the sections of the Code and cases cited by relator's counsel have no application to the case at bar, for the reason that a statute passed since the adoption of the Code (St. 1880, p. 131) has special reference to mining corporations, while the Code has reference only to other character of corporations, and that the statute has established a different rule with respect to the former class of corporations from that of the Code, which has reference to corporations other than those organized for mining purposes. Of that statute, section 2 provides: "All stock in each and every mining corporation in this state shall stand in the books of the company in all cases

in the names of the real owners of such stock or in the name of the trustees of such real owners, but in every case where such stock shall stand in the name of a trustee, the party for whom he holds such stock in trust shall be designated upon the books and also in the body of the certificate of such stock." It is admitted in this case that all of the capital stock of the Hale & Norcross Silver-Mining Company, 112,000 shares, except about 2,800 shares, stood in the names of trustees upon the books of the company, without the names of the persons for whom the parties were trustees being indicated in any manner, either upon the said books or upon the certificates of stock. Counsel further argues and contends that because the stock of said company stood as above named, and was not issued by the company as required by said statute, there was no valid election of directors as the successors of the board from which the respondent received his appointment as superintendent, and under which he claims the right to the office. We cannot agree with counsel in his conclusion. The statute of 1880 does not declare the elections void in case the stock voted for directors does not stand on the books in the names of the real owners, or in case it stands in the names of trustees, and the names of the real owners are not designated on the books and in the certificates. It does not provide any remedy to the aggrieved party in case a vote or election is had other than in accordance with the provisions of that act. Then, in case such vote or election is had, where must the aggrieved party look for a remedy? Counsel for respondent says, in effect, that, when the president rejected the stock offered to be voted at the said meetings of the stockholders, if he was in error the remedy must be sought by an appeal to the courts under the provisions of section 315 of the Code. But the remedy provided by that section is only available when a vote or an election has been had. He admits by his argument that section 315 is applicable to mining corporations, to correct the rulings of the president, if any party is aggrieved thereby. We are of opinion that sections 312, 315, and other sections of the Code, are also applicable to mining companies, and to elections held by them. If we are correct in this opinion, what must be the correct conclusion as to the validity of the election had on the 18th day of March, 1897? Under section 312 a vote or election had other than in accordance with the provisions of law is not void, but voidable only at the instance of stockholders or members, and may be set aside only by petition to the district court of the county where the election is held, and by the supreme court on appeal, under other provisions of the Code. Until that election is declared to be void by the courts of the state of California, we must hold it to be valid.

A number of points and questions were raised and discussed by respective counsel which we do not think are necessary to be considered, under our view of the case. The af-

fidavit of the relator being sufficient in averment, and the material averments being sustained by the proofs, we are of opinion, in consideration of the law applicable to this case, the facts and circumstances disclosed, and for the reasons above given, that the relator, Joseph R. Ryan, has the legal right to the position of superintendent of said company, and that he is unlawfully precluded from the enjoyment of such right by the respondent. The writ of mandamus must issue as prayed for, and it is hereby so ordered.

BELKNAP, C. J., and MASSEY, J., concur.

CENTRAL LOAN & TRUST CO. v. CAMPBELL COMMISSION CO.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

ATTACHMENT—ORDER OF PROBATE JUDGE—JURISDICTION—SERVICE.

1. Under the provisions of sections 4120 and 4121, St. 1893, a judge of probate is authorized to grant an attachment in a cause pending in the district court where it is made to appear that the judge of said district court is absent from the county at the time of granting such attachment, and where a proper showing is made, authorizing an attachment under said sections; and said sections are not invalid, as being in conflict with the organic act of this territory.

2. It is indispensable, to give a court jurisdiction in attachment proceedings, that there should be personal service of the summons in the action upon the defendant, or that the order of attachment be levied upon property of the defendant, or that an order of garnishment should be served upon a garnishee having property in his possession belonging to the defendant, or who is indebted to such defendant. Where there has been no personal service in an action, and no property of the defendant seized under an attachment, and no property or credits belonging to the defendant reached by an order of garnishment, the court has acquired no jurisdiction, there being neither a service upon the defendant nor any seizure of his property, there is nothing for the jurisdiction to rest upon, and any proceedings taken in the cause are coram non iudice and void, and the cause must be dismissed.

(Syllabus by the Court.)

Error from district court, Noble county.

Action by the Central Loan & Trust Company against the Campbell Commission Company. From a judgment of dismissal, both parties bring error. Affirmed.

On July 2, 1895, plaintiff in error commenced an action in the district court of Noble county on a certain promissory note given by defendant in error on September 1, 1894, due two years after date, for the sum of \$15,000, with interest at 8 per cent., which note had been duly transferred to plaintiff in error in the usual course of business. The note, at the commencement of the action, had not become due. Plaintiff asked judgment in accordance with the terms of the note, and that an attachment issue against the property of the defendant in error, on the grounds that the defendant in error was a foreign corporation, and was then about to sell and convey its property with the fraudulent intent to hinder and delay its creditors. The judge of

the district court in which said action was commenced being absent from the county, an application was made in due form to the judge of the probate court of said county for an order of attachment in said action. Such application was granted by said probate judge, and an order of attachment was thereupon issued by said judge to the clerk of the district court of said county, and said clerk issued said attachment, and delivered the same to the sheriff of the county for service. At the time of filing the action, a summons was issued to the defendant, which was, on July 12, 1895, returned "Not found." On July 3, 1895, the attachment was levied upon about 5,000 head of steers as the property of defendant, which were appraised at \$25 per head. On July 29, 1895, an affidavit of service by publication was filed in the action, and publication was made, notifying defendant to appear and answer on or before September 2, 1895. On July 6, 1895, a garnishment summons was issued in said action, and served upon one A. H. Pierce. On August 26, 1895, Pierce answered said garnishment, and filed an interplea in the action, claiming the attached property under a vendor's lien, and filed a motion to discharge the attachment. The answer of the garnishee showed that he was in the possession of the cattle as vendor of the same, under a vendor's lien, by virtue of a written contract of sale from him to said defendant, by which he reserved title to said cattle until the terms of said contract should be complied with by the defendant; that at the time of the service of the said garnishment the defendant was owing him the sum of about \$75,000 upon said contract; that prior to the levy of the attachment and the service of the garnishment order the defendant had parted with all his interest in and to the property, and had sold the same to one Stoddard, as trustee, to secure the payment of a number of promissory notes for about the sum of \$30,000, due and payable to various banks; and that at the time of the service of said order of garnishment defendant had no interest in said cattle, but that all the interest that said defendant had ever had therein was then owned by said Stoddard. Said garnishee further answered that neither at the date of the service of said garnishment, nor at any time, was he indebted to the defendant in any amount whatever, nor did he have any money, property, or effects in his hands or under his control belonging to said defendant, or in which defendant had any interest. No answer was filed to this return of the garnishee, nor any denial made thereof by the plaintiff in error, nor any issue made thereon; but an order was made in said cause requiring said Stoddard to interplead in the action, and also ordering that George W. Miller and J. C. Miller be made parties thereto, and that they interplead therein; that thereafter the said Stoddard and the same Miller and Miller filed their interpleas in said cause, the in-

terplea of said Miller and Miller reciting the said contract for the sale of said cattle between said Pierce and the defendant, and that said contract was made and entered into by defendant for the sole use and benefit of said Miller and Miller; that the said defendant had no interest whatever in said contract or said cattle except that the same, when sold, were to be shipped to said defendant, to be sold upon the market by it as a commission company for a commission of 50 cents per head; that all of said property was the absolute property of said Miller and Miller, subject only to the claim of said Pierce under said contract. On September 7, 1895, an order was made in said cause by consent of the plaintiff and of said Pierce, appointing Pierce receiver, without bond, to market the cattle on the open market, to pay himself out of the proceeds, and to hold the balance subject to the order of the court. Pierce qualified as receiver, and proceeded to market the property, and filed his report in the case. The report showed sales amounting to \$105,062.56, and that, after paying expenses, and the amount due the receiver on his claim, there was a balance remaining in his hands of \$22,361.64. On November 11, 1895, the defendant in error filed a plea to the jurisdiction of the court on the following grounds: Second, "because no actual service has been had upon this defendant by service of summons within Noble county as required by law;" third, "because there has been no seizure of any of defendant's property within the jurisdiction of this court, either by attachment or garnishment process," and, fourth, "because the pretended seizure of such property is void, as a basis of jurisdiction, because there was no actual or constructive service of any attachment or garnishment order on this defendant." On December 16, 1895, an amended plea to the jurisdiction was filed by defendant in error, in which the following additional ground was stated: "Because there is no basis for service by publication herein for the reason that all the attachment proceedings were void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due." On the same day the court sustained the plea to the jurisdiction, on the additional ground stated in said amended plea, and overruled it on each of the other grounds stated, and dismissed the cause for want of jurisdiction. The plaintiff in error excepted to the ruling of the court sustaining the motion, and the defendant in error also excepted to the ruling denying the motion upon the other grounds enumerated therein, and the cause is here upon petition and cross petition in error for decision upon the ruling of the court upon the entire motion.

Harris & Lafferty, William L. Williams, and J. R. Keaton, for plaintiff in error. Asp, Shartel & Cottingham, for defendant in error.

TARSNEY, J. (after stating the facts). Two questions are presented by this record: First, was the court below without jurisdiction, and were its proceedings void on account of the order of attachment having been granted by the probate judge; and, second, if the probate judge had jurisdiction to order the attachment to issue, had the district court acquired jurisdiction to hear and determine the cause under the proceedings had therein prior to the order of dismissal? Sections 4120, 4121, St. 1893, relating to civil procedure, are as follows:

"Sec. 4120: Where a debtor has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay the collection of their debts or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent or is about to remove his property or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors or of hindering them or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the same debtor.

"Sec. 4121: The attachment authorized in the last section may be granted by the court in which the action is brought or by the judge thereof or in his absence from the county, by the probate judge of the county in which the action is brought; but, before such action shall be brought or such attachment shall be granted, the plaintiff or his agent or attorney shall make an oath in writing showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds for an attachment enumerated in the preceding section."

The contention of the defendant in error upon the first proposition involved in this case is that under the organic law the legislature of the territory has no power to devolve the functions of the district court on any other person or tribunal than the regularly appointed judge of said court; and that the above act of the legislature wherein it attempts to confer authority upon the judge of the probate court to grant attachments is unconstitutional and void; that the powers and functions of a probate court or of the judge thereof are, under the organic act, confined to probate matters; and that authority cannot be conferred upon them by the legislature in matters other than matters of probate. When courts are called upon to declare an act of the legislature unconstitutional, and therefore void, the authority of the legislature ought not to be a matter of doubt, but the want of such authority should clearly appear, and no act should be declared unconstitutional, unless the court so declaring can say that its infringement of the superior law is clear beyond reasonable doubt. Every presumption is in favor of the validity of a

law regularly enacted by the lawmaking power. The provision of the organic act of this territory vesting its judicial power is as follows: "That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts and justices of the peace. * * * The jurisdiction of the several courts herein provided for both appellate and original, and that of the probate court and of the justices of the peace, shall be as limited by law: provided, that justices of the peace who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and said supreme and district court respectively, shall possess chancery as well as common law jurisdiction, and authority for redress of all wrongs committed against the constitution or laws of the United States or of the territory affecting persons or property. * * * The said supreme and district courts of said territory and the respective judges thereof shall and may grant writs of mandamus and habeas corpus in all cases authorized by law." Section 9. This act nowhere, in express words, defines or limits the extent of judicial power vested in probate courts, nor the nature of the judicial power vested in them. By it chancery and common-law jurisdiction is expressly declared to be possessed by the supreme and district courts, and authority for the redress of all wrongs committed against the constitution or laws of the United States or of the territory affecting persons and property, and the granting of writs of mandamus and habeas corpus in all cases authorized by law. The question in this case is not whether the act in controversy is inconsistent with the clauses of the organic act which confer upon the supreme and district courts general jurisdiction in chancery as well as common law, or whether the legislature could evade or obstruct the exercise of the powers or general jurisdiction of those courts by conferring precisely the same jurisdiction upon judges of probate. The jurisdiction which the act in question authorizes the judge of probate to exercise is not one that is inherent in any court, nor is it included in the jurisdiction of courts of general jurisdiction by virtue of their possessing chancery as well as common-law jurisdiction. Its invalidity cannot be maintained on the grounds that it is an exercise of chancery or common-law jurisdiction, which is exclusively conferred upon other courts, nor that its exercise belongs of right to courts of general jurisdiction. Conceding that the power conferred by this act upon the probate judge is the power to exercise a judicial function, then two plain propositions present themselves in this case, viz.: Can a probate judge receive other judicial powers than those relating to probate matters; and, if so, can judicial functions as to cases pending in the district court be grant-

ed to any person other than the duly-appointed judge thereof? Under the provisions of the organic act already recited, that the jurisdiction of the several courts therein provided for "shall be as limited by law," and containing a provision "that the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," it could not successfully be maintained that the phrase, "as limited by law," would have the effect to wholly exclude laws made by the legislature of the territory, or that such legislature did not have authority for conferring new rights or creating new remedies or establishing anomalous proceedings; or that they might not direct in what court or by what officer the powers to enforce such rights, remedies, or proceedings might be exercised. The power to issue attachments is not derived from the common law, and never was a part of the jurisdiction exercised by courts of chancery. It is purely of statutory authority and origin. *Jaffray v. Jennings*, 101 Mich. 315, 60 N. W. 52; *Jaffray v. Wolf*, 1 Okl. 312, 33 Pac. 945; *Drake*, *Attachm.* § 1 et seq. This court has held that the power to regulate matters of divorce is a legislative one, and that the conferring of jurisdiction upon probate courts to grant divorces was not a wrongful exercise of the right granted by the organic act to the legislature of this territory to legislate upon "rightful subjects of legislation"; that it was not an infringement on any of the common-law or equity jurisdiction of the supreme or district courts, and that there was no legal reason why the legislature might not enact and repeal laws relating to divorce. *Irwin v. Irwin*, 3 Okl. 186, 41 Pac. 369. The effect of this decision is that, the power being in the legislature to enact the law and create the right, it might determine what tribunal should be vested with the power to determine the right, provided, of course, that such tribunal was, by the organic act, a repository of judicial power.

The identical question involved herein was before the supreme court of Kansas in a number of cases, and the validity of acts identical with the one we are construing was by that court upheld. The constitution of Kansas (article 3, § 8) provides: "There shall be a probate court in each county which shall be a court of record, and have such probate jurisdiction, and care of estates of deceased persons, minors and persons of unsound minds as may be prescribed by law, and shall have jurisdiction in cases of habeas corpus." And article 3, § 1, of said constitution provides: "The judicial power of the state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court, as may be provided by law." These provisions are more definite, and certainly as restrictive, in determining the jurisdiction of probate courts, as the provisions of our organic act; yet in a case where the judge of probate made

an order appointing a receiver in proceedings in aid of an execution issued out of the district court, under a statute of that state authorizing such proceedings, the statute authorizing judges of probate to make such orders was held valid. *Young v. Ledrick*, 14 Kan. 78. An act providing that actual settlers upon school land, who had settled thereon prior to a certain date, and who had made improvements thereon, might purchase the same at the appraised value thereof, and providing that the probate judge should have jurisdiction to hear and determine all questions necessary to be determined in order to ascertain whether the applicant was entitled to purchase said lands thereunder, was held to be valid. In *re Johnson*, 12 Kan. 85. In that case Judge Valentine said: "It is claimed that said sections are unconstitutional, because the jurisdiction they attempt to confer upon the probate court is not probate jurisdiction, nor any jurisdiction authorized to be conferred upon probate courts by the constitution. There is no prohibition, in the constitution or elsewhere, against the exercise of such jurisdiction by the probate court. There is no inconsistency between the exercise of this jurisdiction and the performance of any other duty that may rightfully be conferred upon probate courts." A statute identical in language with ours, and from which ours appears to have been copied, has been in force in Kansas since 1883, and its validity maintained by the courts of that state. *Buck v. Panabaker*, 32 Kan. 467, 4 Pac. 829. In that case, in an action in the district court, an order of attachment was issued by the probate judge of Osage county. Afterwards, the defendants made a motion before the district judge of said county to dissolve the attachment, and the attachment was set aside and discharged. On appeal, the judgment below was affirmed on the ground that it did not appear from the record that the plaintiffs were entitled to the attachment on the grounds stated in their affidavit therefor, and in that case Chief Justice Horton, after quoting the statute, says: "From these provisions of the statute it is clear that a probate judge can only grant an order of attachment when the district judge is absent from the county, upon the grounds mentioned in said section 230." In *Young v. Ledrick*, 14 Kan. 78, *Brewer, J.*, says: "Can a probate judge be invested with judicial function as to cases pending in the district court? This really separates itself into two questions: Can a probate judge receive other judicial powers than those granted by the constitution to the probate court? And can judicial functions, as to cases pending in the district court, be granted to any person other than the duly-elected judge thereof? The first question is no longer an open one in this court, but has been already answered in the affirmative. In *re Johnson*, 12 Kan. 102, and cases cited in the opinion. The second question must also be answered in the affirmative. The jurisdiction of the district

court is not defined by the constitution. It is left to the legislature to prescribe its limits, and the manner of its exercise. While it may be that, under section 5 of article 3 of the constitution, it is impossible for the legislature to provide for more than one judge of the district court, and while it may be that no legislation could be upheld which excluded such single judge from a supervisory control of all the proceedings of that court, yet within this limit we think it competent for the legislature to provide that other persons may exercise some judicial functions in cases pending therein."

In Nebraska, a statute which provides that an attachment may be granted by the court in which the action is brought, or by a judge thereof, or by the probate judge of the county, is held valid. *Reed v. Bagley*, 24 Neb. 332, 38 N. W. 827. The case of *Ferris v. Higley*, 20 Wall. 375, is not in conflict with the views herein expressed. An act of the legislature of Utah territory of 1855 provided that: "The several probate courts in their respective counties have power to exercise original jurisdiction both civil and criminal, and as well in chancery as at common law when not prohibited by legislative enactment and they shall be governed in all respects by the same general rules and regulations as regards practice as the district courts." Mr. Justice Miller, speaking for the court, declared this act to be unconstitutional, but the broad distinction between that act and the one we are considering is readily apparent. The judicial power which it sought to confer on probate courts was not that arising upon a legislative cause of action or legislative remedial procedure, which the legislature might have entirely dispensed with, or might have conferred upon a mere ministerial officer; but that act attempted to confer upon the probate court full concurrent jurisdiction with the district court in all matters, civil and criminal, as well in chancery as at common law. This, the court rightly held they could not do, and while the learned judge in the opinion uses language from which it has been argued that the court intended to hold that in Utah, under an organic act identical with ours, the jurisdiction of probate courts was confined exclusively to matters of probate, and that their jurisdiction could not be enlarged by legislative enactment, we think his language, carefully read, will bear no such interpretation, but that the true interpretation thereof makes it to mean that congress, in conferring on supreme and district courts powers of general jurisdiction in civil and criminal cases, specifically vesting in them common law and chancery jurisdiction, did not intend to leave it to the territorial legislature to confer a general jurisdiction upon probate courts, or to vest them with the essential nature or jurisdiction of the supreme and district courts, or to authorize the legislature to modify in essential particulars the constitution or jurisdiction of those courts. But it was not intended in that case to hold that the legislative power

was so restricted that they might not confer jurisdiction upon the probate courts, or the judge thereof, in matters which did not impair the essential nature or jurisdiction of the supreme or district courts, or relate to common-law or chancery jurisdiction; for in the opinion the learned judge says: "We are not prepared to say that in deciding what law is meant in this phrase, 'as limited by law,' we are wholly to exclude laws made by the legislature of the territory. There may be cases when the legislature conferring new rights or new remedies or establishing anomalous rules of proceedings within their legislative power may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate court may be more specifically defined by territorial statutes within the limits of the general idea of the nature of probate courts, or that certain duties, not strictly of that character, may be imposed upon them by the legislature." We think the decision in this case, when rightly read and interpreted, sustains the principle of the authorities we have before cited, and that there is nothing therein which negatives the authority of the legislature to confer upon judges of probate the function sought to be conferred by the act the validity of which we are considering.

In *Clayton v. Utah Territory*, 132 U. S. 632, 10 Sup. Ct. 190, the court clearly defined what was intended to be decided in *Ferris v. Higley*, *supra*. In commenting upon that case it says: "While there was no definition of the powers of probate courts in the organic act, this court held that the essential nature of probate courts was not such as to justify the conclusion that they were intended to exercise such powers [those of a general nature in civil and criminal cases], and especially it was held that it was not competent for the legislature to create other courts, or vest in other courts created by the organic act powers which had already been vested in the supreme and district courts of the territory, and that, therefore, the statute of the territory conferring common-law and equity jurisdiction on the probate courts was void, as being in conflict with that provision of the act of congress." Had the legislature, in the exercise of its authority to legislate "on all rightful subjects of legislation," seen fit to confer upon judges of probate the power to issue marriage licenses, to solemnize marriages, to organize corporations, to hear and determine contested election cases, to take depositions in any case in any court, or acts of a similar character, we would not be warranted in holding that the conferring of such powers would infringe upon the general jurisdiction of the supreme or district courts, or modify in any essential particular the constitution or jurisdiction of those courts; and such powers are not in their nature distinguishable from that which we are considering. We are clearly of the opinion that the legislature had the authority to provide that in the absence from the county of the district judge,

the probate judge might, upon a proper showing, make an order for the allowance of the writ of attachment in an action pending in the district court upon a debt not then due; and that section 4121, *supra*, is not unconstitutional.

The conclusion we have reached on this point necessitates our consideration of the other proposition presented in defendant in error's special plea to the jurisdiction of the district court, viz. that said court had no jurisdiction, because no actual service had been had upon the defendant, and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process. The record shows that there was no personal service on defendant. The answer of the garnishee showed that the property seized under the writ of attachment issued was in the possession of the garnishee, and held by him under a vendor's lien; that by the terms of the contract creating such lien title to the property was not to pass to the defendant, but was to remain in the garnishee until the terms of said contract had been complied with by the defendant; that defendant at the time of the service of the garnishment had no interest whatever in said property, having transferred and assigned whatever interest he might have had by virtue of said contract to one Stoddard in trust and to be applied in the payment of certain of his debts, amounting to more than any interest which he might have had in said property. Section 4085, St. Okl. 1893, provides: "The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice in writing that he elects to take issue on his answer; in which case the issue shall stand for trial as civil action, in which the affidavit on the part of the plaintiff shall be deemed the petition, and the garnishee's affidavit the answer thereto." No notice having been given to the garnishee by the plaintiff of his intention to take issue on the garnishee's answer in this cause filed, and no issue having been made thereon, under the foregoing provision of the statute, such answer must be taken as conclusive of the truth of all the facts stated therein, and such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached, and that no debts or liabilities were owing to him by such garnishee, and that whatever interest he might have had in such property had before the garnishment been lawfully assigned and conveyed to Stoddard. Was there, then, any constructive service against the defendant in the cause by attachment or garnishment? A garnishment, to have any force or effect, must reach and bind some property of the defendant, or some debt due to him. Where property is sold and delivered upon condition that the title shall not vest in the vendee unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until

the performance of the condition. *Drake, Attachment*, § 246; *Buckmaster v. Smith*, 22 Vt. 203; *McFarland v. Farmer*, 42 N. H. 386; *The Marina*, 19 Fed. 760; *Harkness v. Russell*, 118 U. S. 671, 7 Sup. Ct. 57; *Lucas v. Birdsey*, 41 Conn. 357; *Bradshaw v. Warner*, 54 Ind. 58; *Freem. Judgm.* § 124; *Strong v. Taylor*, 2 Hill, 326; *Sage v. Sleutz*, 23 Ohio St. 1; *Cardinal v. Edwards*, 5 Nev. 40. Where completion of a contract is a condition precedent to payment, the payor is not garnishable on his debt before the contract is completed. *Kiely v. Bertrand (Mich.)* 34 N. W. 674. An answer showing that the debtor has assigned to a third party his interest in the property or in the debt due from the garnishee, and has notified the garnishee, sets up a state of facts showing that the garnishee is under no legal liability to the debtor. *Bailey v. Railway Co. (Iowa)* 17 N. W. 567.

The contention of plaintiff in error that defendant in error's plea to the jurisdiction in the court below was a general appearance of defendant in the action, and gave jurisdiction, cannot be sustained. In order to constitute a general appearance, the defendant must file some plea which, in effect, admits the jurisdiction of the court or personally enters his general appearance. The plea in this cause did not go to the merits of plaintiff's cause of action or his right to sue thereon, but was simply an assertion that the defendant was not in court, and that the court had no jurisdiction of his person or his property, because there had been no service of process, either upon him personally or so as to affect any property owned by him. We must, therefore, conclude that when the answer of the garnishee was filed, and the same was not traversed within the time provided for by law, such answer was conclusive as to the facts therein stated, namely, that no property belonging to the defendant in error or debts due to him were reached by such garnishment, and as no other property of the defendant was seized under the attachment, and there was no personal service upon the defendant, the court had acquired no jurisdiction, and was without jurisdiction to proceed further; that all the subsequent proceedings, orders, and decrees therein, except the order dismissing said cause, were coram non iudice, and void. As the court below entered a final order, dismissing the cause for want of jurisdiction, although not upon grounds herein approved, the judgment below was for the right party, and said judgment is affirmed. The other judges concur, except *BIERER, J.*, who tried the cause below, and *KEATON, J.*, who was of counsel, not sitting.

KELLY-GOODFELLOW SHOE CO. v. TODD.

(Supreme Court of Oklahoma. Feb. 12, 1897.)
REPLEVIN—COMMENCEMENT—PROSECUTION OF SUIT
—APPEARANCE—WHAT CONSTITUTES.

1. In this territory a civil action is commenced by "filing in the office of the clerk of the proper

court a petition, and causing a summons to be issued thereon," and the plaintiff is entitled, in an action in replevin, to institute his claim for immediate delivery of the property; and such action for replevin is "commenced" for the purpose of prosecuting such a claim, although the plaintiff does not follow up his endeavor to procure service by "the first publication" or "a service of summons within sixty days," unless such failure to procure service or make publication within 60 days from the filing of the petition is pleaded as a bar to an action, under the statute of limitations (section 20, art. 3, Code Civ. Proc.).

2. In an action in replevin, if the defendant is found in another county than that in which the action is brought, but yet appears generally to the action by filing his answer, in which ownership and possession are alleged, and in which the jurisdiction of the court is questioned and denied, such an appearance is a general appearance for all purposes; and it is error in the court thereupon to confine the taking of testimony to the mere value of the property, and to direct the jury to return a verdict in favor of such defendant for the value of the property, and damages. In such a case, evidence upon all the issues properly raised in the pleadings, and relevant and necessary to a determination of the whole case upon its merits, should be heard, and the case given to the jury to determine thereupon.

(Syllabus by the Court.)

Error to district court, Lincoln county.

Replevin by the Kelly-Goodfellow Shoe Company against W. N. Todd. From a judgment for defendant, plaintiff brings error. Reversed.

This was an action in replevin, brought December 18, 1893, in the district court of Lincoln county, against W. N. Todd, and was for the recovery of a stock of shoes. Summons was issued and served "by leaving a certified copy with one J. C. Simpson, found in charge of the goods replevined in this action." The order in replevin was issued at the same time, and executed by the sheriff, by taking possession of the goods, and by delivering a true copy of the same to the said Simpson, "whom I found in charge of the goods." On February 10, 1894, the defendant Todd entered a special appearance, and moved the court, supported by affidavit, to quash the service and dismiss the action, for that he was a resident of Logan county, and no process was served upon him in Lincoln county. On the same day the court sustained that part of the motion going to quash the service, the plaintiff excepting. The cause was not dismissed, nor did the defendant except to the action of the court in refusing to dismiss it. The petition was the ordinary petition in replevin, alleging ownership in the plaintiff, describing the goods, averring that the plaintiff was entitled to immediate possession, that the property was wrongfully detained, that it was not taken in execution, etc., alleging the total value at \$1,100.85, and demanding possession and damages. On June 4, 1894, and before answer, the plaintiff filed an amended petition, making, as new parties thereto, W. P. Simpson, J. C. Simpson, and W. H. Falls, in addition to the defendant Todd. Todd was served with summons to answer the amended petition in Logan county on June 4, 1894. Falls and J. C. Simpson were served in Lincoln county on June 9th.

W. P. Simpson was not found. The amended petition alleged generally the usual grounds for replevin, describing "the stock of shoes more particularly described in the original petition herein filed," which was referred to for greater certainty of description. It was alleged that the defendants obtained possession of the goods in question by fraud; that W. P. Simpson had made purchases of them from the plaintiff company in the city of St. Louis, by fraudulent representations of his worth and business standing, upon an agreement to pay cash therefor; that the defendant Todd and the other defendants conspired with the said W. P. Simpson to procure the fraudulent and wrongful possession of the stock of shoes, obtained possession thereof, and wrongfully smuggled and removed them to a remote and out of the way village, known as "Mission," in the county of Lincoln, territory of Oklahoma. On July 7, 1894, the defendant Todd appeared specially, "for the purpose only of testing the jurisdiction of the court, and moved to quash the summons and service," setting up that he was at the beginning of the action a resident of Logan county, never a resident of Lincoln county, where this action was brought, and never had service of summons upon him in Lincoln county, but was served with copy of the summons in Logan county, and supporting his motion by affidavit. A demurrer to the amended petition was filed on the 7th day of July, by W. H. Fallis,—that it did not state facts sufficient to constitute a cause of action as to him. Thereafter, and on the 12th day of November, the court sustained the demurrer, and granted plaintiff leave to amend his petition instantler, which was done. And on the same day the motion of the defendant Todd to quash the service was overruled, to which the defendant excepted, "and defendants were required to answer within thirty days from this date." Thereupon, and on December 10, 1894, the defendant Todd appeared generally to the action, and answered, denying the allegations of the amended petition concerning him, except the allegation that at the beginning of the action he was in possession of the personal property in question, alleging that he was the legal owner thereof, and entitled to remain in possession; that the goods had been wrongfully and unlawfully seized and taken from him forcibly; that they were reasonably worth the sum of \$900; that he had been damaged to the extent of \$500; and prayed for judgment. On April 24, 1895, the defendant Fallis asked for and obtained judgment for costs upon the pleadings, the plaintiff excepting. At the same time, the defendant J. C. Simpson appeared specially, and moved to quash the service upon him, showing, by affidavit, that he was not in Oklahoma at the time the sheriff's return showed that he was in Lincoln county. His motion was sustained, plaintiff excepting. A jury was impaneled, and the cause proceeded to trial. After oral testimony was taken, the writs, return, invoice, etc., were offered in

evidence, and excluded by the court, the plaintiff excepting. The court sustained an objection of the defendant, upon the ground that "the return upon its face does not show that the court, at the time the return purports to have been made, had jurisdiction of the defendant in this case, or that the defendant was in court at the time, and the return upon its face does not show that the property was held by the sheriff until such time as the court should obtain jurisdiction of the defendant in this case, and that the return is void as against the defendant W. N. Todd." And the court excluded all testimony except as to the value of the goods in question, and "directed the jury to return a verdict for defendant," fixing the value of the goods at \$900, and damages for the unlawful detention thereof at \$84.75, which direction was at the time excepted to by the plaintiff. Many assignments of error were made, including: (1) error in sustaining the motion of the defendant Todd to quash the service, February 10th; (8) in sustaining the objection of the defendant to the introduction of any evidence of the writ or order of delivery in replevin, and the officer's return thereto, and the invoice; (9) in holding that, at the time the return purports to have been made, the court had no jurisdiction of the defendant Todd; (10) in holding that the return does not show at the time it was made that the defendant was in court; (17) in sustaining the objection of the defendant to the further introduction of testimony, except as to the question of the value of the property; (21) in sustaining the objection of the defendant to competent testimony as to J. C. Simpson having charge of the goods for the defendant W. N. Todd, and as to visits of Todd to the place where the goods were in charge of the defendant J. C. Simpson; (25) in directing the jury to return a verdict for the defendants.

L. E. Payne, T. G. Chambers, and H. H. Howard, for plaintiff in error. Keaton & Cotteral, for defendant in error.

McATEE, J. (after stating the facts). It is contended by the defendant in error that inasmuch as the action was begun December 18, 1893, and that the defendant Todd was not a resident and not found in Lincoln county, where the action was begun, but was found by the sheriff in Logan county, and inasmuch as no other service was had upon the defendant Todd until the 9th day of June, 1894, and no endeavor was made to procure service, or to follow the attempt to procure service by a publication or service of summons within 60 days after such attempt, the action was never, in fact, commenced, and that the proceeding in replevin was therefore void. This reasoning was based upon the provision (Code Civ. Proc. art. 3, § 20, "Time of Commencing Civil Actions") that "an action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date the sum-

mons which is served upon him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by first publication, or service of the summons within sixty days." It is the contention of the defendant in error that this section of the statute is applicable in an action in replevin, and that, no such service or attempted service or publication within 60 days from the filing of the petition having been made, the action was never "commenced." The section referred to provides that "an action shall be deemed commenced, within the meaning of this article, as to each defendant." But the "article" is a statute of limitations, enacted for the purpose of constituting a special defense and bar to the action, on the ground of lapse of time between the incurring of a liability and the attempt to enforce it by legal proceeding, and its provisions are expressly limited, by the terms of the section itself, to "the meaning of this article." The statute does not apply to an action of replevin, unless the defendant should be here, setting up the statute of limitations as a bar to recovery, which is not the case. In general, a "civil action may be commenced in a court of record, by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." *Id.* p. 771, § 57. And article 10 (Replevin of Property), § 176, p. 789, provides that "the plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the suit or at any time before the answer, claim the immediate delivery of such property as provided in this chapter." The petition having been filed and the summons having been issued in the case, the action was then "commenced," and the plaintiff had a right to then "claim the immediate delivery of the property," and the action was commenced, although the plaintiff did not follow up his endeavor to procure service by the "first publication or a service of summons within sixty days." *Dunlap v. McFarland*, 26 Kan. 341. Afterwards, the petition having been amended, and other parties having been joined in the action as defendants, upon whom personal service was sought to be procured within the county of Lincoln, while the service was not had upon the defendant W. P. Simpson, a demurrer was sustained in behalf of W. H. Fallis, and a motion to quash the service was sustained in behalf of J. C. Simpson, which was yet overruled as to the defendant W. N. Todd. The defendant Todd had his option at that time of retiring from the case, and, if he was en-

titled to a remedy, to pursue it in another action or forum against the plaintiff, or to appear generally to the action. Having determined to appear generally and to answer as he did, he submitted himself to the jurisdiction of the court. *Kennedy v. Beck*, 15 Kan. 418; *Carr v. Huffman*, 47 Kan. 188, 27 Pac. 827.

The defendant, by his answer, avers that he was in the lawful possession of the goods in question, and remained in possession thereof. Under the law in replevin, this possession is actual possession, in person, and he ought not, in justice and equity, to have technical points or irregularities construed in his favor, so as to defeat the action upon the merits, and to claim to be legally absent from the county for the purposes of a fair trial on the issues involved, while he avers in his answer, which is sworn to, that he was in "legal possession,"—that is, actually present,—as required by law, in the county of Lincoln, at the commencement of this action, even if he had not by his answer waived them. *Wells*, Repl. § 634. It is our conclusion, therefore, that in the district court, after the defendant Todd answered in the manner in which he did, accepting the jurisdiction, and by his answer raising the questions of the right of lawful possession of the goods and of the legal ownership, the case should have been heard upon its merits, as raised by the petition, and answer of the defendant thereto, and that the attention of the jury should not have been confined to the ascertainment of the value of the goods and the assessment of damages only, and that they should not have received the direction to fix the amount of recovery in behalf of the defendant, and to fix the damages at a specific sum. The case is reversed and remanded, in accordance with these views, with direction for a new trial upon the merits as raised by the pleadings. All the justices concur, except DALE, C. J., who presided below, and KEATON, J., who was of counsel.

(5 Okl. 368)

HARMON v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

RAPE—EVIDENCE—COMPLAINT.

1. An allegation in an indictment for rape which charges that the defendant "feloniously made an assault and attempted by force, threats, and violence to have carnal knowledge of a female without her consent," is equivalent to a statement that she resisted, and under such an allegation evidence that she resisted or was prevented from resisting is admissible.

2. Evidence is inadmissible, in a prosecution for assault with intent to commit rape, of the particulars of the complaint made by the prosecutrix to her husband some hours after the alleged commission of the offense.

(Syllabus by the Court.)

Error to Payne county court.

Henry Harmon was convicted of rape, and brings error. Reversed.

King & Hutto, for plaintiff in error. W. B. Williams, for the Territory.

McATEE, J. This proceeding was prosecuted in the court below by the defendant in error upon an indictment which charges that the plaintiff in error, "in the county of Payne, and territory of Oklahoma, * * * did then and there unlawfully and feloniously make an assault in and upon one D. Y., a woman, with the intent then and there upon the part of him, the said Henry Harmon, to commit the offense of rape upon the said D. Y. by then and there, without the consent of the said D. Y., attempting by force, threats, and violence to have carnal knowledge of her, the said D. Y.; the said D. Y. not then and there being the wife of him, the said Henry Harmon." Upon this indictment a trial was had, and the jury found the defendant guilty of the charge contained in the indictment "of an assault with intent to commit rape," whereupon a motion was filed by the defendant in arrest of judgment, which alleged that (1) "the indictment upon which the defendant was tried does not state facts sufficient to constitute the offense of which he was convicted," and "(2) that the indictment does not state facts sufficient to constitute a public offense," which motion was overruled; and the defendant thereupon filed his motion for a new trial, alleging that "(2) the court erred in admitting evidence on behalf of the territory over the objection of the defendant," and "(6) the verdict is contrary to law," which motion was argued to the court, and overruled, and exception saved. Under chapter 20, art. 2, p. 104, Sess. Laws 1895, it is provided that: "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances," etc. This indictment seeks to charge an attempt to commit rape under the third subdivision of this section, which provides that: "(3) Where she resists, but her resistance is overcome by force or violence." We are of the opinion, inasmuch as the indictment charged "that the defendant then and there unlawfully and feloniously made an assault in and upon one D. Y., a woman, with the intent then and there upon the part of him, the said Henry Harmon, to commit the offense of rape upon the said D. Y. by then and there, without the consent of the said D. Y., attempting by force, threats, and violence to have carnal knowledge of her, the said D. Y.; the said D. Y. not being the wife of him, the said Henry Harmon," that this was a sufficient allegation that the prosecutrix resisted, and that her resistance was overcome by force or violence. Evidence of such resistance was admissible under this allegation of the indictment. *People v. Pacheco*, 70 Cal. 473, 11 Pac. 761. The evidence of William Y., the husband of the prosecutrix, was admitted over the objection of the defendant, not only to the fact that upon his coming home that night his wife made complaint to him, which was so far right, but he

was also permitted to state to the jury what she said to him. This testimony of the witness, including her statements, should not have gone to the jury. 3 Greenl. Ev. 213; *Rosc. Cr. Ev.* § 23; 2 Bish. Cr. Proc. 903; 1 Phil. Ev. 184; *Kirby v. Territory* (Ariz.) 28 Pac. 1134; *People v. Tierney* (Cal.) 7 Pac. 37. Upon these grounds the case should be reversed and remanded for further proceedings. It is so ordered. All the justices concur, except DALE, C. J., who presided at the trial below.

(Okla. 170)

YOUST v. WILLIS et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

EXEMPTIONS FROM GARNISHMENT.

Debts due the proprietor and keeper of a public hotel for boarding and accommodation of guests are in no sense the earnings for personal or professional services of such proprietor or keeper, and are not exempt from garnishment, under the provisions of subdivision 16, § 1, c. 34, St. 1893.

(Syllabus by the Court.)

Error from district court, Payne county.

Action by Willis and others against John Youst. From a judgment refusing to dissolve a garnishment proceeding, defendant brings error. Affirmed.

Neill & Clark and George P. Uhl, for plaintiff in error. King & Hutto, for defendants in error.

TARSNEY, J. On May 24, 1895, the defendants in error obtained a judgment against the plaintiff in error in the district court of Payne county for the sum of \$221.27 and costs, taxed at \$144.45, upon which execution was issued, and duly returned nulla bona. And thereafter, on the 20th day of January, 1896, and the 3d day of February, 1896, said defendants in error filed in the clerk's office of said court their affidavits for orders of garnishment in aid of said judgment, and summonses were duly issued against divers persons therein named as garnishees. At the time of issuing said summonses in garnishment, and for a considerable period of time prior thereto, the plaintiff in error, John Youst, was the proprietor and keeper of a certain hotel in Stillwater, in said county, and was engaged in managing and conducting said hotel in the usual and ordinary manner and course of such business, entertaining regular boarders and transient guests. The garnishees summoned, and who answered, admitting an indebtedness from them to the said John Youst, were boarders or guests of said hotel. Afterwards, at the April, 1896, term of said court, plaintiff in error filed a motion in said cause to dissolve and vacate the garnishment proceedings on the grounds—First, that the money owing to the defendant from the garnishees is, under the law of this territory, exempt from garnishment; second, "because the money owing to this defendant constitutes the earnings of this defendant within less than

90 days prior to the 20th day of January, 1896, as shown by affidavits A and B, hereto attached and made a part hereof." And plaintiff in error filed affidavits in said court in support of said motion, showing that the only indebtedness due from the garnishees therein to said plaintiff in error was for board and lodging furnished by said plaintiff in error at his said hotel to said garnishees within 90 days prior to the service of such garnishment. The motion to dissolve said garnishment proceedings was by the court overruled, to which action of the court plaintiff in error excepted, and has appealed.

The only question presented by this record is whether the debts due from boarders and guests to the proprietor of an hotel are exempt from garnishment for the satisfaction of debts due and owing upon judgments by him. Counsel for plaintiff in error with great force and earnestness contend that such debts are exempt from garnishment by virtue of the provisions of subdivision 16 of section 1, c. 34, of the Statutes of 1893. The said section provides that "the following property shall be reserved to the head of every family residing in the territory, exempt from attachments or execution and every species of forced sale for the payment of debts"; and said subdivision 16 reads, "All current wages and earnings for personal or professional services earned within the last ninety days." It is under this provision that counsel contend that the exemption is to be found, but we are not prepared to assent to the proposition of counsel that debts due for board or accommodations in a public hotel are in any sense the personal or professional earnings of the owner or proprietor of such hotel. We are not cited to any authority that holds that hotel keeping can be legally classed among the professions, and common experience will demonstrate that though the personal services of the landlord may, and, alas! too frequently do, comprise the greater part of the consideration which a guest receives for his money paid, such consideration may in fact be wholly inadequate. The judgment of the court below is affirmed. The other judges concur, except DALE, C. J., not sitting.

PATSWALD v. UNITED STATES.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

INDICTMENT—DEMURRER—GRAND JURY—ORGANIZATION—CHANGE OF VENUE—APPEAL—RECORD.

1. A demurrer to an indictment goes only to the sufficiency thereof and of the averments therein, and not to questions affecting the regularity or legality of the organization of the grand jury that returns it.

2. By section 5110, St. 1893, as amended by Sess. Laws 1895, p. 196, after an indictment has been returned, questions affecting the regularity of the drawing, summoning, or impaneling of the grand jury must be raised and presented by a motion to set aside the indictment; but by section 5111, St. 1893, as amended by Sess. Laws 1895, p. 197, such questions may be raised and presented upon a motion for new trial, where it

is shown that the facts upon which objections are based were not known to the defendant or his counsel until after the jury was sworn for the trial of the cause.

3. By section 5138, St. 1893, as amended by Sess. Laws 1895, p. 187, where the offense charged in the indictment is punishable with confinement in and for a term less than life in the territorial prison, and an application is made for a change of venue, supported by the affidavit of the accused, and corroborated by five disinterested persons, that a fair and impartial trial cannot be had in the county where the indictment was returned, the awarding or refusing of such change of venue is within the discretion of the court, and the action of the court in awarding or refusing such change will not be reversed unless where an abuse of such discretion is shown by the record.

4. Where facts de hors the proceedings in the trial of a criminal cause, and which may affect the regularity of such proceedings, occur, such facts must be presented to the court by motion, and must be supported by competent evidence, and the evidence as well as the motion must be incorporated in the record, or the action of the trial court in relation thereto cannot be reviewed on appeal.

(Syllabus by the Court.)

Error from district court, Oklahoma county.

Albert W. Patswald was convicted of perjury, and brings error. Affirmed.

John H. Pitzer and T. G. Chambers (Dille & Burford with them on briefs), for plaintiff in error. C. R. Brooks, U. S. Atty., and Thos. F. McMechan, Asst. U. S. Atty.

TARSNEY, J. The defendant, Albert W. Patswald, was indicted, tried, and convicted in the district court for Oklahoma county, sitting with the powers and jurisdiction of a United States district and circuit court, for the crime of perjury, and sentenced to the penitentiary for a term of three years, and to pay a fine of \$1 and the costs of prosecution, taxed at \$2,416.15. From this judgment he appeals, assigning as error the action of the trial court in overruling his demurrer to the indictment, in overruling a motion for change of venue, in overruling a motion to discharge the jury after they had been sworn and pending the trial, and in overruling his motions for a new trial and in arrest of judgment.

The demurrer to the indictment was properly overruled. It set forth at length, and with sufficient clearness and certainty, all the matters and facts necessary to be alleged to fully meet the requirements of the statute, and with the necessary averments to charge the crime of perjury. It alleged with great clearness and with proper averments as to date the pendency of a certain contest and cause in the United States land office at Oklahoma City; that the register and receiver of said land office had jurisdiction to hear and determine said cause; that in the trial of said cause it became and was material to establish and prove certain facts; that said Patswald was a party to said cause; that he was duly sworn as a witness to testify the truth in said cause; that the oath was administered by one D. D. Leach, who was register of said land office, before whom said cause was being tried; that

said Leach was an officer then and there being authorized to administer said oath. The indictment further sets forth with clearness the testimony given by said witness in said cause, states clearly the materiality to the issue, and by proper averments negatives the truth of such testimony, and alleges its falsity. The indictment was not subject to objection as being indefinite, uncertain, or misleading, nor as charging several offenses. The third ground of the demurrer, "that the organization of the grand jury returning the indictment was irregular and void," cannot be raised by or considered upon a demurrer. The demurrer goes to the indictment, and the sufficiency of its averments, and not to the organization of the grand jury that presented it. Such question must first be raised by a motion to set aside the indictment. Section 5110, St. 1893, as amended by Sess. Laws 1895, p. 196. If a motion to set aside the indictment be not made, the defendant may present objections to the drawing or impaneling of the grand jury, and such objections may be shown as grounds for a new trial, and upon a motion for a new trial when a showing is made that those facts were not known to the defendant or his counsel until after the jury was sworn for the trial of the cause. Section 5111, St. 1893, as amended by Sess. Laws 1895, p. 197. There is nothing in this record to show how the grand jury was drawn and impaneled, and no motion to set aside the indictment was made, and nothing relating to the organization of the grand jury was made a ground in the motion for a new trial. The indictment must, therefore, be held to be good.

2. The objection to the action of the court in overruling a motion for change of venue in the cause cannot be sustained. The application for a change of venue, based upon the grounds that the defendant could not have a fair and impartial trial in the county where the cause was pending because of the bias and prejudice of the people of said county against him, was supported by his own affidavit and the affidavits of five others, residents of said county, who upon belief swore that defendant could not have a fair trial in said county because of the bias and the prejudice of the people thereof against said defendant and his defense in said action. Affidavits were filed in opposition to the application for a change of venue, made by 26 citizens of said county, who swore that they knew of no reason why said defendant could not have and obtain a fair and impartial trial in said county, and who knew of no prejudice against him on the part of the people of said county. Section 5138, St. 1893, as amended by Sess. Laws 1895, p. 197, provides: "Second. If the offense charged in the indictment, be punishable with confinement in and for a term less than life, in the territorial prison, and it be shown to the court, by affidavit of the accused corroborated by five disinterested persons, that a fair and impartial trial cannot be had in such county, the court may, in its discretion, award or

refuse the same; the order shall be reviewable on appeal." This statute leaves the granting of changes of venue in the cases embraced in it to the discretion of the court, and the court would have the right, in the exercise of that discretion, to refuse a change of venue where no counter affidavits had been filed, and where no showing was made other than by affidavits in favor of the application. This court, although it may review the action of the court below, cannot reverse such action, unless we can say that there has been an abuse of such discretion. As the record in this cause presents the question, six persons have sworn that the defendant, by reason of bias and prejudice, could not have a fair and impartial trial; and twenty-six other persons have sworn that no such bias or prejudice existed, and that the defendant could have a fair and impartial trial. We cannot reasonably be expected to hold that the action of the court below in refusing the application for change of venue was an abuse of its discretion which would warrant a reversal.

3. On the 13th day of December, 1895, a jury was impaneled and sworn to try the cause, and the trial proceeded from day to day thereafter until the 17th day of said month, when, in the progress thereof, the following motion was made by counsel for the defendant: "Comes now the defendant, and moves the court to discharge him, for the reason that the court has no jurisdiction to proceed further in the trial of this case, because of the fact that a session or regular term of said court had been held in another county within the jurisdiction of this district, intervening the time between yesterday morning at eleven o'clock and this time." And the following colloquy occurred: "By Judge Pitzer (counsel for defendant): We have some authorities. By the Court: I don't care to hear them. The motion is overruled. By T. G. Chambers (of counsel for defendant): We would like to have the record show that there was a term of court held in Pottawatomie county. By Judge Pitzer: I desire to have the record taken down on the refusal of the court to hear authorities and the overruling of the motion of the defendant. By the Court: Proceed with the examination." The action of the court in overruling said motion is assigned as error. Whatever might be the force of the proposition which defendant sought to present and save by his motion, we cannot pass upon the same, because it is not properly saved or presented in the record. If such motion was predicated upon facts dehors the proceedings in the trial of the cause, which facts would show that something had intervened, pending the progress of the trial, which deprived the court of jurisdiction to proceed further therein, such facts should have been presented in support of said motion, and preserved in the record, that we might determine their sufficiency. The allegation in the motion that "a session or regular term of said court had been held in another county within

the jurisdiction of this district intervening the time between yesterday morning at eleven o'clock and this time," was not supported by any authenticated copy of the record or any proceedings of said court held in any other county, nor by any certificate as to such facts, nor by any affidavit to establish such facts, and there is nothing in the record for us to consider which in any manner tends to show that the action of the court below was erroneous.

4. The fourth ground of defendant's motion for a new trial for the overruling of which error is assigned was as follows: "That the defendant herein was tried before an incompetent and disqualified jury, in this, to wit: That one of the jury was a partisan, and actively participant in the securing of counter affidavits in the matter of the application for a change of venue herein." In support of this ground of the motion for a new trial defendant filed and presented an affidavit of one F. E. Sutton to the effect that he was acquainted with one N. O. Taylor, who sat as a juror in the trial of said cause, and that during the time pending the application for a change of venue, and before the trial of the cause, said Taylor assisted in circulating counter affidavits and petitions to be presented to the court for the purpose of resisting the application for a change of venue. If a person called as a juror be disqualified by reason of bias and prejudice, such disqualification should be presented to the court by a challenge of the juror, and not by motion for a new trial. But, waiving the question of the manner in which the disqualification of the juror was sought to be presented in this case, does the record show anything which renders him disqualified? The only ground on which his disqualification was claimed is that prior to the trial, or his being summoned as a juror, he had procured affidavits to be made that there was no such bias or prejudice existing in the minds of the people of Oklahoma county that would preclude the defendant from having a fair trial therein. We do not think this even tends to show him to have had such bias or prejudice against the defendant as would disqualify him as a juror, or as tending to show that he had any bias or prejudice against the defendant. The affidavits which it is alleged he assisted in procuring were to the effect that no bias or prejudice existed such as would preclude the defendant from having a fair trial in the county, and, if it did not exist in the county, it could not have existed in the mind of the particular juror.

5. The defendant, as one of the grounds upon which his motion in arrest of judgment in this cause was based, alleged in said motion that "on the 21st day of December the judge of this court, as the presiding judge in this case, went to Cleveland county, and held a session of court, and returned and resumed the trial of this case,—all over the objection of this defendant; that said court in Cleveland county was held as shown by exhibit hereto

attached, and made a part of this motion." Exhibit A, attached thereto, was as follows: "December 24, 1896. Court convened pursuant to adjournment. Present and presiding, the Honorable Henry W. Scott, Judge, W. H. Ebey, Clerk, by Deputy U. S. Marshal, by deputy and sheriff, at three o'clock p. m." To which was attached a certificate, as follows: "I, W. H. Ebey, district clerk in and for Cleveland county, territory of Oklahoma, do hereby certify that the above is a true and correct copy of the record of opening court on the date aforesaid. [Signed] W. H. Ebey, Clerk, by Tressa Meek, Deputy. [Seal.]" No other or further proof was offered by the defendant in support of the matter set up in said motion. It will be noticed that the allegation in the motion states that "on the 21st day of December" the judge went to Cleveland county, and held a session of court, and returned and resumed the trial of this defendant, while the exhibit offered in support thereof shows whatever action it purports to show occurred on "December 24, 1896"; but the journal entry found in the record conclusively shows the court engaged in the trial of this cause on the "21st day of December, 1895," both in the forenoon and in the afternoon; that on said day, and all of said day, the cause was being argued by counsel to the jury, and the charge of the court was given to the jury, and they retired to deliberate of their verdict. The motion alleges the judge to have been absent from the county on the "21st day of December, 1895," on a day when the journal shows conclusively that he was not absent; and the exhibit in support of the motion shows his presence in Cleveland county on the "24th day of December, 1896,"—more than eight months after this cause was filed in this court. It would seem that, if the liberty of the defendant was a matter of any importance, or that the objection to the proceedings of the court on the trial were deemed by those who made and presented such objections to be meritorious, and deserving the consideration of this court, there would not have been that gross carelessness in the preparation, examination, and certification of the record that manifestly appears therefrom. It is a rule as old as the law itself that the proceedings of a court of record must be presumed to be regular and valid unless the contrary appears from the properly authenticated record of such proceedings. If we were permitted to presume that "December 24" was a clerical error, and meant, in said exhibit, "December 21" (as we do presume that "1896" was intended for "1895"), which we are not, because as to said "December 24" there is no impossibility or apparent ambiguity, then we are confronted with the fact that there is no certificate, indorsements, or file marks thereon which indicate that it was ever presented in court attached to said motion, or read or considered on the hearing thereof. But, independent of these objections, and treating and considering the said exhibit as though it had

been attached to said motion, and read and considered by the court, we must hold that it does not prove or establish the fact contended for by counsel for defendant, namely, that after the cause of defendant had been submitted to the jury, and while they were deliberating of and concerning their verdict, the judge of the court left the county of Oklahoma, and went to Cleveland county, and there held a session of the district court for that county. This exhibit is not an authenticated copy of the record and proceedings of any court. It does not purport to be taken from the journal of the proceedings of the district court of the Third judicial district sitting in and for the county of Cleveland. It does not purport to be certified to by the clerk of the district court of the Third judicial district. It does not bear, and is not attested with, the seal of any court, nor is there any certificate or words to indicate that the word "Seal" written thereon was intended to represent the seal of the district court of the Third judicial district in and for Cleveland county. We must therefore hold that there was no sufficient proof to establish the fact set up in said motion in arrest of judgment, and that, therefore, the question therein raised is not before us for consideration. There appearing no substantial error prejudicial to the defendant in this record, the judgment of the court below must be affirmed. It is so ordered. The other judges concur.

TERRITORY ex rel. MILLER v. HEWITT,
Treasurer of Board of Education.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

MANDAMUS TO PUBLIC OFFICER—REMEDY AT LAW.

This case is heard upon the petition and answer, which show that money is now in the hands of the respondent, who is the treasurer of the board of education of the city of Guthrie, and that it is either now due to the relator or to other persons, who, like him, hold warrants from the board of education upon the said treasurer, directed to the district fund, and that the treasurer refuses to pay so much of such fund to the relator as will satisfy the warrant held by him. *Held*, there is in this case a plain and adequate remedy at law in behalf of the relator against the treasurer on his bond, and his action should be at law, even if there was no contention as to whether the money in the hands of the treasurer is due to the relator, or to other holders of similar warrants.

(Syllabus by the Court.)

Application by the territory on the relation of H. L. Miller against F. W. Hewitt, treasurer of the board of education of the city of Guthrie, Logan county, Okl. T. Refused.

Green & Strang, for relator. Asp, Shartel & Cottingham, for respondent.

McATEE, J. This is an original application in this court for a peremptory writ of mandamus, and is presented upon the petition and answer, both of which are sworn to. The petition avers the incorporation of the board of education of the city of Guthrie, and that the defendant is the duly elected

and qualified treasurer of that board. That on the 6th day of November, 1895, the board of education made and delivered its warrant No. 2, series 2, for the sum of \$15.20, for services to the board of education, and that the relator owns this warrant by assignment for value, and that it was drawn on the district fund of the board of education in the hands of the respondent. That it was duly presented for payment on the 6th day of November, and payment refused by the respondent, and by him indorsed as follows: "Nov. 6, 1895. Presented for payment, and not paid for want of funds. F. W. Hewitt, Treasurer." That there were in the hands of the respondent at that time district funds of the board in the sum of \$3,335. That the warrant was legally and properly issued, and that it was the duty of the respondent to have paid the same. In his answer, the respondent, after denying generally the allegations of plaintiff's petition, and demanding a jury for the trial of the issues of fact raised in the pleadings, avers that: "On the date of the registration of the warrant sued upon there were outstanding and registered warrants which had been presented and registered for want of funds, about the sum of \$32,200; that of this sum \$21,000 had been funded by the district court upon the application of the board of education of the city of Guthrie, but at the time of the funding of said indebtedness there were warrants outstanding and unpaid which had been duly registered upon his warrant register as such treasurer, amounting to the sum of \$9,200, left unprovided for in the said funding, and thereafter to be provided for, as stated to the district court by the board of education in its petition for said funding, by 'money then in the treasury and in the county treasury, and from the proceeds of collections of delinquent taxes and other available funds in the treasury, or soon to be received by this respondent,' but that said indebtedness, although represented by warrants allowed by the board of education, and ordered to be paid and registered as provided by the statute, still remains unpaid, and is prior in point of time to the warrant sued upon, and that the holders of that prior warrant indebtedness are demanding payment from this respondent to the extent of the money now in his hands." The respondent also alleges that an action has been brought by him in the district court of Logan county in the nature of an interplea, in which he seeks to compel the holders of the prior indebtedness and the holder of the present warrant to come into court, and have their priorities determined.

It is contended by the respondent upon this state of facts that mandamus will not lie, inasmuch as the respondent, if he should pay the warrant sued upon here, may hereafter be liable for the payment thereof in the action now pending, by way of interplea, or in some other proceeding, to those who hold the

prior warrants; and he asserts that upon the admitted facts in this case this court will not enforce the performance of the duty here sought to be charged upon him, and in fact no such duty exists as can be enforced by mandamus. It is provided in the Code of Civil Procedure (section 4596, p. 833, of the Statutes of Oklahoma, 1893) that: "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." It was said in *State v. McCrillus*, 4 Kan. 250, that: "The facts show that the money is now in the hands of the treasurer, that it is due to the relator, and that he refuses to pay it over. Is there not a plain and adequate remedy in the ordinary course of law? An action against the treasurer on his bond is as plain a remedy as a suit upon a note against a delinquent debtor; and if, as was suggested by the counsel on both sides, the question of the validity of the bond is to be raised, such an action is a more appropriate one to try the question than is afforded by this writ." And it was held in *State v. Bridgman*, 8 Kan. 459, that: "Where the relator holds evidence of indebtedness of the county, and a fund has been provided, and placed in the hands of the county treasurer, to pay off said indebtedness, held, that there was a plain and adequate remedy by suit on the treasurer's bond, and that a writ of mandamus will not be allowed to compel the treasurer to pay the claims of relator." To the same effect is *Byington v. Hamilton*, 37 Kan. 759, 16 Pac. 54. In the case now under consideration, in which there is a conflict between the claims sued upon here and other claimants for the same fund in the hands of the respondent, the reason exists with still greater force that the relator should be remitted to his remedy at law. The application for the writ therefore will be refused. All the justices concur.

(5 Okl. 326)

SMITH et al. v. BAKER et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

INSOLVENCY — PREFERENCES — ASSIGNMENTS FOR CREDITORS — STATUTES — CONSTRUCTION.

1. The right of an insolvent debtor to pay one or more creditors in preference to others, and the right to make a general assignment for the benefit of all his creditors ratably, are distinct and independent rights.

2. Where an insolvent debtor makes conveyance of the whole of his property, by bill of sale or chattel mortgage, to one or more of his creditors, in good faith, and in absolute, executed payment of a bona fide debt, or for the security of a bona fide indebtedness, although in exclusion of other creditors, the transaction lacks the essential elements of a trust, and cannot be brought within the range of the statute relating to voluntary assignments. The statute regulating and permitting voluntary assignments by insolvent debtors for the benefit of creditors was not intended to, and does not, affect or qualify the right of such debtors to make preferences among their creditors under section 4 of chapter 27 of the Statutes of 1893.

3. Under the laws of this territory, in 1893, an insolvent debtor had two ways in which he might dispose of his estate: First, under section 4, c.

27, St. 1893, by using the same to pay or secure his debt to one or any number of his creditors; second, if he desired to distribute his estate equally to all his creditors, he might do so under the assignment law. If he elected to distribute his estate under the assignment law, such distribution was required to be for the benefit of all creditors equally, and the assignment could not create preferences in favor of any.

4. Where the legislature of one state or jurisdiction adopts a statute in force in another jurisdiction, which has already received a construction in its courts, it is presumed to adopt the construction thus given; but, to sustain the presumption, such construction must have been placed thereon by the highest judicial tribunal authorized to pass upon the question, and such construction must have been so long established as to have been known, or so long that it reasonably might have been known, to the legislature adopting it.

Bierer, J., dissenting.

(Syllabus by the Court.)

Error from district court, Canadian county.

Action by J. H. Baker and others against Rebecca A. Smith and others. From a judgment for plaintiffs, defendants bring error. Reversed.

The judgment of the court below, from which this appeal is prosecuted, was upon a motion for judgment upon the petition and answer in the cause, and adjudging certain conveyances to be an assignment for the benefit of creditors, appointing a receiver to take charge of the property and effects conveyed, and for a sale thereof, and decreeing that the funds arising from such sale should be held by such receiver in trust to be applied in payment of the costs and expenses of the suit, and of the indebtedness due the creditors of the persons making such conveyances. The facts averred or admitted in said petition and answer may be fairly stated thus: On April 28, 1893, the plaintiffs in error Kate Smith and Florence Smith formed a general partnership for the purpose of carrying on the business of general merchants at El Reno, in said county, under the firm name and style of Smith & Smith. On May 1, 1893, Rebecca A. Smith, also a plaintiff in error, and the mother-in-law of said Kate Smith and Florence Smith, loaned to said firm \$3,120, and took their notes for said amount. She afterwards loaned to said firm various sums, amounting to \$1,853, and on October 11, 1893, took their notes therefor. That all of the money for which said several notes were given was used by said firm of Smith & Smith in their business. That said firm had two store rooms, in one of which they carried on the business of druggists, and carried a stock of drugs, etc.; in the other, a general stock of dry goods, groceries, boots, shoes, etc. The firm of Smith & Smith became, in the regular course of business, indebted to the defendants in error, and on November 23, 1893, numerous actions had been commenced against them in the courts of said county by divers creditors, other than the defendants in error, and judgments were about to be taken in said actions. That said firm was then insolvent, and unable to meet their obligations as such obligations

became due. That said Rebecca A. Smith was on said 23d day of November, 1893, aware of the financial condition of the firm of Smith & Smith, and knew that said firm was insolvent. That on said day she purchased of Smith & Smith their entire stock of drugs, which was valued and invoiced at \$1,870, and took a bill of sale therefor. That she took immediate, actual possession of said drug store, and thereafter carried on the business in her own name. The consideration for the sale of said drug store was the cancellation of the said notes dated October 11, 1893. That said bill of sale was duly recorded on the 23d day of November, 1893. That the firm of Smith & Smith was then and remained indebted to the said Rebecca A. Smith to the full amount of the notes given by them on the 1st day of May, 1893; and on demand of said Rebecca A. Smith for security on said notes the firm of Smith & Smith, on said 23d day of November, 1893, executed and delivered to her a chattel mortgage on the stock of dry goods and groceries in their other store, which mortgage was duly recorded on said date. At the time of making said bill of sale and the said chattel mortgage, the firm of Smith & Smith had no real estate, and the said bill of sale and chattel mortgage covered and conveyed all the personal property which said firm owned or possessed, except that which might have been exempt by law from seizure and sale under attachment or execution. The indebtedness for which said bill of sale and chattel mortgage were given was a bona fide, subsisting indebtedness. When they made said bill of sale and chattel mortgage, the firm knew that they could not continue their business longer, and must abandon the same, and said Rebecca A. Smith then knew that said firm, by reason of their inability to meet their debts and liabilities, could not longer continue their said business. That it was stipulated in the said chattel mortgage that the mortgagors might retain possession of the goods mortgaged, and sell the same in the usual course of trade, as the agent of the said Rebecca A. Smith; accounting to her for the proceeds of such sales, less certain expenses in selling the same. That, immediately on the delivery of said bill of sale and chattel mortgage, Rebecca A. Smith took possession of all of said property so conveyed, and continued to operate the two said stores and run the same until November 25, 1893, when, under the order of the court in this cause, a receiver was appointed and took possession thereof. That Fremont Smith and William C. Smith are the husbands, respectively, of said Kate Smith and Florence Smith, and were made parties defendant in said petition. That on the 1st day of December, 1893, plaintiffs in error filed in said cause a motion to set aside the order appointing said receiver, on the grounds—First, that said action was not pending at the time said receiver was appointed; and, second, that neither of the defendants had any

notice or knowledge that any application had been or would be made for the appointment of a receiver in said cause, prior to the appointment of said receiver. That said motion was by the court overruled, and by plaintiffs in error exception was taken. The plaintiffs in error filed a demurrer to the petition in said cause, which demurrer was by the court overruled, and exception was duly saved. From the final judgment and decree in said cause, plaintiffs in error have appealed, and the cause is brought to this court for review.

C. H. Carswell and Dille & Schmook, for plaintiffs in error. W. H. Criley, Forest & Gunn, Blake & Blake, and Keaton & Cotteral, for defendants in error.

TARSNEY, J. (after stating the facts). The question in this case is directly this: Is the legal effect of the above-stated facts to make the bill of sale and chattel mortgage a general assignment by Smith & Smith for the benefit of their creditors. At common law, a debtor in failing circumstances may use any and all of his property to pay one or more of his creditors in preference to others. There was no principle or rule of the common law which limited or controlled the right of an insolvent debtor in the distribution of his assets, provided they were applied in discharge of his bona fide debts. At the common law, an insolvent debtor might make preferences among his creditors, and use the whole or any portion of his property in the payment of one or any number of his creditors, or give the whole or any part of his property, as security for the payment of debts, to one or any number of his creditors. The statute of this territory recognizes and affirms the right of a debtor to prefer one creditor to another. "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demands in preference to another." Section 4, c. 27, St. 1893. This provision simply codifies the common law, and, unless qualified by other statutory provisions, the right of the debtor to select and prefer one creditor to another, and to transfer his property in payment, or to convey it as a security to one or more of his creditors, remains as at common law; and it follows that Smith & Smith, in making payment of a part of their debts to Rebecca A. Smith by their bill of sale, and in securing the remainder of said debt by their chattel mortgage, were exercising a right recognized and assured to them both by the common and statutory laws, unless such right has been limited or taken away by other provisions of the statute. This, it is contended by defendants in error, has been done by the statutes of this territory regulating assignments in trust by insolvent debtors for the benefit of their creditors. Section 1, c. 5, St. Okl., provides: "An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust towards the satisfaction of his creditors, in conformity

to the provisions of this title; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by incorporations or by other specific classes of persons: provided, however, that such assignment shall not be valid if it be upon, or contain, any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent shall become a trust fund to be administered in equity, in the district court, and shall inure to the benefit of all the creditors in proportion to their respective claims or demands." The contention of counsel for defendants in error is that the two instruments,—the bill of sale and chattel mortgage,—and all the transactions connected with them, were contemporaneous, and the firm being in failing circumstances amounted to an assignment, within the purview of this statute; that when an insolvent debtor makes a general distribution of all his property and effects, whether to all or only a part of his creditors, thereby abandoning his business, or putting himself in such situation that it is impossible for him to continue it, he has made a voluntary assignment, in effect, under the assignment law; and this whether the instrument by which the operation is effected be denominated an "assignment," or "mortgage," or "bill of sale," or whether by several or either or both. So long as the instrument or instruments employed by the debtor, whatever called, work an absolute transfer, substantially, of all the property and effects of an insolvent to another or others, with a design on his part that it shall do so, and that his connection with the business shall cease, it is an assignment, under the statute.

Is this the meaning of our voluntary assignment law, if interpreted by the usual rules and canons of interpretation, and was such the intention of the legislature in enacting it? Unenlightened and unembarrassed by somewhat conflicting judicial decisions, we would have no difficulty in determining the meaning and effect of our assignment laws, or in answering the above question, involving the rights of the parties in this controversy, as we should conclude that, unless the position of defendants in error be untenable, there could be no conditions surrounding an insolvent debtor or his estate upon which the provisions of section 4 of chapter 27 of the Statutes could be operative. That section puts no limitation on the amount of property which a debtor may use in payment, or as security for the payment, of a debt to one creditor in preference to another. It does not limit its operation to those only who, making such payment or giving such security, continue or intend to continue in business; nor does it prohibit such payment or security by way of preference where the debtor thereby puts himself in such situation that it is impossible for him to continue his business; nor can it be said

that it was not intended to include or apply to insolvent debtors, for none but insolvent debtors would need to make preferences, or require the sanction of law therefor. The general scheme and plan of our assignment law, as we would deduce the same from the plain language of its various provisions, would seem to comprehend no change as to the right of the debtor to control and dispose of his property directly for the payment or in security of his debts, but that under section 4 of chapter 27 he might, as theretofore, in good faith, sell his property, mortgage or pledge it, to secure a bona fide debt; that it recognized the rights of creditors to result from their vigilance, and that by being vigilant they might require the debtor, whose estate would not be sufficient to pay all his debts in full, to satisfy or secure their particular demands in full, though it should result in reducing the pro rata amount which other creditors might be able to acquire out of the estate; and that such debtor might lawfully satisfy in full the debts and demands of such vigilant creditors, but that when such debtor reached the point where he was ready and determined to yield the dominion of his property, and did not desire to make preference of one creditor over another, but did desire that his entire estate should be equally distributed for the benefit of all his creditors, he might avail himself of the provisions of the assignment law, and, by placing his entire estate in trust for the benefit of all his creditors, prevent any of such creditors from acquiring a preference by attachments, executions, or other processes of law. It would seem to have been the intention of the legislature not to take away any right which the debtor had at the common law, but to extend his dominion over his estate, and to provide a means whereby he might voluntarily protect such assets from enforced preferences by any of his creditors, and save the same for equal distribution among all. In no sense does the language of the statute indicate an intention to compel an involuntary or compulsory distribution of the insolvent's estate. An absolute conveyance or a mortgage does not come within the requirements of the instrument by which it provides that the estate shall be transferred. It requires the transfer to be in trust, and that it shall be to one or more assignees, who may execute the trust. It provides when a court of equity may take charge of the insolvent's estate and distribute it among all his creditors, viz. when under the instrument of assignment for which it provides "any creditor is to receive a preference or priority over any other creditor." Construing this statute in connection with section 4 of chapter 27, and giving to each the natural and plain meaning of the language employed, and that it was the intention of the legislature that both should run together and be operative,—and this we must do,—we could not construe them to mean otherwise than that an insolvent debtor has two ways in which

he may dispose of his estate, first, under section 4, c. 27, by using the same to pay or secure his debts due to one or any number of his creditors, but, if he shall choose or desire to distribute his estate equally to all his creditors, he may do so under the assignment law, and that, if he so elects, he must distribute the same equally to all, and cannot create preferences in favor of any.

We are not, however, left to depend upon our own reasonings and conclusions as to the meaning of the language of the statute. This and analogous statutes have received the interpretation of nearly every court in the country, and the great weight of authority is in accord with the views herein expressed. In fact, the authorities would seem to be practically unanimous in holding that, notwithstanding such assignment law, an insolvent debtor may dispose of his estate by other modes of conveyance than by the assignment therein provided for, and may make preference of certain of his creditors to the exclusion of others. The course of decisions, and the discussion therein of this question, are so familiar to the bench and bar that a review of the authorities herein could serve no useful purpose, and we content ourselves with simply citing a few of the most recent decisions: *Union Nat. Bank of Chicago v. Kansas City Bank*, 136 U. S. 235, 10 Sup. Ct. 1013; *Hardt v. Heldweyer*, 152 U. S. 547, 14 Sup. Ct. 671; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372; *Farwell v. Nillon*, 133 Ill. 45, 24 N. E. 74; *Fromme v. Jones*, 13 Iowa, 474; *Buel v. Buckingham*, 16 Iowa, 284; *Warner v. Littlefield*, 89 Mich. 329, 50 N. W. 721; *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512; *Moore v. Meyer*, 47 Fed. 99; *Crow v. Beardsley*, 68 Mo. 435; *Weber v. Mick*, 131 Ill. 520, 23 N. E. 646; *Burrill, Assn. § 3*; *Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304; *Giddings v. Sears*, 115 Mass. 505; *Covanhoven v. Hart*, 21 Pa. St. 495; *Hargadine v. Henderson*, 97 Mo. 375, 11 S. W. 218; *May v. Tenney*, 13 Sup. Ct. 491; *Manning v. Beck*, 129 N. Y. 1, 29 N. E. 90; *Tompkins v. Hunter (Sup.)* 24 N. Y. Supp. 8; *Costello v. Chamberlain (Neb.)* 53 N. W. 1034; *Gilbert v. McCorkle*, 110 Ind. 215, 11 N. E. 296; *Cutter v. Pollock (N. D.)* 59 N. W. 1062; *Manufacturing Co. v. Max (S. D.)* 58 N. W. 14; *Jewett v. Downs (S. D.)* 60 N. W. 76; *Jaffrey v. Wolf*, 1 Okl. 312, 33 Pac. 945. In this last case the present learned chief justice, speaking for the court, used this language: "After a careful review of all the authorities at our disposal, while we find that some of the courts have so construed the assignment laws of the several states as being against the proposition that a creditor may in good faith transfer all his property for a payment of a part of his indebtedness, yet we are of the opinion that such construction is strained, and not in harmony with the intention of the lawmakers who enacted the statute. * * * If the legislatures of the several states which have enacted assignment

laws had intended to prevent a person in falling circumstances from using his property in the payment of such of his bona fide debts as he might desire, they could easily have found language to express such intention. The very fact that the statutes are not clearly susceptible of such construction is a good reason for not so interpreting them." The rule contended for by defendants in error has been upheld in the case of *Straw v. Jenks*, 6 Dak. 414, 43 N. W. 941. In that case the direct opposite of what we have shown to be the general rule was sustained, and it was there held, under a statute identical in language with our own, that "where an insolvent debtor mortgages all his property to one creditor, and puts the mortgagee in possession, he divests himself of all title therein, but the mortgage becomes, in effect, an assignment for the benefit of all the creditors"; and counsel for defendants in error contend that our statute in relation to assignments was adopted from the statutes of the territory of Dakota after the decision in *Straw v. Jenks*; that such adoption carried with it the construction placed upon it by the decision in that case, and made such construction a part of the statute, and that such construction should be followed by this court; that upon the authority of that case the conclusion of this court, and the rule established in *Jaffrey v. Wolf*, supra, must be overruled and reversed. If the rule thus contended for, that the previous construction of an adopted statute is a part of the statute, must prevail, then it would not avail to show that the authorities upon which that case was based did not support its conclusion, or that the conclusion of the court resulted from a clear misinterpretation of the authorities which it cited, and upon which it relied; that its conclusion has been almost universally condemned as unsound; that nearly every court whose decision was cited therein has since repudiated the interpretation placed upon such decision therein. It would be a sufficient answer to the position of defendants in error to say that no decision is conclusive anywhere, except as to its application of the law to the facts in the particular case before it, and that the principle of the case of *Straw v. Jenks*, applicable to the facts therein stated, is clearly distinguishable from the case at bar. In this case there is no element of trust. In *Straw v. Jenks* there were several mortgages to different mortgagees, and the property was placed in the hands of an agent or trustee in trust for the purpose of selling and dividing the proceeds among the several mortgagees. In *Manufacturing Co. v. Max (S. D.)* 58 N. W. 14, the supreme court of South Dakota, in expressly overruling *Straw v. Jenks*, says: "It is quite probable that the opinion of the learned judge, which was elaborate and instructive, laid down some propositions not necessary to a decision of that case upon the facts presented, and that the law which might perhaps have properly decided that case does not necessarily decide this. In that case the

mortgagors made several chattel mortgages, at practically the same time, to as many different creditors. They were all immediately placed in the hands of an agent or trustee for enforcement. The acts were all so nearly simultaneous, and so closely related to each other, as to suggest the deliberate intention of the mortgagor to thus create a trust in such agent or trustee for the benefit of such preferred creditors." Conceding that the case of *Straw v. Jenks* is applicable and in point upon the main question involved in this case, we are not prepared to say that the doctrine of adoption sought to be invoked by defendants in error can be successfully invoked in this case. We cannot say judicially that the statute of assignment of this territory was, in a legal sense, adopted from the statute of the territory of Dakota. It is true that it is an exact transcript of the Dakota statute, but there is nothing in the legislative enactments of this territory which affirmatively shows a legislative intent of adoption from that territory; and as the statute is substantially that of many of the older states, and accurately the same as that of some, having no legislative action or declaration to inform us, we cannot say that the legislature of this territory intended to adopt it from the territory of Dakota, with the construction that might there have been given to it. Nor can the doctrine apply in this case, for the reason that the essential elements upon which it is based are here totally wanting. The doctrine itself is but founded upon a presumption; that is, that, where one state or sovereignty adopts a statute of another state or sovereignty which has already received a known and definite construction in its courts, it is presumed to adopt the construction thus given. *Ballance v. Rankin*, 54 Am. Dec. 41. The essential element upon which the presumption is based is that it has already received a known and definite construction. The construction must have been fixed and uniform, and must have been so long established as to have been known, or so that it reasonably might have been known, to the legislature adopting it. *Hunter v. Truckee Lodge*, 14 Nev. 38. The meaning of a statute cannot be considered as settled by judicial construction, so as to carry that construction with it to the jurisdiction where it is adopted, when it has not been so settled by the highest judicial authority which can pass upon the question. *Andrews v. Hovey*, 124 U. S. 716, 8 Sup. Ct. 676. The supreme court of the territory of Dakota was not the highest tribunal that could have passed upon the question involved in that case, as an appeal would lie therein to the supreme court of the United States. It would be giving a ridiculous construction and meaning to the plain words of the language to say that one case, which was overruled and repudiated almost before it was officially published, could give a settled construction to the meaning of a statute which should bind a foreign jurisdiction. As the legislature has by an act approved March 49 F.—5

8, 1895 (Sess. Laws 1895, p. 106), removed all occasion for future controversy over the question involved in this case, and as the rights of all the parties to this controversy, and of all other parties to matters pending in litigation arising out of like transactions, have attached since the decision of the court in *Jaffrey v. Wolf* was rendered, and such rights involved in pending litigation may be presumed to have been acquired or to have attached on the faith of that decision, we would, though much less satisfied than we are of the correctness of the views and conclusions herein stated, hesitate long before adopting contrary views, which could result only in the divesting of rights and interests acquired in good faith and for valuable considerations. For the reasons stated, we are of the opinion that the law of this case was correctly stated by the chief justice in *Jaffrey v. Wolf*, supra, and it therefore follows that the judgment of the court below was erroneous, and should be reversed. It is therefore ordered that the judgment of the court below be reversed, and judgment is herein rendered in this court for the defendants and against the plaintiffs; and it is further ordered that all funds derived from the sale of the property taken possession of by the receiver appointed by the court below in this action, and now in the possession of said receiver or the clerk of said court, be immediately turned over to the defendant Rebecca A. Smith. The other judges concur, except BIERER, J., who dissents, and KEATON, J. (who was of counsel), not sitting.

LOOKABAUGH v. LA VANCE.

(Supreme Court of Oklahoma. July 30, 1897.)

PLEADING—AMENDMENTS—APPEAL—RECORD—REVIEW.

1. Where a suit is brought to recover the purchase price of a possessory right to and improvements upon a claim on which plaintiff held the homestead entry, it is proper for the court to allow an amendment to the petition changing the description of the land from the S. W. $\frac{1}{4}$ of section No. 23, to the S. W. $\frac{1}{4}$ of section No. 25, in township No. 15 N., range 11 W., I. M.

2. Matters which are not a part of the record, except when brought into it by case-made or bill of exceptions, cannot be presented to this court upon a transcript of the record.

(Syllabus by the Court.)

Appeal from probate court, Blaine county.

Action by John La Vance against Elijah E. Lookabaugh. From a judgment for plaintiff, defendant appeals. Affirmed.

Lookabaugh Bros. and Hobbs & Kane, for appellant. Victor Payne and Asp, Shartel & Cottingham, for appellee.

BIERER, J. John La Vance sued the plaintiff in error, Elijah E. Lookabaugh, in the probate court of Blaine county to recover the sum of \$500, with interest, which he alleged was due him as the purchase price of the S. W. $\frac{1}{4}$ of section 25, township 15 N., range 11 W., I. M., upon which plaintiff had a

homestead entry, and for plaintiff's improvements thereon. The plaintiff, during the trial of the case, amended his petition so as to allege that the claim sold was the S. W. $\frac{1}{4}$ of section No. 25, instead of the same quarter of section 23, in the same township and range, as stated in the petition. Judgment was given for the plaintiff for the sum of \$500, interest and costs, and the defendant has assigned a number of errors for a reversal of the case. There is only one, however, that is presented by the record, and that is the error assigned on permitting the amendment to the petition; and manifestly there was no error in this, the only amendment made being in the number of the section which it was alleged the land was in.

The other errors assigned are to the overruling of motion to quash the summons, overruling of motion for change of venue, overruling motion for continuance, error in refusing to permit plaintiff in error to introduce evidence in the case, in sustaining demand for judgment by defendant in error, error in rendering any judgment in said cause against the plaintiff in error, error in overruling defendant's motion for new trial. No case-made was served, signed, or settled by which to preserve the questions sought to be brought here, and no bill of exceptions filed. Plaintiff in error seeks to present them by transcript, but none of these matters, excepting the exception taken to the filing of the amended petition, could be preserved in that way. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382. The judgment of the court below is affirmed, with costs. All the justices concurring.

LYNCH v. RICHARDSON LUMBER CO. (Supreme Court of Oklahoma. July 30, 1897.)

PLEADINGS—DEFECTS—WHEN DISREGARDED.

Under sections 140 and 316 of the Code of Civil Procedure, this court will disregard any error or defect in a pleading which does not affect the substantial rights of the adverse party, and which is not prejudicial. Where the whole record shows no merit in the defense of an action or upon appeal, the court will disregard any defects in the form of a petition demurred to.

(Syllabus by the Court.)

Error from district court, Kay county; before Justice A. G. C. Blerer.

Action by the Richardson Lumber Company against J. W. Lynch. From a judgment for plaintiff, defendant brings error. Affirmed.

A. A. Byers and Joseph Wisby, for plaintiff in error. Allen & Allen and Hardin Ebey, for defendant in error.

TARSNEY, J. The only question presented or argued in the brief of counsel for the plaintiff in error arises upon the action of the court below in overruling a demurrer to defendant in error's petition. The petition set forth in ordinary and concise language that the plaintiff sold and delivered to the defendant a bill of lumber amounting to \$505; that defendant admitted the correctness of the account; that defendant gave to the plaintiff

his check in payment of said account, drawn on the National Bank of Ft. Worth, Tex.; that said check was given by defendant and received by the plaintiff in settlement and payment of said account; that said check was returned to the plaintiff by said bank, having indorsed on the back thereof, "No funds;" that plaintiff immediately notified defendant of the dishonor of said check; that said account, or check, or any part thereof, had not been paid the plaintiff. It is insisted that this petition is defective under subdivision 5, § 89, Code Civ. Proc., which provides "that it shall be good grounds for demurrer that several causes of action are improperly joined." But this objection was not made by the demurrer. The ground for the demurrer stated was "that said petition does not state facts sufficient to constitute a cause of action." We do not think the grounds stated in either the demurrer or the brief are tenable. Two causes of action are not stated. The cause of action alleged is the failure to pay the check. The averments of the petition as to the sale and delivery of the lumber were intended to show the consideration for the check, and might be regarded as surplusage, not being necessary. The petition is not as artistically drawn as it might have been, but it states a cause of action. We have examined the whole record, and there is no merit, either in the attempted defense or in this appeal; and, if the petition is technically defective, we would not be justified in reversing the judgment. Section 140 of our Code of Civil Procedure provides: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." And section 316 of the Code provides: "No exception shall be regarded unless it is material and prejudicial to the substantial rights of the party excepting." Under these provisions that precision is not required in making or construing pleadings that, "Can a hair divide between its south and southwest side?" The judgment of the court below is affirmed.

BIERER, J., who presided in the court below, not sitting; all the other justices concurring.

WILL T. LITTLE CO. et al. v. BURNHAM et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

CHattel Mortgages — VALIDITY — POSSESSION — EFFECT.

1. A chattel mortgage was executed by the plaintiff in error, the Will T. Little Company, to Horsfall, to secure a debt due the Guthrie National Bank. Afterwards possession was taken of the stock of goods by M., president of the bank. A question arose upon the validity of the mortgage upon its face. Upon the trial, after a jury was impaneled and testimony was taken, the case was withdrawn from the jury, and submitted to the court. The journal entry taken by the clerk of the court, the journal entry prepar-

ed by the attorneys, and signed by the judge, and an amendment to the record before the same was settled and signed, all showed that "both parties elect to submit the case to the court upon the question of the validity of the mortgage in question." *Held*, that the question as to whether possession was taken by M., in behalf of the Guthrie National Bank, under a transfer by way of pledge, cannot, after such an agreement, be considered by this court.

2. The right having been reserved to the maker of a chattel mortgage of a stock of goods, wares, and merchandise to sell, "in the usual course of business, and apply the proceeds of such sales to pay the actual and necessary expenses of carrying on the business, and replace enough goods to keep the stock up to its present value," the mortgage also provided that it was to "cover all goods, wares, and merchandise hereafter bought for said store." The power is thus reserved to the mortgagor to appropriate the surplus. Such an instrument is itself fraudulent and void as to creditors, as a matter of law, irrespective of the question as to whether or not any fraud or fraudulent intent did, in fact, exist.

3. But such mortgage is good between the parties to it, and when the mortgagee has obtained possession of the mortgaged stock by the consent of and agreement with the mortgagor, and has proceeded to exercise his rights over the property, as provided by the mortgage, to secure the payment of his debt, such mortgage is completely good, as against creditors asserting their rights under liens acquired subsequent to such possession.

(Syllabus by the Court.)

Error to district court, Logan county.

Replevin by Burnham, Hanna, Munger & Co. against the Will T. Little Company and another. From a judgment for plaintiffs, defendants bring error. Reversed.

S. L. Overstreet and Saunderson & Thomas, for plaintiffs in error. Green & Strang, for defendants in error.

McATTEE, J. This was an action in replevin in the district court of Logan county, brought by the defendants in error (plaintiffs below), against the plaintiffs in error, to recover possession of a stock of merchandise located in the city of Guthrie, valued at \$2,400.81, in which the plaintiffs claimed a special ownership in the property, by virtue of a chattel mortgage, and caused a writ in replevin to issue, under which the sheriff of Logan county seized the goods in controversy, taking the same from the possession of the plaintiff in error W. J. Horsfall, who, within the time allowed by law, gave a redelivery bond, and held possession of the property, and afterwards filed his answer in the cause, the same being a general denial. On April 1, 1893, the plaintiff in error the Will T. Little Company executed to the plaintiff in error W. J. Horsfall, cashier of the Guthrie National Bank, a chattel mortgage upon the goods in controversy, to secure an indebtedness of \$1,400, evidenced by two promissory notes, one dated March 1, 1893, for the sum of \$600, due 60 days after date, and the other dated March 28, 1893, for the sum of \$800, due 60 days after date. The mortgage contained the following clause: "This is to be a continuing mortgage on the stock of goods, with the right of maker there-

of to sell in the usual course of business, and apply the proceeds of such sales to pay the actual and necessary expenses of carrying on the business, and replacing enough goods to keep the stock up to its present value. This mortgage is to cover all goods, wares, or merchandise hereafter bought for said store." This mortgage was taken by Horsfall to secure money of the Guthrie National Bank, of which J. W. McNeal was president, and was filed and entered for record April 19, 1893. Upon the 20th day of April, 1893, Mr. McNeal, as president of the bank, went into possession of the goods described in the mortgage, and held the same as the representative of the Guthrie National Bank. Immediately after the goods in controversy were delivered to the plaintiff in error Horsfall, and to McNeal for the bank, Will T. Little telegraphed Burnham, Hanna, Munger & Co. to send their adjuster; and soon thereafter a man named Zigler, attorney for the defendants in error, appeared, and represented the defendants in error as their attorney; whereupon, on April 20, 1893, the Will T. Little Company executed to the defendants in error a chattel mortgage upon the stock of goods in controversy, to secure a purported indebtedness of \$5,189.71, subject to the lien and possession of the Guthrie National Bank for the sum of \$1,400, which mortgage was delivered to Zigler, and placed upon record, and Zigler went into possession of the goods, subject to the possession of J. W. McNeal, Horsfall, and the Guthrie National Bank. Afterwards, and on the 27th day of April, 1893, one C. W. Miller, another representative of defendants in error, received from the Will T. Little Company a chattel mortgage upon the same stock of goods to secure the payment of a promissory note of even date therewith, for the sum of \$2,264.71, payable to the order of the defendants in error one day after date, which said mortgage was filed for record on the same day; and thereupon the said C. W. Miller, representing the defendants in error, released the mortgage theretofore taken by Zigler. At the time that the second mortgage was taken by Miller for the defendants in error, Horsfall was in possession of the property for the Guthrie National Bank. The claim of the defendants in error to recover in this case is based upon the chattel mortgage taken April 27, 1893, and upon possession taken thereunder. The case was tried before Hon. Henry W. Scott, judge of the district court, by special assignment for the trial of the cause, and a jury. Upon the trial the mortgage to Horsfall was offered in evidence by the defendants (plaintiffs in error), objected to as void, and the court had sustained the objection; and thereafter a number of witnesses were introduced, and their testimony taken, that they had obtained possession under that mortgage of the mortgaged stock at the solicitation and request of the mortgagor. After the taking of testimony was closed upon both sides, the case was argued by the attorneys, and during the argument the jury was discharged from further ac-

tion in the case, and the court announced that he "would take the case from the jury, and decide it upon legal questions, both parties to the cause having elected to submit the cause upon the question of the validity of the chattel mortgage in question given by the defendant the Will T. Little Company to W. J. Horsfall, cashier, the question being one of law only, and there being no question of fact for the jury to determine"; and the court proceeded to take the same under consideration. The jury was thereupon discharged from further action in the case, and judgment was deferred until May 12, 1894, when judgment was rendered in behalf of the defendants in error for the recovery of the property.

Error is assigned in this: That (1) the court erred in withdrawing the case from the consideration of the jury; and (2) in admitting testimony on the part of the defendants in error, over the objection of the plaintiffs in error; and (3) in ruling out evidence offered by the plaintiffs in error; and (4) in overruling the motion for a new trial; and (5) in rendering judgment for defendants in error. Under these assignments of error, it is the contention of the plaintiffs in error (1) that the mortgage given to Horsfall, as cashier, was a valid and subsisting lien upon the property taken in the action, and was not upon its face void in law; and (2) that, even if the mortgage was invalid, the possession of the property taken in the action was acquired in the first place by the plaintiffs in error Horsfall, as cashier, and J. W. McNeal, as president, of the Guthrie National Bank, by the voluntary surrender to them of the goods by Will T. Little, president of the plaintiff in error corporation; and that, if the possession under the mortgage was not good, yet that the possession so acquired by the voluntary act of the Will T. Little Company operated as a lien by way of pledge, separate and independent from the rights which the plaintiffs in error Horsfall, as cashier, and the Guthrie National Bank, claimed to have acquired under and by reason of the chattel mortgage executed to them; and that this possession, so acquired by way of pledge, was of itself valid, sound, and sufficient to insure to the plaintiffs in error a primary lien thereupon, which could not be affected by the invalidity of the chattel mortgage theretofore executed to them, if the chattel mortgage should be determined by this court to be invalid. Upon this contention it is to be said that evidence was adduced in the case to show, in behalf of the plaintiffs in error, that the delivery of the goods to the plaintiffs in error Horsfall, as cashier, and McNeal, as president, was a voluntary act of the Will T. Little Company; and, upon the other, evidence was also produced tending to show that possession of the goods by the said plaintiffs in error Horsfall and McNeal was under, by virtue of, and directly in pursuance of, the authority which they claimed to have by virtue of the chattel mortgage, and not otherwise. It was testified to by Mr. McNeal, when called as a

witness in the case, that, when possession was taken by him for the Guthrie National Bank, "I went to Hunter, who had the keys, and announced that I took possession of the stock of goods, and put Hunter in possession for the bank, and put a notice on the door of the store that the store was closed under mortgage to Guthrie National Bank." The original notices which were posted upon the door of the store were given in testimony, and accompany the case-made. They are two in number, and each read as follows: "Closed by Guthrie National Bank, under chattel mortgage." The property was thereafter sold by Horsfall, as the cashier of the Guthrie National Bank, and the notice of mortgagee's sale, after giving the date of the sale, and describing the property, provides that "the above-described property is taken as the personal property of the Will T. Little Company, under and by virtue of a certain chattel mortgage executed by the Will T. Little Company to W. J. Horsfall, cashier of Guthrie National Bank, which said mortgage bears date of April 1, 1893, and was executed to secure the sum of fourteen hundred dollars, as evidenced by two certain promissory notes,—one for six hundred dollars, dated March 7, 1893, due sixty days after date; and one for eight hundred dollars, dated March 28, 1893, and due sixty days after date," and further provides that the "mortgaged property is disposed of and the proceeds will be applied in payment of said mortgage indebtedness, expenses, and costs of foreclosure. * * *" The journal entry of the trial taken at the time by the clerk of the court, and certified to by him as a true and correct copy of journal entry of the trial of the cause, as the same was taken at the trial by him, states that after "the calling of the trial, and the announcement that the parties were ready for trial, and the statement that the jury was duly impaneled and sworn to try the case, and that the following witnesses were duly sworn to testify on behalf of plaintiff, * * * and * * * on behalf of defendants," and after stating that defendants rest, and plaintiff introduced testimony in rebuttal, states, as a part of the further proceedings of the court, that "the jury is now discharged from further action in this cause, and the court defers judgment until May 12, 1894, both parties elect to submit the case upon the question of the validity of the mortgage in question;" and the judgment entry of the court, signed by the judge before whom the cause was tried, states that "the court thereupon discharged the jury from the further consideration of the evidence in the case, and the question to be settled was the validity of the chattel mortgage brought in evidence by the defendants. It was thereupon agreed by the parties that the case should be submitted to the court upon the validity of said mortgage." Afterwards, and upon the settlement of the case, an amendment to the record was suggested by the defendants in error, and allowed by the court to be inserted in the record, which states that "both parties

elected to submit the case upon the question of the validity of the chattel mortgage in question, given by the defendant, the Will T. Little Company, to W. J. Horsfall, cashier of Guthrie National Bank. The question being one of law only, and there being no question of fact for the jury to determine, the jury is discharged from the further consideration of the case." If it were left to this court to determine the preponderance of the evidence, we should have no doubt in determining the law to be against the acquisition of any right in behalf of plaintiff in error the Guthrie National Bank to claim possession of the stock of goods by virtue of the contract of pledge upon the facts in the case, independent of, and separate and distinct from, the claims set up by it under the chattel mortgage; but this question of fact and claim of legal right was surrendered in behalf of the plaintiffs in error when it was agreed by the parties that the case should be submitted to the court upon the validity of the mortgage, and when "both parties elected to submit the cause upon the validity of the mortgage in question."

If the validity of the mortgage upon its face, and measured by its own terms, was the simple question brought here for our consideration, we should have no difficulty in determining it. It provides, in terms, that it shall be (1) a continuing mortgage, and (2) with the right of the maker thereof to sell in the usual course of business, and (3) to apply the proceeds of such sales to pay the actual and necessary expenses of carrying on the business, and (4) to replace enough goods to keep the stock up to its present value. The mortgage was given upon the 1st day of April, 1893, to secure promissory notes dated, respectively, March 1st and March 28th, payable 60 days after date, due upon the 29th to the 1st day of May, and the 21st to 30th days of May, respectively, of 1893. There is no intimation in the mortgage that the maker thereof made any engagement to make any appropriation of the proceeds of the mortgaged stock to the payment of the debt then described as due to the mortgagee, until the days, respectively, last mentioned; nor is there any intimation or provision therein that any such payments would be required by the mortgagee. The power being given to the maker of the mortgage to sell in the usual course of business, and apply the proceeds of such sales to pay the actual and necessary expenses of carrying on the business, and replace enough goods to keep the stock up to its present value, what was to become of the proceeds of sales after the payment of expenses and replacing stock, during the period from the time of the making of the mortgage, April 1, 1893, up to the time of the maturity of the notes, upon May 1st and 30th, respectively? There is no answer to this but that it leaves these proceeds to be disposed of as the maker of the mortgage saw fit. During that period, if the mortgage was valid and effective, the mortgagor was left at liberty, according to this stipulation, to convert his

stock into money, and appropriate the proceeds thereof to his own use, if the mortgagee conceded this privilege, and the mortgage would then be effective as a protection of the property of the mortgagor against the claims of other creditors, while the mortgagee derived no benefit therefrom. If this could be sustained, the mortgagee could simply use his mortgage as a protection or shield over the mortgagor, while the latter "continued" to replenish his stock of goods "in the usual course of business," and, after "applying the proceeds of sales to the payment of actual and necessary expenses and replacing stock," to appropriate the balance of the proceeds to his own use. Possession having been here left to the mortgagor, with the privilege of appropriating, according to the terms of the mortgage, a part of the property to his own use, his possession was his own possession, and not that of the mortgagee. The intention of the parties may have been absolutely fair and honest. The mortgagee may have believed that his mortgagor would appropriate the proceeds to the payment of the mortgage debt. The mortgagor may have honestly intended to do so. But the mortgage was void, as a matter of law.

The conclusion here arrived at is not based upon what the parties may have intended to do, but is based upon what the mortgage does, in fact, concede to the mortgagor the privilege to do. The privileges of possession and appropriation are there provided for, for the benefit of the mortgagor, by the terms of the mortgage; and, if such an instrument and conveyance could be sustained, it would be at the option and within the power of the mortgagor and mortgagee to enable a fraud to be perpetrated upon creditors, and to enable the mortgagor to convert the property into money, and apply it to his own use, fraudulently, while the mortgage served to protect the property included in it, from the claims of other creditors. Such a privilege is against the policy of the law, and wherever stocks of merchandise have thus been mortgaged, and the privilege of appropriation by the mortgagor to his own use have been thus permitted by the terms of the mortgage, the decision of the courts of this country have condemned them with almost entire unanimity, and the instrument itself has been as uniformly held to be fraudulent and void as a matter of law, irrespective of the question as to whether any fraud or fraudulent intent did in fact exist. Means v. Dowd, 128 U. S. 281, 9 Sup. Ct. 65; Implement Co. v. Schultz, 45 Kan. 52, 25 Pac. 625; Robinson v. Elliott, 22 Wall. 523; Lorie v. Adams, 51 Kan. 692, 33 Pac. 599; Blakeslee v. Rossman, 43 Wis. 116; Tallon v. Ellison, 3 Neb. 63; Barnett v. Kinney (Idaho) 23 Pac. 922; Lang v. Lee, 3 Rand. (Va.) 410; Hubbell v. Allen, 90 Mo. 574, 3 S. W. 22; Looker v. Peckwell, 38 N. J. Law, 253.

But it is contended by the plaintiffs in error that, in taking the case away from the jury, and in undertaking to decide it upon legal

questions, the court erred in considering only the validity of the mortgage, executed to Horsfall, upon its face, and apart from the fact of possession, which was produced in evidence. Inasmuch as the motion for a new trial declared (1) that "the finding and decision of the court in the cause is not sustained by sufficient evidence," and (3) that "the finding and decision of the court is contrary to the evidence and law," and (4) that the court erred "in sustaining the plaintiff's objection to the introduction of the mortgage given by the Will T. Little Company to Horsfall, offered in evidence by the defendant, and for excluding the same," and inasmuch as it is assigned for error here that (3) "the court erred in ruling out evidence and testimony offered by these plaintiffs in error on the trial of this cause, to which plaintiffs in error at the time duly excepted," and (4) the court erred in overruling the motion of this plaintiff in error W. J. Horsfall, cashier of the Guthrie National Bank, for a new trial, this point is properly raised for the consideration of this court. Little, the plaintiff in error, testified that he was the "president of the company that signed a mortgage to W. J. Horsfall, and also to the plaintiffs in this action, and that he had turned over the stock of goods to McNeal, president of the Guthrie National Bank, and that he afterwards gave a mortgage to Burnham, Hanna, Munger & Co." McNeal testified that he "was president of the Guthrie National Bank, and that, about the 20th day of April, Little, being sick at home, sent for him; that he went down to see him; and that Little then stated to him that he had concluded that he was unable to pay his debts, and wanted him to take possession of the goods, and, if anything else was left, to turn it over to Burnham, Hanna, Munger & Co." Miller, the agent of the defendants in error, also testified that Little told him that "he could not turn the stock over to me, because the Guthrie National Bank had demanded the stock." There was no evidence contradicting this testimony. At the time the cause was taken from the jury, it therefore stood as an undisputed fact in the record that, prior to the execution of the mortgage to Burnham, Hanna, Munger & Co., the plaintiff in error was in possession of the stock of goods by the agreement of the mortgagor. While the mortgage to Horsfall was, taken alone and "upon its face," void, yet the law is that, notwithstanding its invalidity, it was yet good as between the mortgagor and the mortgagee, and valid as to all creditors obtaining liens upon it subsequently to the time at which the mortgagees took actual possession under their mortgage. While the mortgage would have been void as to creditors attaching, or in execution prior to the time at which the bank took possession, yet the mortgage was good as between the parties to it; and when the plaintiff in error had obtained possession by the consent of the mortgagor, and had proceeded to the appropriation of the goods to the payment of the debt due to the

Guthrie National Bank, according to the terms of the mortgage, it was completely good as against creditors asserting their rights under liens acquired subsequent to such possession. *Brown v. Webb*, 20 Ohio, 390, where it is said that "a mortgage of personal property, where the mortgagor retains possession by virtue of the mortgage, with a power of sale, is void, as against subsequent purchasers, and execution creditors; but, when possession is taken by the mortgagee, the mortgage becomes valid, so as to protect the mortgaged property from execution creditors not having made a levy, and against subsequent purchasers from the mortgagor." *Nash v. Norment*, 5 Mo. App. 545; *Eastman v. Water-Power Co.*, 24 Minn. 437; *Chapman v. Weimer*, 4 Ohio St. 481; *McTaggart v. Rose*, 14 Ind. 230; *Dayton v. Bank*, 23 Kan. 290; *Bank v. Sargent*, 20 Kan. 576; *Cameron v. Marvin*, 26 Kan. 626. In the latter case, the supreme court of Kansas, all the justices concurring, adopts the statement of the law upon the point as contained in *Jones, Chat. Mortg.* § 178, as follows: "If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. The subsequent delivery cures all such defects. * * * Delivery of possession under a mortgage before rights have been acquired by others will cure any invalidity there may be in the instrument, * * * or from its containing a provision which makes it void except as between the parties." And the supreme court of Kansas, in the last-named case, declare that "this statement of the law is undoubtedly in accordance with the great weight of authority."

This is an action in replevin, in which the gist of the action is the wrongful detention of the goods. The case could not have been passed upon by the district court but by taking into consideration all the evidence offered tending to show who was in possession, and how that possession had been obtained. The judgment signed by the district judge, undertaking to set forth a finding of fact, stated that "the defendant Horsfall, cashier of the Guthrie National Bank, took possession of the stock of goods in controversy, under and by virtue of the chattel mortgage," etc., and that the court could not as a matter of law and right, and did not as a matter of fact, undertake to ignore the evidence produced before it to the jury, and in the case for consideration at the time the case was taken from the jury to be determined upon "legal questions." We think, then, that the trial court, in considering this case, and rendering its decision, should not have confined its attention to the mortgage "upon its face," and apart from the evidence, if it had in fact done so, "both parties having elected to submit the cause upon the validity of the chattel mortgage in question." Accompanied by possession, the legal rights of the plaintiff in error the Guthrie Na-

tional Bank were entirely different from what they would have been had it, as mortgagee under the mortgage in question, remained out of possession. We think that the submission of the cause upon the validity of the mortgage should be interpreted to mean the submission of the cause as the facts had at the time of that submission been shown to be. The judgment of the court below is therefore reversed, and the case remanded to the district court, with direction to enter judgment for the plaintiffs in error. All the justices concur, except DALE, C. J., who was of counsel.

ATCHISON, T. & S. F. R. CO. v. HOLLAND.

(Supreme Court of Kansas. June 5, 1897.)

NEW TRIAL—WAIVER—SPECIAL FINDINGS—INCONSISTENCY.

1. A motion for judgment on special findings, notwithstanding the general verdict, and one for a new trial, may be filed by the defendant at the same time; and the submission and decision of the former motion will not operate as a waiver of the latter.

2. Where special findings upon a material issue are contrary to the evidence and inconsistent with each other, indicating that the jury did not fairly and intelligently consider the case, the general verdict should be set aside, and a new trial granted.

(Syllabus by the Court.)

Error from district court, Cowley county; A. M. Jackson, Judge.

Action by Lou Holland against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. A. Hurd and M. G. Troup, for plaintiff in error. Madden & Buckman, for defendant in error.

JOHNSTON, J. Lou Holland was struck and seriously injured by a passenger train of the Atchison, Topeka & Santa Fé Railroad Company, at a crossing near the station of Hackney, and she seeks to recover damages for the injuries sustained. Hackney is a hamlet consisting of a church, store, station house, and a few residences. At that point the railroad runs in a southwesterly direction, while the wagon track runs north and south, and crosses the railroad track about 250 yards south of the station house. The country in the vicinity of Hackney is nearly level, but the grade of the railroad slightly descends to the south. There is a curve in the railroad about 275 yards north of the station house, leaving an unobstructed view of the track for about 525 yards north of the crossing. The station house is west of the railroad track, and between it and the wagon road. Above the crossing, and where the highway nears the station house, the wagon track angles over to the railroad, and they come together at a point about 40 rods north of the crossing. From that point the wagon track parallels the railroad to the crossing, the two tracks being only

from five to eight feet apart. At the crossing the highway turns somewhat abruptly to the east over the railroad track. For many years Lou Holland had lived near the railroad track, and about half a mile south of the crossing. On the day of the injury, she went to Winfield in a buggy to which was hitched a single horse, and on the evening of that day started south, on her way home. As she approached Hackney, she was aware that a train was past due, and she states that she kept a lookout for the same. She says that she looked several times before angling over to the railroad, and also while driving close to and parallel with the railroad track for a distance of about 40 yards to the crossing, but did not see or hear a coming train. While paralleling the track, her back was towards the coming train, and when she turned upon the track, and had passed nearly over the same, the locomotive struck the hind wheel of her buggy, throwing her out, and causing the injuries complained of. In her petition she charges that the railroad company was negligent in failing to sound the whistle 80 rods from the crossing, and she alleges that the employees of the company operating the train "failed and neglected to sound the whistle or ring the bell or otherwise warn this plaintiff of the approach of said train, and, without slacking the speed thereof, carelessly, negligently, and wantonly ran into and against the plaintiff and her buggy, causing the injuries above set forth." The speed of the train is alleged to have been at a rate of from 35 to 50 miles an hour. A general verdict awarding plaintiff below \$6,300 as damages was returned by the jury, and with it a number of special findings. The company at once filed a motion asking judgment on the special findings, notwithstanding the general verdict, and upon the same day filed a motion for a new trial. Six days afterwards the motion for judgment on the special findings was considered and overruled, and immediately afterwards the motion for the new trial was refused.

It is contended that the two motions are inconsistent, and that the filing of the first operated as a waiver of the motion for a new trial. We think no such consequence follows the filing of the two motions. Each is an attack on the general verdict, and if it is not set aside upon the first motion, and judgment given on the special findings, the court is asked upon the second motion to set it aside, and grant a new trial. Probably a written motion for judgment on the findings is not essential. When inconsistent with the general verdict, they control, and it is the duty of the court, with or without formal application, to give judgment accordingly. Civ. Code, § 288. If such a motion is filed, and the decision thereon is not promptly given, a party cannot safely defer his motion for a new trial. If the findings settle the case a new trial should not be asked for or allowed, and if the court fails to reach a conclusion upon the first motion, or for any reason postpones its decision be-

yond three days after the verdict is returned, no opportunity is given to obtain a new trial. The pendency of a motion for judgment on the findings affords no excuse for a delay in filing the motion for a new trial more than three days after the rendition of the verdict. A motion filed after that time is a nullity. *City of Osborne v. Hamilton*, 29 Kan. 1. We think the two motions may be pending at the same time, and that the motion for the new trial is not waived by a motion for judgment on the special findings, notwithstanding the general verdict. *Luse v. Railway Co.*, 57 Kan. 361, 46 Pac. 768; 16 Am. & Eng. Enc. Law, 636; Elliott, Gen. Prac. § 995.

It is contended that the jury did not give the case a fair and intelligent consideration, and that this appears from the inconsistency of the special findings with each other and with the general verdict; and there is a further contention that the verdict is without support, and that several important findings are contrary to the testimony. The failure to give the statutory signals as the train approached the crossing where the injury occurred is chiefly relied on as a ground of negligence. The locomotive whistle was sounded for the station a short distance north of the post designating where the whistle should be sounded for the crossing; and, while those in charge of the train testified that they also sounded the whistle for the crossing, there is testimony tending to show that they did not, and therefore there was evidence from which an inference of negligence might be drawn by the jury. The company claims that the injury resulted from the contributory negligence of the plaintiff below, and there is considerable in the evidence tending to sustain the claim. The care exercised by her before and at the time of the injury was therefore an important consideration for the jury, and upon this question their findings cannot be reconciled with the testimony or with each other. She testified that she repeatedly looked and listened for the train as she approached the crossing, but did not see or hear it until she was upon the crossing. She states that she was aware that a train was due, and had looked for it several times before she reached that portion of the highway which runs parallel with the railroad. In going across to that part of the highway, the depot obstructed her view for a moment; but when she reached that point, and started southwest along and within from five to eight feet of the railroad track, she states that her view was obstructed. Although she testified that she could then see past the depot, and up the track, the jury answered that her view was obstructed by the depot. In answer to the eighth question, as to whether she could see an approaching train as she was about to cross the railroad, they responded: "No; the depot obstructed the view." In answer to the thirteenth, they say that she could have seen an approaching train just prior to the time she attempted to cross the track if there had been no obstruction. In

answer to the fifteenth, they stated that the depot prevented the plaintiff from seeing an approaching train if she had looked for it just prior to driving on the crossing. Although the jury found that her view was obstructed, so that she could not see the approaching train, there is a finding that those in charge of the train could see her for a considerable distance before reaching the crossing. In answer to the twenty-fourth question, it is stated that the plaintiff could not obtain a fair view of the train as she was approaching the crossing without stopping her vehicle for that purpose, while she states that she did look, and did obtain a view, and saw no train approaching. How she could be in view of the men on the train and the train not within her view at the same time is not explained; and it was absurd to say that she could not get a fair view of the track without stopping her vehicle. The motion and noise of the same might have interfered with her hearing the train, but certainly could not have prevented her from obtaining a view along the track. Whether she exercised due care for her own safety just before attempting to cross the track was an issue in the case, and a matter of consequence. The plainest dictates of prudence and a sensible regard for her own safety required that, before attempting to cross, she should look and listen for the approach of the train, and take all reasonable precautions to avoid danger. As the trial court instructed the jury, "if the view of the track was partially obstructed, whereby she was unable to see an approaching train, then greater care was required on her part than would be if she had an open and extended view of the track." She was bound to know that a railroad crossing is a dangerous place, and is guilty of negligence unless she approaches it as if it were dangerous. If she went upon the track without exercising ordinary care and taking reasonable precautions for her own safety, she is guilty of contributory negligence, and cannot recover. The findings of the jury are to the effect that she could have seen the approaching train if there had been no obstruction, and yet the plaintiff herself says that, for a distance of from 100 to 150 feet before reaching the crossing, her view was not obstructed. It is obvious that the jury disregarded the testimony, and the findings indicate that the questions submitted were not fairly considered and determined. In other respects the findings show that the jury were heedless and inconsiderate. In her testimony, the plaintiff states that she was driving at the rate of from six to seven miles an hour when she approached the crossing, but the jury answer that she was only going about four miles an hour. In answer to the question if the employés of the company intentionally and wantonly drove the train upon and against the buggy in which she was riding, they say: "Yes, through neglect of duty." The petition alleged that the train was traveling at from 35 to 50 miles an hour. One wit-

ness stated that it was running more rapidly than usual, and another that it was "running like the devil." The only witness who attempted to give the speed with any definiteness testified that it was running 35 or 40 miles an hour. Notwithstanding this testimony, and although the plaintiff below did not claim that the speed was greater than 50 miles an hour, the jury found that the train was traveling at the rate of 60 miles an hour.

Objections are made to rulings upon the testimony, but we find nothing substantial in them; nor do we see any reason for criticising the instructions, unless it is the one charging the jury upon the subject of gross and wanton negligence. It is doubtful if there is anything in the testimony warranting the giving of such an instruction.

It is insisted that the testimony of the plaintiff below clearly demonstrated that she was guilty of contributory negligence, and therefore the demurrer to her evidence should have been sustained, or a verdict directed in favor of the company. There is sufficient proof of the negligence of the company, and, in view of the great speed at which the train was running and the testimony of the plaintiff herself as to the care she exercised, it cannot be said as a matter of law that she is guilty of such contributory negligence as will bar a recovery. As some of the findings, however, are contrary to the evidence upon a material issue in the case, and are inconsistent with each other, we think that a fair trial of the case has not been had, and therefore the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(58 Kan. 313)

THOMAS et al. v. OWEN.

(Supreme Court of Kansas. June 5, 1897.)

DOMESTIC JUDGMENTS — FEDERAL COURTS — CONCLUSIVENESS OF MARSHAL'S RETURN.

A judgment of the circuit court of the United States, sitting in Kansas, is to be treated in the state courts as a domestic judgment; and the return of the marshal of personal service of a subpoena in chancery in the action in which the judgment is rendered, is conclusive on the parties to the same extent as the return of a sheriff on a summons issued from a state court.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by David Owen against David Thomas and others. Judgment for plaintiff, and defendants bring error. Reversed.

Buck & Spencer and Charles E. Dyer, for plaintiffs in error. L. B. & J. M. Kellogg, Graves, Lambert & Dickson, and W. C. Simpson, for defendant in error.

ALLEN, J. The proceedings of the trial court are presented here by case-made, and objection is made to the consideration of the alleged errors, on the ground that the time to make a case was not extended by order of the court until four days after the motion for a

new trial was heard and overruled. The record does not fairly present the question whether the case must be made, or time for making it extended by order of the court, within three days after the announcement of the ruling of the court, or whether it may be delayed until three days after the order is actually entered on the journal by the clerk. The language of the statute is that the case "shall be served within three days after the judgment or order is entered." In the judgment entry it is recited that on the 13th day of June, 1894, and before the aforesaid judgment was entered of record, the defendants filed their additional motion for judgment on the verdict; and in the same entry it appears that, on the 15th day of June, 90 days were allowed for making and serving a case. Again, on page 293 of the record it is recited that "before a judgment was entered in this case, to wit, on June 13, 1894, said defendants filed their motion, of which the following is a copy." These recitals show, in the words of the statute, that judgment was not entered before the 13th of June, and time to make a case was given on the 15th of the same month. The trial judge having signed and settled the case, we cannot indulge presumptions in opposition to its recitals for the purpose of invalidating it.

This was an action of ejectment to recover a lot in the city of Emporia, with damages for its detention. It appears from the special findings in the case that on the 12th of June, 1874, David Owen borrowed from the Northwestern Mutual Life Insurance Company \$2,700, for which he gave a mortgage on the lot in controversy. He having made default in the payment of interest, the company, on the 22d of May, 1878, commenced a suit in the circuit court of the United States for the district of Kansas to foreclose the mortgage. A chancery subpoena was duly issued, on which the deputy marshal made return of personal service on David Owen. Afterwards a judgment of foreclosure was entered, and on the 1st of September, 1879, the lot was sold by a master in chancery to the insurance company for \$3,850. Owen, the defendant in that case, and plaintiff in this, was present at the sale, as was also Howard Dunlap. The sale was afterwards confirmed, and on November 28th the special master executed to the insurance company a deed, which was duly recorded on the 16th of December following. On the 4th of December, 1879, the insurance company conveyed the lot to Dunlap; and, on the 17th of December, Dunlap conveyed to the defendant David Thomas, by warranty deed, for the sum of \$5,500; and Thomas thereafter collected the rent of the building, and has had possession of the property ever since. Other facts bearing on the question whether Owen was equitably estopped from asserting title to the lot were found by the jury, but it is unnecessary to state them in order to dispose of the case. Owen claimed, and the jury found, that the return

of the deputy marshal on the subpoena was false; that, in fact, no service of process from the United States circuit court was made on him before the judgment of foreclosure was entered. The district court held that the marshal's return might be contradicted, and the trial resulted in a judgment in favor of the plaintiff for the lot, and \$3,600 damages for its detention. In the case of *Goddard v. Harbour*, 56 Kan. 744, 44 Pac. 1035, we had occasion to consider the question as to the conclusiveness on the rights of the parties of a sheriff's return of service of a summons. After a full consideration of the question, the conclusion was reached that "the return of a sheriff that he has served a summons on the defendant personally, being a matter as to the truth or falsity of which he has personal knowledge, is conclusive between the parties."

The question is now raised whether a judgment of the circuit court of the United States, sitting in Kansas, is to be treated as a domestic judgment, and the return of service of process by the marshal therefore conclusive, or whether it is to be regarded as merely on the same footing with foreign judgments, and open to attack for want of jurisdiction. In the case of *Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727, it was held that "a judgment of the United States circuit court for the district of Kansas occupies the same footing as a judgment of the state court, and may be made the basis of a creditors' bill or other like equitable action in the state court brought to protect the rights of creditors in a trust fund which has been wrongfully appropriated or misapplied." This decision, though in a case involving different questions from those presented here, is directly in point on this proposition. To the same effect, see *Walker v. Cronkite*, 40 Fed. 133; *Turnbull v. Payson*, 95 U. S. 418; *Bates v. Days*, 17 Fed. 167; *Adams v. Lisher*, 3 Blackf. 241; *Womack v. Dearman*, 7 Port. (Ala.) 513; *Adams v. Way*, 33 Conn. 419; *Williams v. Wilkes*, 14 Pa. St. 223. The special findings in this case show the execution of the mortgage, a foreclosure thereof in the circuit court of the United States, the record of which shows jurisdiction in the court, and all proceedings regular and in due form, the execution of the master's deed under a sale duly made and confirmed, and possession taken and maintained by the defendant from December, 1879, till December, 1893, when this action was commenced. No attack is made on the record for fraud or irregularity, other than the claim of want of actual service of the subpoena. The marshal's return of service being conclusive between the parties, the master's deed conveyed a good title to the insurance company, which has passed by the mean conveyances before mentioned to the defendant Thomas, and, on the facts found, he was entitled to judgment against the plaintiff. The questions whether the five-years statute of limitations was a bar to the plaintiff's action, and whether the facts developed on the trial, and found by the jury,

estopped the plaintiff from asserting title against the defendants, so fully discussed by counsel, are rendered unimportant by the conclusion reached. The judgment must be reversed, with direction to the court below to enter a judgment on the special findings of the jury in favor of the defendants for costs. All the justices concurring.

(58 Kan. 283)

SUPREME LODGE OF ORDER OF SELECT FRIENDS v. DEY.

(Supreme Court of Kansas. June 5, 1897.)

BENEVOLENT ASSOCIATIONS—ACTIONS BY MEMBERS.

The general laws of a mutual benefit society, which, by the use of permissive words, only allow an appeal from the decision of an officer of the order, before whom the claimant of a death or disability benefit is required in the first instance to prosecute his claim, but which do not obligate him to appeal from an adverse decision as a condition precedent to an action upon his certificate or policy of insurance, may, in the event of such decision, maintain an action in the courts for the recovery of his loss.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by Daniel T. Dey against the Supreme Lodge of the Order of Select Friends. Judgment for plaintiff. Defendant brings error. Modified.

J. L. Denison, for plaintiff in error. Fuller & Randolph, for defendant in error.

DOSTER, C. J. In the case of *Supreme Lodge v. Raymond*, 57 Kan. 647, 47 Pac. 533, we had under consideration the question of the right of a holder of a benefit certificate in the plaintiff organization to resort to the courts to compel satisfaction of his claim. It was there held that "it is competent for a fraternal organization, which provides for the payment of benefits, to make reasonable rules or laws requiring those claiming benefits to submit their claims to designated officers or tribunals of the organization for investigation and allowance before the claims are made the subject of litigation in the courts; but a requirement of this kind does not abridge the right of members to resort to the courts when their claims have been submitted to, and finally rejected by, such officers and tribunals." "The right of resort to the courts will not be deemed to have been taken away by mere inference, and, if it can be done at all, it will only be where the restriction is stated in the clearest and most explicit terms." We are now called upon to determine whether the claimant under a benefit certificate, issued by the society in question, is compelled to exhaust all the remedies provided by it, by way of appeal from one tribunal to another, before resorting to the courts for the collection of his claim. The general laws of the order, after declaring the circumstances under which a member may become entitled to apply for the fulfillment of its contract or policy of in-

surance, provide as follows: "Any member claiming the disability benefit under section 8 or 9 of this law shall make application therefor to his lodge upon the blank form furnished by the supreme lodge, accompanied by a certificate of a reputable physician, setting forth in full the nature and extent of the disability. Thereupon such certificate and application shall be forwarded to the supreme medical director, and a certified copy thereof sent to the supreme recorder, to remain on file as part of the papers in such case. Upon receipt of proper notice of disease or accident disability, the supreme medical director shall immediately proceed to investigate the same, and for that purpose shall appoint one physician, who shall be paid by the supreme lodge. The subordinate lodge to which the member belongs shall appoint one, to be paid by such subordinate lodge, and the member shall appoint one, to be paid by said member, neither of whom shall be the member's attending physician or a subordinate medical examiner of this order, whose duty it shall be to make a careful examination of the member's condition, and report to the supreme medical director as to the character and permanency of such disability. If it shall appear from such examination that the member is totally and permanently disabled from following his usual business, occupation, or profession, the supreme medical director shall approve the same, and order the benefit paid. If, however, in the opinion of the supreme medical director, there is a fair and reasonable doubt concerning his total or permanent disability, he shall reserve his opinion thereon for any period he may determine upon not exceeding six months, and shall then order a new examination to be made by the same or other physicians. If the result of this second examination also be uncertain, the supreme medical director may, in like manner, provide for a third examination, which shall be made within three months thereafter; and upon this being done, or upon the expiration of the said three months, he shall either recommend or refuse to recommend the benefit paid, and, for his service rendered in disability claims, receive such an amount as the supreme lodge or the supreme executive committee shall determine. Any claimant or his representative, feeling aggrieved at the decision of the supreme medical director, may take such case by appeal to the supreme executive committee, thence to the supreme lodge, by serving notice thereof upon the supreme recorder, within thirty days after receipt of notice of the supreme medical director's decision or of the decision of the supreme executive committee; and, at the next regular or special session of the supreme lodge or supreme executive committee, it shall accord the applicant a fair and full hearing, and then dispose of the matter by a majority vote of the supreme executive committee, or, if in the supreme lodge, by a majority vote of all present entitled to vote thereon, as justice and equity may de-

mand: provided, that the supreme medical director or any member of the supreme executive committee shall not vote thereon." The defendant in error, a member of the order, claiming to have incurred a disability entitling him to the payment of his benefit certificate, prosecuted his claim before the supreme medical director, in accordance with the foregoing provisions. That officer rejected the claim, whereupon the defendant in error brought suit for its recovery. Upon the trial judgment was rendered in his favor, from which the supreme lodge of the order prosecutes error to this court.

The gravamen of the decision in the Case of Raymond, supra, was that the right of resort to the courts for the determination of disputed questions of contract liability can only be relinquished, if at all, by the use of the clearest and most explicit terms, and is not to be presumed or inferred from language which stops short of an express renunciation. This is conceded by plaintiff in error so far as the right to finally appeal to the courts is concerned; but the claim is put forward that one may contract to hold his right of resort to the courts in abeyance until such private and special remedial agencies as may be agreed upon have been applied to and have decided adversely; that, for instance, a member of a benefit society may contract to withhold his appeal to the courts until all the tribunals provided by the order have reviewed his case, and determined it against him; and it is said that, considering the benevolent and fraternal character of the order in question, a fair construction of the terms of its general laws, to which defendant in error subscribed, show that such a contract was made. In addition to the sections of the society's general laws before quoted, it is elsewhere provided that "no claim for a benefit from the relief fund shall be paid until all the laws or rules of the order have been fully complied with, and the requisite proof of the justness of the claim has been made, in accordance with the general laws of the order." And elsewhere it is declared that "the supreme lodge, when convened agreeable to the provisions of the constitution and laws of the order, shall have original jurisdiction over all subjects pertaining to the welfare of the order, and absolute control of all appeals from the grand or subordinate lodges and members; and its decisions upon all questions and appeals, when properly presented and heard, are the supreme law of the order." It will be conceded that the settlement of disputes concerning the payment of death or disability claims within the membership of the order, and by its own tribunals specially provided therefor, without resort to the courts, is within the general design of all fraternal co-operative societies, and that the law should be given such reasonable interpretation as will promote such design, and subserve the desires of the order in that respect. However, as re-

marked in the Case of Raymond, *supra*, the fact must not be overlooked that such societies are not purely charitable organizations, nor the benefits promised by them in the nature of gratuities. The relation between the society and its members is, after all, a contract relation; and in the effort to ascertain the rights of the member against the society, upon the occurrence of a loss by him, their positions and interests are antagonistic. In every case, therefore, resort must be had to the contract to determine the rights of the one and the obligations of the other. It will be observed that, in the section of the society's laws providing for the initiation of a demand under a benefit certificate, the words used are mandatory in their meaning. They are: "Any member claiming the disability benefit shall make application therefor to his lodge, * * * accompanied by a certificate of a reputable physician. * * * Thereupon such certificate and application shall be forwarded to the supreme medical director," etc. This language imposes an obligation upon the member to present his claim in the first instance to the subordinate lodge to which he belongs, and to permit its reference to the medical director for adjudication. His appeal to the courts would not lie until this had been done, because the member, by subscribing to this reasonable requirement, would have bound himself to permit an investigation into his claim by an officer specially agreed upon therefor. Had the subsequent provisions relating to appeals by the member been expressed in such mandatory phrase, no doubt could arise as to his obligation to follow the prescribed course. The courts, in such instance, would refuse inquiry into his case, until he had exhausted the remedies within the order which he had agreed to pursue. But the provisions relating to appeals are not mandatory; they are permissive only. They confer a right upon him, but they do not compel him to pursue it as a condition precedent to an action in the courts. They afford a cumulative remedy, but are not necessary requirements. The language employed is: "Any claimant or his representative feeling aggrieved at the decision of the supreme medical director may take such case by appeal," etc. We know of no rule of construction which requires such language to be given an obligatory, and not a permissive, signification. The provision that "no claim for any benefit from the relief fund shall be paid until all the rules of the order shall have been complied with" should, of course, be construed in *pari materia* with the one relating to appeals, if it threw any light upon the subject, but it does not. The question still remains: Is the permission to appeal not a permission merely, but an obligation to do so if aggrieved? Nor does the article vesting jurisdiction in the supreme lodge over appeals, and making its decisions thereon "the supreme law of the order," aid us in determining whether the privilege of

appeal is a grant of favor to the claimant, or a limitation upon his right.

The provisions we have been construing, called the "General Laws of the Society," may, for the purpose of aiding us to a conclusion, be likened to an ordinary public statute, and therefore subject to the ordinary rules of statutory interpretation. They are the statutes of the society, binding its constituency in the same way and to as great an extent as public statutes bind the general citizenship. We take it that the usual methods by which we arrive at the intent of a legislative enactment may be employed to ascertain the meaning of the words used in the articles in question. Words of permission, it is true, are sometimes used in an obligatory sense. But the cases in which such meaning is given are always stated to be where the thing directed to be done is for the sake of justice, or wherever third persons or the public have an interest in the performance of the act authorized. *Dwar. St.* 220; *Blake v. Railroad*, 39 N. H. 435. Where, however, the public rights and interests are not concerned, or private persons have no lawful claim or interest in the exercise of the power, the word "may," by which the power is conferred, shall receive its ordinary meaning. *Dwar. St.*, *supra*; *Minor v. Bank*, 1 Pet. 64; *Buffalo & B. Plank-Road Co. v. Commissioners*, 10 How. Prac. 239. Although the provisions we have quoted apply only to the membership of the order in question, and are not public statutes, yet constituting, as they do, a code of laws for the government of the society, as to it they possess characteristics which justify the employment of the ordinary rules of statutory interpretation to ascertain their meaning. The rights and interests of the society are not concerned that an aggrieved member appeal from the decision of one of its tribunals to another. No member of the society or other private person has a lawful claim or interest in the exercise of the right of appeal. Therefore, the permissive words to be found in the society's code of laws will be given that ordinary signification which they receive when used in general legislative enactments.

The conclusion which we have reached is supported by the decision of the supreme court of Indiana in the case of *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571, in which it was held that "by-laws merely giving a member the right to appeal to a superior body will not deprive him of his rights to sue. To have that effect, it must positively require him to prosecute an appeal before resorting to the courts for redress." For an elaboration of some of the reasons which incline us to the decision made, we quote from the opinion in that case: "In order that this general right—a right possessed by all citizens—should be curtailed, it must clearly appear that he to whom the money is due has agreed that it may be abridged. One who asserts a claim to money due upon a contract occupies an en-

tirely different position from one who presents a question of discipline, of policy, or doctrine of the order or fraternity to which he belongs. All the decisions, from first to last, recognize a broad distinction between the two classes of cases, and the one before us belongs to the class where property rights are involved, and is a member of a class cognizable by the courts. The policy of the law, as declared in our constitution and by our decisions, is to fully open the courts to those who seek money due them upon contract; and the party who asserts that the right to invoke the aid of the courts has been curtailed must show a clear agreement abridging the right. These principles necessarily lead to the conclusion that a corporation that has agreed to pay pecuniary benefits to one of its members cannot successfully resist an appeal to the courts without showing an agreement that, before making such appeal, the member shall pursue a course of procedure prescribed by the laws of the organization. In the case in judgment there is a clear right to the benefits claimed, for so the by-laws provide; and, where there is a right, there is a remedy. If there is a remedy, it is the usual one, unless, by a legal contract, the parties have otherwise agreed. Here the usual remedy, open and free to all citizens having a just demand, is an ordinary action at law, and the question narrows to this: Has the claimant abridged his remedy by contract? We find nothing in the by-laws that can be deemed a partial or total surrender of his right to enforce his contract in the usual method. It is true that there is a general right to appeal provided for; but there is no stipulation that the claimant of benefits shall appeal, and, if we are correct in our reasoning, there is no abridgment of his right to pursue the usual remedies. In order to abridge this right, there must be a stipulation to that effect. Men do not lose their legal right to enforce their contracts unless they yield it up by agreement. The provision that an aggrieved party may appeal is permissive. It does not wrest from him the right conferred upon him by law. If a man has a legal right, and the corporation of which he becomes a member adds another, that of appeal to its superior governing bodies, the added right is merely cumulative; it is not exclusive. Positive words, only, can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right. In order to destroy such a right, proper limiting words must be employed. Here there are no limiting words. There is nothing that limits the general right to sue in courts, and a right such as this cannot be taken away without a clear agreement surrendering it. If it had been the intention to require members to surrender their rights to sue at once upon a breach of contract, and to compel them to first appeal to the grand bodies of the order, it would have been easy to so declare; but there was no such declaration, and therefore no agreement taking away

the right to sue for the enforcement of the contract, which claimant possessed by virtue of the law of the land. The right to sue is one given, as we may have seen, by law, and no custom can be good which is contrary to law. A custom that a party having a claim for money due upon contract may not pursue the usual remedies provided by law is not valid."

We have examined the claim put forward by the plaintiff in error that the defendant in error was not entitled, under the definition of "total and permanent disability," contained in the general laws of the order, to the payment of his benefit certificate. The evidence as to the character and extent of the disability in question convinces us of the justness of the claim made, and we accordingly rule against this contention of the plaintiff in error.

The judgment of the court, however, must be modified in amount. It was stipulated on the trial of the case that, "in the event that plaintiff was entitled to recover in his action, the amount of his recovery would be \$2,197.45." The court, however, rendered judgment in his favor for \$2,549.04. It is said that the difference is interest accrued upon the amount due to the claimant between the occurrence of the disability and the date of the judgment in his favor. Such, perhaps, is true; but the stipulation between the parties as to the amount of liability, if any, must control. We cannot sustain the judgment as rendered. It is ordered modified as to the excess above the stipulated amount, and affirmed as to the remainder. All the justices concurring.

(58 Kan. 324)

McINTOSH v. WHEELER.

(Supreme Court of Kansas. June 5, 1897.)

EXECUTORS AND ADMINISTRATORS — ALLOWANCE OF DEMAND—APPEAL—DISMISSAL.

1. An administrator of the estate of a deceased person, who seeks to appeal from an allowance of a demand against the estate, must give notice of such appeal, either during the term at which the decision is made or within 10 days after the date of the allowance.

2. Where a motion to dismiss an appeal is made in due time, erroneously overruled, and excepted to by the plaintiff, he does not confer jurisdiction on the court by thereafter litigating the demand in the district court, but may, after final judgment against him, take advantage of the error in the ruling on the motion by petition in error in this court.

(Syllabus by the Court.)

Error from district court, Marion county; Lucien Earle, Judge.

David McIntosh obtained an allowance against the estate of W. J. McIntosh. D. W. Wheeler, special administrator, appeals. From an order of the district court refusing to dismiss the appeal, claimant brings error. Reversed.

King & Kelley, for plaintiff in error. Hess & Johnson, for defendant in error.

ALLEN, J. On the 14th of October, 1891, David McIntosh obtained the allowance by the

probate court of Marion county of a claim amounting to \$4,880.25 against the estate of W. J. McIntosh, represented by D. W. Wheeler as special administrator. David McIntosh was the general administrator of the estate. The special administrator attempted to appeal from the order, and for that purpose made the necessary affidavit on the 30th of October. Whether this affidavit was filed in the probate court does not appear. The only notice of appeal given was served on the 22d of January, 1892. The certificate of the probate judge to the transcript of the proceedings in his court, which was filed in the district court, is dated November 25, 1891. On the 27th of January, 1892, the plaintiff, David McIntosh, moved to dismiss the appeal because not taken within the time or in the manner provided by law. The motion was overruled, and the plaintiff excepted. The ruling of the district court on this motion is assigned as error.

Section 189 of the act respecting executors and administrators reads: "All appeals shall be taken during the term at which the decision complained of is made, or within ten days after the making of such decision. Notice of such appeal shall be given in open court and entered on the record, or by written notice to the opposite party, or his attorney of record." By section 1 of chapter 157 of the Laws of 1891 it is provided: "That each probate court shall hold regular terms, commencing on the first Monday of each month, and shall continue in session until all the business of the term is completed, when the court shall formally adjourn to the next regular term, commencing on the first Monday of the following month." Even if we assume that the affidavit was filed on the day it was sworn to, and that the probate court was still in session, there is no pretense that a notice of appeal was given in open court, or that a written notice was served earlier than the 22d of January, 1892. This was not in time. The notice is an essential requisite of an appeal, and must be given during the term at which the decision complained of is made, or within 10 days after the decision. *McClun v. Glasgow*, 55 Kan. 182, 40 Pac. 329, the court erred in overruling the motion to dismiss the appeal. But it is said that the motion was overruled at the March term, 1892, and that the petition in error was not filed in this court until October, 1894; that it is, therefore, too late to present the error on this ruling to this court; that the plaintiff in error entered a general appearance in the district court, and prosecuted his claim therein through three successive trials, and that he thereby waived any error there might be in the ruling of the court on the motion. It was held in *Edenfield v. Barnhart*, 5 Kan. 225, that "error does not lie to this court from an order of the district court refusing to dismiss an appeal until the case is finally disposed of." To the same effect are *Dolbee v. Hoover*, 8 Kan. 124; *Anderson v. Higgins*, 35 Kan. 201, 10 Pac. 570; *Mill Co. v. Bovard*, 34 Kan. 21, 7 Pac. 622; *Simpson v. Rothschild*, 43 Kan. 33, 22 Pac.

1019; *Simpson v. Kirschbaum*, 43 Kan. 36, 22 Pac. 1018. The objection of the plaintiff to the jurisdiction of the district court was made in due time. The steps taken by the special administrator were insufficient either to affect the order of the probate court allowing the plaintiff's demand, or to confer jurisdiction on the district court to again try the case. By proceeding to a trial in the district court after a motion to dismiss had been overruled, the plaintiff did not waive the objection to the jurisdiction of the district court. He was not bound at his peril to allow final judgment to be rendered against him, and then raise the question of the validity of the appeal in this court. He had a right to continue to assert the validity of his claim before the district court, and did not, by so doing, confer jurisdiction on it which it had not obtained by virtue of the attempted appeal. *Railway Co. v. Morse*, 50 Kan. 99, 31 Pac. 676; *Bentz v. Eubanks*, 32 Kan. 321, 4 Pac. 269; *Dickerson v. Railroad Co.*, 43 Kan. 702, 23 Pac. 936; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707; *Warren v. Crane*, 50 Mich. 300, 15 N. W. 465. The judgment is reversed, and the case remanded, with directions to the district court to dismiss the appeal.

JOHNSTON, J., concurring. DOSTER, C. J., not sitting, having been of counsel.

(58 Kan. 331)

DRUMM v. CESSNUN.

(Supreme Court of Kansas. June 5, 1897.)

NEW TRIAL—EVIDENCE—MALICIOUS PROSECUTION.

1. A verdict which is the result of prejudice should never be the basis for a judgment, but it is the duty of the court to set it aside, and award a new trial.

2. Where certified copies of papers filed in a public office are offered in evidence, the certificate should show that they are copies of the original papers, and not of a transcript of them.

3. In an action for a malicious prosecution, the question as to what constitutes probable cause for an arrest is one of law for the court, but the facts bearing on the question of probable cause are to be determined by the jury.

(Syllabus by the Court.)

Error from district court. Wabaunsee county; William Thompson, Judge.

Action by James Cessnun against A. Drumm and others. Judgment for plaintiff, and defendant Drumm brings error. Reversed.

Robert C. Helzer, for plaintiff in error. Geo. G. Cornell, M. B. Nicholson, and Frank Herold, for defendant in error.

ALLEN, J. This action was brought by James Cessnun against A. Drumm, A. J. Snider, and George T. Vance to recover damages for an alleged malicious prosecution. Snider was not served with summons. The issues between the plaintiff and defendants served with summons were tried to a jury, and resulted in a verdict in favor of the plaintiff for \$8,000 damages. The evidence showed

that Cessnun was arrested by the sheriff of Wyandotte county under a warrant issued on a complaint sworn to by Vance, charging him with having obtained money from the firm of Drumm & Snider by false pretenses. A motion for a new trial was filed, in passing on which, it appears from the case-made, the court remarked: "That at the time the jury returned a verdict in this case the court was, and still is, of the opinion that the verdict was excessive, and that the jury was prejudiced against the defendants or their business; and that, unless the plaintiff would remit the sum of \$3,000 of the amount of the verdict returned by the jury, the court would grant a new trial in the case." The plaintiff consented to remit. The motion was thereupon overruled, and judgment entered for the plaintiff for \$5,000 and costs. The evidence offered at the trial was conflicting; that on the part of the plaintiff, though not very satisfactory, tending to support his claim, and that introduced by the defendants tending to establish a complete defense. There is no doubt that the plaintiff was arrested on the affidavit filed by Vance, and kept in confinement eight days; nor that he was afterwards discharged. An award of \$8,000 damages seems very large. The trial judge held that it was excessive, and was of the opinion that the jury was prejudiced against the defendants or their business. If so, there has been no fair trial of the case. If the element of prejudice had been eliminated from the minds of the jurors, they might have credited the testimony offered by the defendants, rather than that on the part of the plaintiff, for aught that can be known. We know of no rule by which the court can determine that a part of a single award of damages is excessive, and the result of prejudice, while the remainder is untainted. If prejudice has turned the scale, the verdict should be set aside, and a new trial had before an unbiased jury. *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. 499; *Railroad Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Railroad Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108.

As this compels a reversal of the case, it is unnecessary to enter into any extended discussion of other alleged errors. The certificate of the clerk of the district court to the copies of the papers in the case of the state of Kansas against James Cessnun is somewhat defective in that it states: "The foregoing to be a full, true, and correct copy of the transcript of the recognizance," etc. It ought to show that they are true and correct copies of the original papers, and a correct transcript of those matters that are entered on the record. In the instructions given the court submitted the question as to what constituted probable cause for the plaintiff's arrest to the jury as a matter of fact. Where there is no dispute as to the facts, it is well settled that it is for the court to determine as a matter of law whether probable cause is shown. Where the facts are disputed, it must be left to the jury to determine what the facts

are, but the court should instruct what facts amount to probable cause for an arrest and what do not. The court should summarize the claims of the parties, and state to the jury what basis of fact must exist to show probable cause, and what will sustain the claim of a want of probable cause. *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Railroad Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. 328; *Railway Co. v. Quinn* (Kan. Sup.) 48 Pac. 132. The judgment is reversed, and a new trial ordered. All the justices concurring.

(58 Kan. 349)

CITY OF TOPEKA v. TOPEKA WATER CO.

(Supreme Court of Kansas. June 5, 1897.)

FORFEITURE OF FRANCHISE — MANDAMUS TO CORPORATION.

1. Courts are extremely reluctant to adjudge forfeitures of corporate privileges and franchises, and, being vested with some discretion in proceedings brought for that purpose, will ordinarily only do so where no other adequate remedy is available.

2. Mandamus may be employed to compel a water company to extend its mains in a city, where, under the contract between the city and the company, it is the duty of the company to make such extension.

(Syllabus by the Court.)

Error from district court, Shawnee county; William Thomson, Judge pro tem.

Action by the city of Topeka against the Topeka Water Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. S. Bird and S. B. Isenhardt, for plaintiff in error. A. L. Williams, N. H. Loomis, and R. W. Blair, for defendant in error.

JOHNSTON, J. This is an action by the city of Topeka to forfeit the franchise and privileges granted by the city to the Topeka Water-Supply Company in 1881, and which were assigned and transferred to the defendant, the Topeka Water Company, in 1891. An ordinance was enacted which granted the company the right and privilege of constructing waterworks and maintaining the same for a period of 20 years. Authority was given to use the public streets, alleys, and grounds of the city as might be necessary for the distribution of the water. It was provided that the main and distributing pipes should be not less than 15 miles in length, and that the works should be "constructed of not less than three million gallons capacity, fire pressure, in twenty-four hours." The city agreed to rent 150 hydrants, to be located along the 15 miles of water mains, at an annual rental of \$7,000; and there was a further provision that the city could require the erection of 150 additional hydrants on the 15 miles of mains, at an annual rental of \$50 each; and for every mile of future extensions the company was required to erect 10 hydrants, for which the city was to pay the sum of \$500 per annum. It

was ordained that the city might require the company to extend its mains along any graded street, and also to lay mains on streets which were not on grade, but when the streets were finally brought to grade the expense of relaying the mains and pipes was to be paid by the city. The company was required to furnish good, clear, healthful, and wholesome water at a schedule of rates which was prescribed in the ordinance. The city was entitled to water for washing and flushing the gutters and sewers free of charge, and also for water for the use of the fire department, city buildings and offices, the public schools of the city, and at certain designated watering fountains. The test of the capacity of the works was that they should "discharge ten one-inch streams at the same time from any ten hydrants on the distribution pipes, with fifty feet of hose attached, to the height of one hundred feet, or maintain its equivalent pressure at the nozzle or hydrants." The ordinance prescribed the grounds upon which the franchise might be forfeited in the following language: "Any failure on the part of said company to comply with any of the provisions of this ordinance, either as to the amount of water or the quality of the same, or any failure to furnish sufficient supply of water at all times, excepting in cases of unavoidable accident, said company shall forfeit its franchises, and its charter shall be null and void." The works were erected, and, after being tested, were accepted by the city, and have been in operation since 1881. In the petition the plaintiff charged that the water was impure, and that the works were not up to the required standard. It was also alleged that the city had repeatedly made demands upon the company to extend its mains and pipes into certain additions and portions of the city not supplied by the 15 miles of mains already constructed, but that the company had refused to do so. The alleged grounds of the impurity of the water and the insufficiency of the strength of the waterworks were abandoned, and no testimony was introduced on the trial with reference to the quality of the water or the strength of the works. The question submitted to the trial court was whether, under the ordinance, the company had forfeited its rights by refusing to extend its mains as demanded by the city. The court found in favor of the company and refused to adjudge a forfeiture.

It will be seen that nothing remained in contest but an interpretation of the provision of the contract relating to extensions. The claim was made by the city, and denied by the company, that the city might, at its option, require the laying of additional mains over any of the unoccupied streets. Because of this dispute and refusal, the city asks an absolute annulment of the contract, and a forfeiture of all the franchises and privileges under which the company is operating. Under the contract, a large and expensive plant has been constructed, which has been in operation for about 16 years. There are many important

stipulations in the contract other than the one in controversy, which have not been mentioned, and out of which large and valuable property rights have grown. It appears that a bona fide dispute has arisen over the interpretation of a single provision, but should it be settled in a proceeding for an absolute forfeiture, and should the denial of the claim of the city in one particular be visited by the extreme penalty of civil death? The controverted question is an important one to the city and its inhabitants, and, if the interpretation placed upon it by the city be the correct one, it is entitled to a prompt and effectual remedy. The law, however, does not look with favor on forfeitures, and it would appear that another remedy exists in which an interpretation of the contract may be obtained, and complete redress awarded. Doubtless there are cases where the city may properly ask a forfeiture, and where an annulment of the contract is the only adequate remedy. *Burlington Waterworks Co. v. City of Burlington*, 43 Kan. 725, 23 Pac. 1008; *City of Winfield v. Winfield Water Co.*, 51 Kan. 70, 32 Pac. 603. It is insisted that this remedy should be allowed here because a forfeiture is provided for in the contract itself. In the section of the ordinance relating to forfeitures the failure to make future extensions of the mains and pipes was not made a ground of forfeiture. The failure to furnish the quality of water prescribed, or to furnish the quantity and force named, in the ordinance, excepting in cases of unavoidable accidents, are made grounds of forfeiture; but no other reasons were mentioned, and probably an annulment of the contract upon other grounds was not within the contemplation of the contracting parties. It will be observed that this proceeding is not brought by the state, and that neither the validity of the organization of the company nor its right of existence is in question. The state is not asking to reclaim the franchises bestowed by it upon the company, but the city seeks an annulment of the contract because of the nonperformance of a condition subsequent; and the failure to perform this condition is not made a ground of forfeiture. If, however, the company failed to carry out the purposes of its organization, and willfully violated the provisions of the ordinance other than those specified as grounds of forfeiture, an annulment might, in some instances, be had; but, as has been before observed, a forfeiture is always abhorred, and, according to repeated decisions of this court, it will ordinarily not be declared where there is another adequate remedy. *State v. Wilson*, 30 Kan. 661, 2 Pac. 828; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935; *Weston v. Lane*, 40 Kan. 479, 20 Pac. 260. See, also, 5 *Thomp. Corp.* § 6608; *Hugh, Extr. Rem.* § 649; 4 *Am. & Eng. Enc. Law*, 223, and cases cited. As determined in the cited cases, the court is vested with some discretion in such a proceeding, and, since it is slow to adjudge the extreme penalty where the law has provided other sufficient remedies, the question arises, is man-

damus a suitable and sufficient remedy? It has already been determined that a corporation organized to promote public works, and which has been granted a franchise by a city through an ordinance, may be compelled to perform its duties towards the public by a proceeding in mandamus. *City of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309. In such an action the dispute as to the interpretation of the contract may be settled, and the whole controversy in this case determined. It is stated in behalf of the company that if it is held by the court that the interpretation contended for by the city is correct the company will abide the result, and at once construct the additional mains and pipes. We will not undertake in this proceeding to determine the rights of the parties under their contract, but, holding that mandamus is an available and adequate remedy for the determination of the controversy, the judgment of the district court will be affirmed. All the justices concurring.

(58 Kan. 365)

STATE v. ADAMS.

(Supreme Court of Kansas. June 5, 1897.)

ROBBERY—INFORMATION—OWNERSHIP.

Robbery in the first degree may be committed by taking property from the possession of a servant or agent of the owner, as well as from the owner himself; and in the information the ownership of the property may be alleged as in the person robbed, or the true owner.

(Syllabus by the Court.)

Appeal from district court, Hamilton county; William Easton Hutchison, Judge.

Frank L. Adams was convicted of robbery, and appeals. Affirmed.

A. J. Hoskinson, for appellant. L. C. Boyle, Atty. Gen., and C. T. Reid, M. W. Sutton, and George Getty, for the State.

ALLEN, J. The defendant was convicted in the district court of Hamilton county of robbery in the first degree, and sentenced to 15 years' confinement in the penitentiary. From this conviction he appeals. The amended information charges the defendant with having made an assault on Jim Akin, and that he did then and there, in the presence and against the will of said Akin, by violence to his person, and by putting him in fear of immediate injury, rob, steal, take, and carry away certain personal property therein described, belonging to one Fred Harvey. Numerous errors are assigned, one only of which requires especial consideration. We find no error in the rulings of the court on preliminary motions. One substantial question, however, is presented. The section of the statute under which the conviction was had is section 73 of the act regulating crimes and punishments (Gen. St. 1889, p. 674), and reads as follows: "Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence,

and against his will by violence to his person, or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." It is contended that under this section of the statute the property taken must be the property of the person robbed; that, if it be the property of another, it is larceny, but no robbery. It must be conceded that the language of the section is susceptible of the construction urged by counsel for appellant; and the supreme court of Missouri, in the case of *State v. Lawler*, 32 S. W. 979, has held that an indictment in substance like the one under consideration fails to charge an offense under a similar statute of Missouri. The argument of the case is that the person robbed must either own the property taken, or have such title to it as would have enabled him to maintain an action to recover possession of the property if wrongfully taken from him. On the other hand, the court of appeals of New York, in the case of *Brooks v. People*, 49 N. Y. 436, held, under a section of the statute of that state identical with the one above quoted, that in an indictment for robbery the property may be laid as belonging either to the actual owner, or the person robbed, and it was said: "The act intended that the person robbed should be regarded as the owner, as against the robber, of all goods whereof he was robbed. He must have a possession or custody of the goods or they could not be taken from the person or in his presence by violence to his person, or by putting him in fear of some immediate injury to his person." It cannot be that the legislature ever intended to give less protection against violence to a wife or child in the possession of property belonging to the husband or father, or to a servant in the possession of the property of his master, than to the owner himself when in possession of his own property. The characteristic of robbery, distinguishing it from other forms of larceny, lies in the violence inflicted on the person of the one in possession of the property, or in putting him in fear of injury to his person. So far as the mere taking of the property is concerned, the offense is neither greater nor less than if filched in any other way. The gravity of the offense lies in the breach of the peace, in the personal violence inflicted, or the terror excited in the mind of the individual robbed. At common law it was never held that the property taken must belong to the person robbed. It was sufficient that the property belonged to the person robbed, or some third person. *Com. v. Clifford*, 8 Cush. 215; *People v. Shuler*, 28 Cal. 490; *State v. Ah Loi*, 5 Nev. 99. As against the robber, a servant has the same right, and rests under the same duty, to preserve and defend his possession of the property, that the owner has. He is the custodian, and has a right to oppose the violence offered by the robber with violence, if necessary. As against him, he stands as the owner, and we think the statute intended to extend to him

the full measure of protection that it gives to the owner or bailee. The principles governing civil actions for the recovery of property wrongfully taken have no application in a case of robbery. Proof that the property was in the lawful possession and keeping of Jim Akin, and that it belonged to a person other than the defendant, was sufficient, and the statement in the information of the name of the real owner of the property, whose title was good as against Akin himself, did not prejudice the rights of the defendant, or render the information defective. The judgment is affirmed. All the justices concurring.

(53 Kan. 278)

CORBY v. MORAN et al.

(Supreme Court of Kansas. June 5, 1897.)

SHERIFFS' DEEDS—VALIDITY—COLOR OF TITLE.

1. A sheriff's deed founded upon a mortgage foreclosure judgment is not void upon its face unless defects sufficient to invalidate it appear in the instrument itself; and a misrecital by it of the date of the judgment upon which it is founded, which is manifestly a clerical error, and a misdescription of the land ordered to be sold, where it is manifest that the tract conveyed is a portion of the one so ordered to be sold, and a misstatement of the capacity in which plaintiff recovered judgment, as executrix instead of in her own right, do not render such deed inadmissible in evidence; and an instruction to the jury to find against the party claiming under it because of such misrecital, misdescription, and misstatement is error.

2. A sheriff's deed founded upon a mortgage foreclosure judgment, which had been previously paid, is a nullity in the hands of the judgment creditor as purchaser; and the recording of such deed does not start the running of the statute of limitations in his favor.

(Syllabus by the Court.)

Error from district court, Doniphan county; J. F. Thompson, Judge.

Action by James Campbell, for whom was subsequently substituted James Moran and another, against Amanda Corby, for the recovery of land. From a judgment for plaintiff, defendant brings error. Reversed.

James F. Pitt, for plaintiff in error. Albert Perry and Moran & Moran, for defendants in error.

DOSTER, C. J. This action was ejectment for the recovery of 120 acres of land. In 1873, James Campbell borrowed \$440 of Amanda Corby, and secured the same by mortgage upon a quarter section of land of which the tract in dispute is the greater part. Having defaulted in the payment of the mortgage debt, foreclosure suit was instituted, and judgment recovered January 3, 1876. In April following, Mr. Campbell sold 40 acres of the mortgaged land to procure money with which to pay the mortgage judgment, and with which he did pay it, as he claims, to one Thomas Culligan, the authorized agent of Mrs. Corby. Soon thereafter Mr. Campbell went to the Black Hills country of Dakota, and did not return until 1893. Notwithstanding the pay-

ment of the mortgage judgment as claimed by Mr. Campbell, several orders of sale were issued thereon, under the last of which the land was sold and bid in by Mrs. Corby herself. In 1879 a sheriff's deed was executed to her as purchaser, and under it she went into possession the following January, through her tenants, and since then has continuously remained in possession through such tenants. Upon Mr. Campbell's return this action was instituted, and thereafter a substitution was had of parties plaintiff, not necessary to be explained here. Mrs. Corby defends upon her mortgage judgment, foreclosure sale and sheriff's deed, and the five-years statute of limitations contained in section 16 of the Civil Code. To these defenses the plaintiffs reply that such sale and deed are nullities, and pass no title, because of the payment of the judgment upon which they are founded, and because the sheriff's deed is void upon its face. Upon the trial the court instructed the jury that such deed was void upon its face, and because thereof directed the return of a verdict in favor of the plaintiffs (defendants in error here). The court, however, submitted to the jury the question whether the mortgage judgment had been paid prior to the sheriff's sale and deed, as alleged by plaintiffs, and the jury found, in answer to a special interrogatory upon the subject, that such judgment had been paid prior to such sale and deed.

The first question for consideration relates to the validity of the deed, and the consequent correctness of the court's instruction to find for the plaintiffs because of invalidity apparent upon its face. This instruction of the court was error. The sheriff's deed was entirely regular upon the face of the instrument itself. It contains, however, some misrecitals of the record upon which it was founded. It recites the recovery of a judgment for the sale of the 120 acres of land which it purports to convey, less a railroad right of way; whereas the judgment in reality was for the sale of a full quarter section, without the reservation of such right of way. No doubt these discrepancies occur on account of the sale of the 40 acres in 1876, to raise money for the payment of the debt as alleged by plaintiffs, and also through the subsequent condemnation of a railroad right of way. Were discrepancies of land description available to defeat such an instrument as this, those in question cannot do so because of the manifest and proper reasons for their occurrence. The deed recites the date of the judgment as January 3, 1875, one year earlier than it was in fact rendered, and the order of sale preceding such deed likewise made the same mistake in dates. The deed also recites the recovery of judgment by Amanda Corby, "executrix of John Corby, deceased," whereas the judgment was in favor of Mrs. Corby in her own right. When a sheriff's or other like deed is said to be void upon its face it must be tested by what appears upon such face, and not by what appears in the record of proceedings upon which it was

founded. The misrecitals of land description and other facts are but irregularities, and do not operate to prevent the running of the statute of limitations. The statute was devised for the purpose of limiting the period within which such irregularities might be urged to defeat the title under the deed. *Young v. Walker*, 26 Kan. 242, was decided upon principles directly applicable to this case. It follows, therefore, that the court's instruction to the jury to find in plaintiffs' favor because of invalidities upon the face of the deed was erroneous.

Following the instruction to find for the plaintiffs, the court directed an inquiry into the question of payment of the mortgage judgment, for the purpose, we suppose, of determining the amount, if anything, to be paid by plaintiffs to defendant in discharge of the judgment, and as a condition precedent to regaining possession of the land. This was proper, under section 613 of the Civil Code, but we are of the opinion that the question of the payment of the debt could not have been properly considered by them, and the facts of the case as claimed by the defendant properly inquired into in the face of a positive instruction to the jury to find at all events in the plaintiffs' favor; and especially is this true under another instruction given to the jury to the effect that, if they believed from the evidence that Mr. Campbell had paid to Mr. Culligan, the defendant's agent, the money derived from the sale of the 40 acres of land in satisfaction of the judgment, they should find that such judgment had been paid, although they might believe from other evidence that after such payment Mr. Campbell had received different sums of money from Mr. Culligan. It was claimed by defendant, and evidence introduced to prove such claim, that if the judgment had been paid to Mr. Culligan the money received by him therefor had been paid back. Thus the question of the payment of the judgment was rendered difficult of determination by the doubt which the court's instruction threw upon the question of the subsequent reclamation of the money from Mr. Culligan, if, in reality, it had once been paid to him. That upon a future trial the law may be understood, we feel justified in saying, though not strictly necessary to the determination of the case as presented to us, that if, as a fact, the mortgage judgment was paid prior to the sheriff's sale, there can be no doubt that such sale was a nullity, and the deed founded thereon likewise a nullity, as against the defendant and all other persons having knowledge of the same, as much so as though the fact was apparent upon the face of the deed or the record upon which it was founded. There can be no valid sale under a satisfied judgment. *Weston v. Clark*, 37 Mo. 568; *Durfee v. Moran*, 57 Mo. 374; *McClure v. Logan*, 59 Mo. 234; *Drefahl v. Tuttle*, 42 Iowa, 179; *Frost v. Bank*, 70 N. Y. 553; *Craft v. Merrill*, 14 N. Y. 456; *Wood v. Colvin*, 2 Hill, 566. Nothing but adverse possession for 15

years of land so sold will protect the purchaser's claim thereto. The claimant under a sheriff's deed founded upon a sale made in pretense of satisfying a judgment already paid cannot be protected by the five-years statute of limitations in this case, and this is true whether defendant, claiming under such deed, is a resident of the state or a nonresident and absentee, as the defendant is said to be. For the error pointed out, the judgment will be reversed, and a new trial ordered. All the justices concurring.

(58 Kan. 293)

ATCHISON, T. & S. F. R. CO. v. ADERHOLD.

(Supreme Court of Kansas. June 5, 1897.)

RAILROADS—CROSSINGS—MAINTENANCE—NEGLECT—PROXIMATE CAUSE—TRIAL—SPECIAL INTERROGATORIES.

1. In constructing its railroad over a highway, the railroad company placed a box culvert about nine feet from, and parallel with, its track. It was at the foot of the embankment supporting the track, and was placed across the highway mainly for the purpose of draining and protecting the embankment, but it also formed a part of the approach to the crossing. *Held*, that it is a part of the railroad structure, and that it is the duty of the company to maintain it in a safe condition for persons traveling the highway.

2. To sustain a recovery for injuries suffered through the alleged negligence of the defendant, it is not enough to show that it was negligent in some particular, but it must appear that the negligence in some way contributed to the injury; and, upon an examination of the testimony, it is *held* to be insufficient to sustain the verdict.

3. Each special interrogatory submitted to the jury should be so framed as to present distinctly a single material fact involved in the issues of the case.

(Syllabus by the Court.)

Error from district court, Jefferson county; Lewis A. Meyers, Judge.

Action by George W. Aderhold, administrator of the estate of John E. Aderhold, deceased, against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. Waters & Waters, for defendant in error.

JOHNSTON, J. This was an action brought by George W. Aderhold, as administrator, against the Atchison, Topeka & Santa Fé Railroad Company, to recover damages for the death of his son, John E. Aderhold, who was killed in a collision with a freight train. The casualty occurred at a highway crossing in the country on a clear April day in 1892. At the point where the accident occurred the highway runs north and south, and the track of the railroad company approaches the highway from the west upon a curve. The country south of the crossing slopes to the north, so that there is a slight cut in the highway on the south of the railroad track, while on

the north side the ground is about level with the track. In the approaches on each side of the track, and about 9 feet from, and parallel with, the rails, the railroad company placed plank culverts, about 16 feet long, for the purpose of draining the track and completing the approaches to the crossing. These box culverts had been sunk in the ground on a level with the highway, and covered with dirt. Planks had also been placed on either side of each rail in the manner required by statute. John E. Aderhold, who was between 18 and 19 years of age, had frequently traveled over the crossing, and was familiar with the surroundings. On the day of the accident he was driving a team of horses attached to a farm wagon, going northward towards Valley Falls. Just before approaching the crossing, he was noticed by a witness to be driving on a slow walk, with his head bent forward, apparently looking into the bottom of the wagon. A view of the track could be had from the highway towards the east for some distance, except where it was obstructed by a house and barn which were near to the crossing. About noon of that day a freight train, consisting of a locomotive and 12 box cars, approached from the west, on a down grade, and was running at the rate of from 25 to 30 miles an hour. When the horses had passed partly over the track, the locomotive ran into the front of the wagon, throwing the horses on one side of the track, and Aderhold and the principal part of the wagon on the other side, instantly killing Aderhold and the horses. The house of J. W. Rose was about 200 feet from the railroad crossing, and there, as has been stated, Aderhold was seen, with his head down, driving on a slow walk towards the crossing. No one saw him after that time, except the men upon the train, who testified that when they first saw him he was driving at a walk, with his head down, but that as he approached the track he looked up and saw the train, and, partly rising upon his feet, attempted to urge the team over the track ahead of the locomotive. The casualty is alleged to have been caused by the negligence of the company in failing to build and maintain a safe and suitable crossing. The principal complaint is in regard to a hole in the culvert on the north side of the track, and that it had been there so long that the company knew, or should have known, of its existence. It was also alleged that the whistle of the locomotive was not sounded, nor was the bell rung, on approaching the crossing. The jury found in favor of the plaintiff below, but they also found that the whistle was sounded 80 rods from the crossing, as the statute requires, and also that, when Aderhold was discovered by the engineer, that employé applied the air brakes, and did all in his power to stop the train.

The negligence relied on to sustain the verdict is the defect in the crossing. If the box culvert is a part of the crossing, which it was, the duty of the railroad company to maintain,

then it must be held that the crossing was defective. In or near the wagon track there was a hole in the culvert, which some witnesses say was about 6 or 8 inches square, and others that it was about 18 inches long and 12 inches wide. It was noticed by a witness traveling over the highway about two or three weeks before the accident occurred. The culvert is a necessary part of the railroad, and had been constructed and previously maintained by the railroad company. The main purpose of the culvert was to drain and protect the embankment which supported the track. The highway was established before the railroad was built, and it therefore became the duty of the railroad company to restore the highway to its former state, or to such a state as to have not necessarily impaired its usefulness. Gen. St. 1889, par. 1207. After the highway had been properly restored, the duty still remained upon the company to maintain a reasonably safe crossing over its tracks. It would not do to say that the road overseer had control of the crossing over the track and structure of the company, nor to hold him responsible for its maintenance. It is the duty of the company to maintain its track in a suitable and safe condition, and the absolute control of the same is necessary to the accomplishment of that purpose. The culverts being a necessary part of the structure, we think the court ruled correctly in holding that it was the duty of the company "to repair any and all holes in its culverts, when the same would endanger the safety of persons traveling the highway." The question remains, however, whether the defect or hole in the culvert in any way contributed to the injury. In this respect the testimony appears to be insufficient. It is not shown that the hole was seen by the horses, or that it impeded them in passing over the railroad. There is no testimony that the horses slackened their speed after starting over the crossing, or that the condition of the crossing delayed or hindered them to any extent. The only testimony in the case as to the conduct of the driver and the action of the horses on the crossing was given by the trainmen, and it clearly tends to show that there was no hindrance or delay on account of the hole on the other side of the track. Indeed, if the evidence of these witnesses was accepted,—and there were no others who saw Aderhold drive upon the track,—the court would be compelled to hold that he did not exercise ordinary care for his own safety. They state that while the team was in a walk, and before starting over the crossing, Aderhold looked at the train, and then urged his horses into a more rapid pace, only to reach the crossing in time to collide with the train. According to their testimony, he saw the train in time to have avoided the danger and the disastrous consequences. But, if what they say is true, it would seem that he misjudged the distance the train was away, and the time required to pass over the crossing. The jury, however, disbelieved and dis-

regarded their testimony in this respect; for in response to an interrogatory as to whether Aderhold, before going upon the track, looked to ascertain if a train was approaching, they answered that "there is no evidence that the jury accepts on this point, one way or the other." It was the duty of Aderhold, before going upon the track, to look and listen for an approaching train; but, notwithstanding the jury found that he exercised due care, they also made the specific finding that there was no evidence that he looked in the direction of the approaching train just before driving onto the railroad crossing. It is argued that some of the testimony given by these witnesses was so inconsistent and unreliable that the jury could not give credit to any of it. It is true that some of the testimony given by them as to the respective distances that the train and Aderhold were away from the crossing when Aderhold was first discovered by the trainmen is somewhat incredible, and this may have led the jury to disbelieve all of the testimony in respect to what was seen at the crossing. In the nature of things, it would be difficult for persons on a moving train to closely estimate distances, and, as there was only a moment of time for them to take in the situation, it is easy to understand how a mistake might be made. If it can be said that there was no testimony as to the care exercised by Aderhold, we may presume that, actuated by the love of life, the instinct of self-preservation, and the known desire of men to avoid injury, he did exercise due care. This presumption, however, is deemed to be overthrown where there is direct proof to the contrary. *Railroad Co. v. Hill*, 57 Kan. 139, 45 Pac. 581. Assuming, however, that he is not chargeable with negligence, we are nevertheless required to hold that the testimony fails to show that the accident was the result of the negligence of the company. The culvert was defective, it is true; but who can say that the hole was a factor in causing the injury, or that the previous repair of the defect would have averted the injury? It is possible that the horses might have been frightened and hindered by the hole, but things which are possible may never happen. The accident may be accounted for in several ways, and other and more plausible theories of the collision may be readily suggested; but liability cannot be fixed on a bare guess, nor can a verdict rest on mere conjecture.

There is good cause for the objections made against the form of the interrogatories submitted in behalf of the plaintiff below. Some of them embrace as many as seven distinct facts which are not closely related, and are so framed as to invite an affirmative or negative answer to the entire group. No question should be submitted unless it is so framed as to present distinctly to the mind of the jury a single material fact involved in the issues of the case. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(58 Kan. 299)

RILEY v. TOWNSHIP OF GARFIELD et al.

(Supreme Court of Kansas. June 5, 1897.)

COUNTIES DE FACTO — CONTRACTS — POWERS OF COMMISSIONERS — CLAIMS.

1. From the time Garfield county was organized as such until the decision of this court in the case of *State v. Board of Com'rs of Garfield Co.*, 38 Pac. 559, declaring the act creating the county unconstitutional, it was a county de facto, and the acts of its officers were the acts of de facto officers, binding as such between the people of the county and third parties dealing with them as public officers.

2. Chapter 50 of the Laws of 1879 authorized the board of county commissioners of a county to compromise matured and maturing indebtedness of every kind, and to issue bonds in payment for any sums so compromised, and gave to the board of county commissioners authority to compromise an indebtedness evidenced by valid county warrants, and issue bonds in payment therefor without a vote of the people.

(Syllabus by the Court.)

Mandamus by Lewis A. Riley against the township of Garfield and others. Peremptory writ allowed.

W. C. Webb, for plaintiff. S. S. Ashbaugh, Milton Brown, and Martin & Little, for defendants.

ALLEN, J. This is an action to compel the township trustees of Garfield township, in Finney county, and the board of county commissioners of the county, to levy a tax to pay the interest coupons and create a sinking fund for the payment of certain refunding bonds issued by the board of county commissioners of Garfield county, and held by the plaintiff. This case has already been considered on a motion to quash the alternative writ of mandamus, and the decision rendered thereon is reported in 54 Kan. 463, 38 Pac. 560. Subsequently an answer was filed, and the case was heard on the evidence submitted. A very elaborate brief is filed on behalf of the defendants, in which numerous questions are discussed at length. The facts do not differ materially from the averments of the writ, which are sufficiently set forth in the report of the case above referred to. By section 6 of chapter 81 of the Laws of 1887 the legislature attempted to create Garfield county with boundaries which, if the sections had been full, would have given it an area of 432 square miles. Thereafter the same proceedings were had as in other cases of the organization of counties, and a full set of county officials was elected, and continued to carry on the county government until the act was declared void by this court in the case of *State v. Board of County Com'rs*, 54 Kan. 372, 38 Pac. 559, because it was ascertained by a survey ordered by this court that the county contained only 430½ square miles, being 1½ square miles less than the minimum required by the constitution. It is now shown that the records of the government survey of the lands included within the county, filed in the office of the auditor of state and other public offices, show that slightly less than 430½ square miles were

actually included in the county. On this it is argued that the plaintiff was bound to take notice of the facts disclosed by the public records and of the provisions of the constitution, and that these together disclosed the invalidity of the attempted county organization. The government surveys of public lands are rarely strictly accurate. In this case the survey ordered by this court showed a fraction more included in the territory than would appear by the government survey. The action of the legislature in attempting to establish the county carries with it a presumption of validity only to be overthrown by conclusive proof. The law itself did not disclose the grounds of its invalidity. In the case of *State v. Carroll*, 38 Conn. 449, it was held, after very full consideration, that "the acts of an officer appointed and acting in pursuance of a law are valid as the acts of an officer de facto, even though the law be afterwards judicially declared unconstitutional." To the same effect, see *Brown v. O'Connell*, 4 Am. Rep. 89; *Com. v. McCombs*, 56 Pa. St. 436. We are driven to the alternative of holding either that all of the acts of those who were recognized as public officers of Garfield county between the time when its organization was proclaimed by the governor and its dissolution by the judgment of this court were void, or that they were valid as the acts of officers de facto. The better reason and weight of authority seem to support the latter, and to make the acts of those acting under a law duly passed by the legislature valid until the act is declared unconstitutional by a competent tribunal. We shall not attempt to discuss in detail all the questions raised by counsel for the defendants, but shall consider only those matters now urged for the first time, and which seem to be important. The bonds in suit were issued under chapter 50 of the Laws of 1879, for the purpose of refunding outstanding county warrants. It is contended that the act does not authorize refunding bonds to be issued to take up county warrants, and that it does not authorize bonds to be issued to take up indebtedness of any kind without a vote of the people, and particularly that such a vote is necessary when an attempt is made to convert nonnegotiable warrants into interest-bearing bonds. The language of the statute is very broad. It authorizes counties, cities, etc., "to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever." This language is certainly broad enough to include county warrants. It would be difficult, indeed, to select words more comprehensive than those contained in the act. In 1871 the section containing the language above quoted was amended by the legislature so as to authorize the refunding of bonded indebtedness only. This indicates a legislative construction of the act of 1879. The contention that the refunding act does not authorize warrants to be refunded into bonds without a vote of the people of the county is also answered by the act itself

and section 3 of chapter 25 of the General Statutes of 1889, relating to counties and county officers, which reads: "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." The refunding act authorizes a county to refund its indebtedness. No vote of the people is required in the case of a county, but the act expressly requires a compromise by a township or school district to be submitted to a vote at an election called for that purpose. The argument that the compromise is distinct and separate from the refunding, and that the question of refunding must be submitted to the people in every case, and that of the compromise only by townships and school districts is too nice to be sound. The compromise and the refunding together constitute but a single transaction. The long list of special acts cited in the brief shed no light on the case in hand. The validity of the bonds must be determined under the law authorizing their issuance, not under other acts having no application. We are unable to perceive any evidence of legislative intent affecting the refunding act of 1879 to be drawn from the numerous special acts cited. The contention that a law authorizing the board of county commissioners to issue negotiable bonds without a vote of the people ought to be void may be sustained by very weighty arguments, but to declare it unconstitutional some provision must be pointed out which either in terms or by necessary implication makes it so. It is not contended that power cannot be conferred on counties and municipalities to incur a bonded indebtedness. The custom of doing so is too well established to admit of a question now as to the existence of the power. That the legislature may require a vote of the people as a condition precedent to the action of the board is well settled, but there is no provision of the constitution requiring such a vote. The doubt has been whether authority could be conferred on the people to decide such questions at an election. Section 21 of article 2 of the constitution reads: "The legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient." Under this, authority is given to delegate legislative powers to the board of county commissioners, and it is the board of county commissioners, as the representative of the county, that the refunding act confers authority on to compromise and refund the indebtedness of the county. There is no contention in this case either that the act under consideration is unconstitutional or that it does not authorize negotiable bonds to be issued. Nor is there any claim that the warrants for which the refunding bonds forming the basis of this suit were exchanged were without consideration, fraudulent, or invalid for any reason. The contention is merely that bonds may not be issued to refund county warrants. In this state of the case we must assume that the warrants

were valid, and the bonds issued in exchange for them based on a good consideration. The question whether Garfield township is the successor of Garfield county, entitled to its property, and liable for its debts, was sufficiently considered on the motion to quash, and needs no further discussion now. It appears that it is not yet time to commence to raise a sinking fund for the payment of these bonds, and that part of the relief demanded will be denied. A peremptory writ will be awarded directing a levy on the property included in Garfield township to pay the interest coupons.

JOHNSTON, J., concurring. DOSTER, C. J., not sitting.

(58 Kan. 328)

CITY OF TOPEKA v. HEMPSTEAD.

(Supreme Court of Kansas. June 5, 1897.)

MUNICIPAL CORPORATIONS—BRIDGES—NEGLIGENCE
—SUNDAY—WORK OF NECESSITY.

1. The approach to a bridge on a city street was narrow, high, and left unprotected on the sides by railings or barriers, and, while a dairyman was driving a horse and wagon over it, the harness broke without fault of the driver, the horse became frightened, and started to run, and, while the horse was only under partial control, the wagon slid off the embankment, throwing the driver out, and injuring him. It appeared that, if there had been a proper railing upon the side of the embankment, the casualty would not have occurred. *Held*, that the city was negligent in leaving the approach to the bridge without railings or barriers for the protection of travelers, and that the city was liable for the injury sustained, notwithstanding that the breaking of the harness and the fright of the horse may have concurred in producing the injury.

2. The delivery of milk to his customers by a dairyman is a work of necessity, and not within the inhibition of a law forbidding any labor on Sunday other than works of necessity or charity.

(Syllabus by the Court.)

Error from district court, Shawnee county; A. H. Vance, Judge pro tem.

Action by Elizabeth D. Hempstead against the city of Topeka. From a judgment for plaintiff, defendant brings error. Affirmed.

W. A. S. Bird, for plaintiff in error. Bain & Forbes, for defendant in error.

JOHNSTON, J. John C. Hempstead was killed by falling from a high bridge erected upon a street of the city of Topeka. He was engaged in dairying, and on Sunday morning, May 22, 1892, was on his way to deliver milk to a customer. He was using a mare attached to a light wagon, and as he was driving down a hill, and upon the approach of the bridge, one of the back straps of the harness gave way, which hit and frightened the mare, and she started towards the bridge upon a gallop. Hempstead undertook to hold and guide the mare, and did gain partial control over her; but the approach to the bridge being narrow (not much wider than the wagon), and there being no barrier or protection on the sides, and the mare having slightly veered from the center, the wagon slid off, dragging the

mare and Hempstead down to the bottom of the creek. The approaches were made of earth and stone, and were about 20 feet high. The embankments had been washed away to some extent, and the roadway was slanting at the point where the casualty occurred. The widow, Elizabeth D. Hempstead, brought this action, alleging that the approach to the bridge was defective and dangerous, and that the city was negligent in not protecting the same with barriers or railings; and upon the trial a verdict was rendered in her favor, and judgment entered thereon for \$3,000.

It is contended that the city is not liable, because the defect in the bridge was not the sole cause of the injury, but that the running away of the horse, which was entirely beyond the control of the driver, should be regarded as the proximate cause. We entertain no doubt that the evidence justified the verdict of the jury. The bridge, which was one of the thoroughfares of the city, was obviously defective and dangerous. The failure of the city to erect a barrier or other means of protection on the sides of so high an embankment for the safety of travelers was culpable negligence. The fact that the mare took fright, and started to run, will not prevent a recovery. According to the findings of the jury, based upon sufficient evidence, Hempstead did not lose control of the mare, and he was in the exercise of reasonable care when the injury occurred. The fright of the mare, it is true, was caused by the breaking of the harness; but it is found that Hempstead was not guilty of any negligence in this respect, and there is the further finding that the injury which caused his death would not have occurred if there had been a sufficient barrier or railing on the approach to the bridge. This being true, and there being no negligence on the part of Hempstead, there can be no question of the liability of the city. In a somewhat similar case, where the city was negligent in maintaining a street, and injury resulted to one who was driving a horse over the defective street, it was held that the city was liable for the injury, although the horse took fright, and ran away, and was beyond the control of the driver when the injury occurred. It is decided that, according to the weight of authority, the city is liable in such case, where the traveler is not negligent, and where the injury would not have been sustained but for the negligence of the city. *Railway Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012. The ruling in that case applies closely to the facts in this one, and determines the point in controversy against the contention of the city.

It is contended that no recovery can be had, because Hempstead was engaged in his ordinary business on Sunday, in violation of a city ordinance and of a statute prohibiting and punishing any labor on Sunday other than works of necessity or charity. This claim is without merit, as the delivery of milk to his customers may be fairly classed in the works of necessity which are excepted from the op-

eration of the law. It was necessary to milk the cows, and dispose of the milk while it was fresh, and hence the labor was a work of necessity as to Hempstead. It was a work of necessity as to his customers, as much as that of a druggist who furnishes medicine to the sick, or that of the hotel keeper who furnishes food for his guests, or of the water company which supplies water for its customers. Such employments are generally regarded as necessary, and not within the inhibition of Sunday laws. *Morris v. State*, 31 Ind. 189; *Wilkinson v. State*, 59 Ind. 416; *McGatrick v. Wason*, 4 Ohio St. 566; *Whitcomb v. Gilman*, 35 Vt. 297; *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926; 24 Am. & Eng. Enc. Law, 542, and cases cited.

Exceptions were taken to the rulings of the court in the admission of testimony, and also in charging the jury; but we find no error in any of them, nor anything requiring special comment. The judgment of the district court will be affirmed. All the justices concurring.

(58 Kan. 334)

KING et al. v. CITY OF KANSAS CITY.

(Supreme Court of Kansas. June 5, 1897.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERS—LIABILITY FOR RESULTING INJURIES.

1. In devising a plan of sewerage the municipal authorities of a city are vested with a large legislative discretion, and, if it is exercised in good faith, the city is ordinarily not liable for incidental injuries to property which are solely attributable to the plan.

2. In such cases, however, if through any negligence in carrying out the plan, or in constructing or maintaining the sewers, the property of a private owner is injured, a liability will arise.

3. The collection and precipitation of water or sewage upon the private property of an owner, in such a way as to constitute a direct invasion of the owner's rights, and in the nature of a trespass upon his property, will create a liability against the city, regardless of the plan upon which the sewer is constructed.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county.

Action by James King and another against the city of Kansas City. From a judgment for defendant, plaintiffs bring error. Reversed.

Action by James King and Nina King against the city of Kansas City to recover damages, in the sum of \$3,171, alleged to have been sustained by the discharge of sewage upon their property in that city. It is alleged that in 1889 the city constructed sewers through the part of the city in which the plaintiffs' land is situated. Among other things, the petition alleges: "That the construction and maintenance of the said sewers by said city defendant was negligent, careless, and unskillful, and damaged the plaintiffs in this, to wit, that the said sewers were so constructed that when the Kansas river, into which they emptied, was swollen on account of the spring rain, the water in the said river, in its rise, would reach a point higher than the head of

the sewers, or the various openings into the said sewers; and the said defendant city was further negligent and careless in this, to wit, that they failed to provide for the said sewers suitable flood gates, or flood gates of any kind, with which the mouths of the sewers could be closed during the rise in the said Kansas river. That by reason of the construction of the said sewers as aforesaid, and by failing to provide flood gates as before stated, the water of the said river flowed backward through the said sewers, along in the spring of 1892, or on or about the — day of May, in said year, and flooded the district in which the plaintiffs' property was located, as hereinbefore stated, to the depth of from one to three feet, and that the same continued so to be flooded, from said cause hereinbefore mentioned, for a period of from 15 to 20 days. That there was higher ground between the property of the plaintiffs and the river than the ground upon which the plaintiffs' house was located, which said ground was high enough to protect, and would have protected, the property of the plaintiffs from the rise in the river, had it not been for the construction of the said sewers through and upon the said high ground, thereby creating a water way through which, and only through which, the plaintiffs' property could have been flooded." A particular description of the property injured is set out, with a detailed statement of the damages sustained, and there is an averment that an account or claim had been presented to the city, and that the same had been disallowed. An answer was filed, denying the averments of the petition, and alleging that the loss sustained was the result of the plaintiffs' own negligence. At the opening of the trial counsel for the plaintiffs stated the facts in the case in greater detail and particularity than they were set forth in the petition, and at the end of the statement the court gave judgment for the defendant, on the ground that the petition and statement of counsel, together, did not show a cause of action against the defendant. Of this ruling the plaintiffs complain.

N. B. Carskadon, for plaintiffs in error. K. P. Snyder and T. A. Pollock, for defendant in error.

JOHNSTON, J. (after stating the facts). We think the city is answerable to the plaintiffs for the damages resulting from the precipitation of the sewage and river water upon their premises. Although their buildings were erected upon low ground, the rim of the high land along the river effectually confined the water therein, and protected the plaintiffs' property from the overflow of the river in rainy seasons and when freshets occurred. It seems that there is but little fall in the land towards the river in that portion of the city, and that the sewers are so constructed that in case of high water the sewage and river water flow back and are forced out of

the openings near the plaintiffs' premises inundating them to a depth of from one to three feet. From the statement of counsel, which the court considered, it appears that the mouths of the sewers, where they empty into the river, are above the water in its ordinary stages, but when the river rises, as it frequently does, to a depth of from 10 to 20 feet above low-water mark, the water is higher than the heads of the sewers, and, as a consequence, it is forced back, and floods the surrounding district. The contention is that, the municipal authorities having in good faith adopted a plan of sewerage, and constructed it out of good materials in a skillful manner, no liability can arise against the city. In inaugurating a sewerage system, and in devising plans for the construction of the same, the city is vested with a large legislative discretion; and if in good faith it is exercised, the city is ordinarily not liable for incidental injuries to property owners which are solely attributable to the plan. In such cases, however, if through any negligence in carrying out the plans, or in constructing or maintaining the sewers, the property of a private owner is injured, a liability will arise. According to the averments of the plaintiffs the sewers were not properly constructed or completed. It was manifest to those who selected the plans, as well as to every one else, that a rise in the river, which it appears was of frequent occurrence, would set the water back, and inundate the property at the sources of the sewers. To properly complete them flood gates over the mouths of the sewers were necessary, and this provision, it is averred, would have prevented the water from flowing back until the flood had subsided. This necessary and simple contrivance would have prevented the injury, and the failure to provide the same was negligence, which renders the city liable for resulting injury.

Another reason why the city should be held liable is that the inevitable result of the construction of the sewers was the injury of plaintiffs' property. The building of the sewers was more than an incidental injury. It was a direct invasion of their rights and in the nature of a trespass upon their property. Before the construction, the high land was a complete barrier against the high water, while the openings made therein for the sewers necessarily precipitated the water, sewage, and filth upon them whenever the river was swollen. The high water in the river cannot be regarded as extraordinary or unprecedented, because it is stated that it was frequently in that condition, and it is averred in the petition that it occurred when the river was swollen by the spring rains. It therefore appears that the rises in the river recur with the regularity of the seasons, and hence must have been anticipated by all who gave any attention to the plan, and the natural consequence must have been within the knowledge of the municipal authorities. The city cannot collect sewage and filth and precipitate it

upon the property of a citizen without liability, even if the plan is devised in good faith and the best material is used in the construction. It is immaterial from which end of the sewer the discharge is made. The consequence and liability are necessarily the same. "Courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed by the municipal authorities as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable." Dill. Mun. Corp. § 1047. See, also, *Ashley v. City of Port Huron*, 35 Mich. 296; *Tate v. City of St. Paul*, 56 Minn. 527, 58 N. W. 158; *Selfert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321; *Lehn v. City and County of San Francisco*, 66 Cal. 76, 4 Pac. 965; *City of North Vernon v. Voegler*, 89 Ind. 77; *Inhabitants of West Orange Tp. v. Field*, 37 N. J. Eq. 600.

Upon the facts stated a right of action is shown to exist in the plaintiffs, and therefore the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(53 Kan. 305)

LEAVENWORTH, N. & S. RY. CO. v. MEYER.

(Supreme Court of Kansas. June 5, 1897.)

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS
—COMMISSIONERS—AUTHORITY—DAMAGES
—EVIDENCE—HARMLESS ERROR.

1. The statute requires that the duties of commissioners appointed to condemn land for a railroad right of way, and to award damages therefor, shall be performed by a full body of three members, or by two of them upon notice to the third, and opportunity by him to participate therein; and a condemnation and award made by two after the resignation of the third is not a valid proceeding, and, if such action of the two after the retirement of the third appears upon the face of the report, such instrument is void, and such proceedings and report are likewise void if it appears therefrom that after the resignation of the one member an appointment to fill the vacancy was made, but that such appointee took no part in the proceedings, had no notice thereof, nor opportunity to participate therein.

2. The statutory rule that "words giving a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority," applies to boards or tribunals the membership of which is full, and not to one whose membership has never been fully appointed, or, if appointed, has become reduced in number, nor to one in whose proceedings the minority has been given no opportunity to participate.

3. Until the report of commissioners appointed to condemn land for a railroad right of way and award damages therefor has been filed, it is within the control of such commissioners, although written out and signed, and may be changed by a majority, or dissented from by a single member. The act of filing such report is in law the act of condemnation and award, and must be performed as the act of the full body, or the act of a majority upon notice to the third.

4. A case is not of necessity to be reversed because of error in the admission of evidence in

support of a claim for damages, but, if such erroneous evidence consists of statements of amounts of damage sustained, the judgment may be modified to the extent of the highest estimate of such damages made by any of the witnesses.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Lewis A. Meyers, Judge.

Action by Otto Meyer against the Leavenworth, Northern & Southern Railway Company for damages as for trespass on land. From a judgment for plaintiff, defendant brings error. Modified.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. L. B. & S. E. Wheat, for defendant in error.

DOSTER, C. J. The plaintiff in error instituted proceedings to secure a right of way through Leavenworth county. Messrs. Hacker, Havens, and Jaggard were appointed commissioners to condemn such right of way and award damages therefor. The route of the railroad, as laid out, ran across a section of land belonging to defendant in error. The commissioners viewed the same, estimated the value of the land taken and the damages to the remainder not taken, and prepared and signed a report on either the 15th or 16th of December, 1886,—probably on the date first mentioned. On the 16th of December Mr. Hacker resigned his position as commissioner, and on the 17th of December Mr. C. F. W. Dassler was appointed in his place to complete the work of the commission. At one place in the report of proceedings it is recited that Mr. Dassler was appointed on the 18th, but the difference in dates is immaterial. He qualified for the duties of his position on the 18th, and on that day the report of condemnation, valuation of land, and assessment of damages, which had been previously prepared and signed by Messrs. Hacker, Havens, and Jaggard, was filed, as required by law, in the office of the county clerk. To this report the signature of Mr. Hacker, as one of the commissioners, appears. That of Mr. Dassler, his successor, does not appear upon such report, and he took no part in the condemnation, valuation, and appraisal, so far as the land of defendant in error is concerned, and was not consulted about the making up or filing of such report. The defendant in error was dissatisfied with the valuation and assessment of damages, but neglected to appeal therefrom within the statutory time. He thereafter instituted an action in the district court to recover damages as for a trespass upon his land. Upon the trial of the case the railroad company, the plaintiff in error, defended upon the ground of the previous condemnation and award of the commissioners; claiming it to be res adjudicata, because not appealed from. The report of the commissioners' proceedings was offered in proof of the claim of adjudication. Its reception as evidence was objected to by plaintiff (defendant in error here) because void upon its face, showing no valid con-

demnation and award. The court rejected the report, and, upon trial and verdict of the jury, rendered judgment in plaintiff's favor for an amount considerably in excess of the commissioners' award. The principal question in the case arises upon the offer and rejection of the report.

The question for determination is whether the report of the commissioners, agreed upon and signed by all three, but not filed until after the resignation of one of such commissioners, and the substitution in his place of another, who did not join in the making of such report, or take any part in the condemnation proceedings, is valid, and estops the landowner from suing in trespass for the damages sustained by the taking of the right of way through his land. We are fully persuaded that the action of the court in rejecting the report in question was right, both upon reason and the authority of adjudicated cases. A board of condemnation commissioners constitutes a body in whose action all must participate, or have an opportunity to participate. They can perform no duty except when in session, or except through such formal and concurrent action as may be termed a session, and of the holding of such sessions all must have notice and an opportunity to attend. This has been repeatedly decided in this state as to boards of county commissioners and other like tribunals. *Paola & F. R. Ry. Co. v. Commissioners of Anderson Co.*, 16 Kan. 302; *Commissioners of Anderson Co. v. Paola & F. R. Ry. Co.*, 20 Kan. 534; *Alkman v. School Dist.*, 27 Kan. 129; *Bank v. Drake*, 35 Kan. 504, 11 Pac. 445. The rule of these cases is but an expression of the common-law doctrine upon the subject. To indicate the legislative design to secure the action and judgment of three persons in condemnation proceedings, it is provided, as to such commissioners, in section 87, c. 23, Comp. Laws 1885, that "in case any vacancy occurs, or any such commissioner or commissioners refuse to serve on such board, the district judge shall appoint in the manner herein provided, some other person or persons, having the qualifications herein provided." It is reasonably clear from the former decisions of this court as to boards of a like character, and from the statute quoted, that, if no more than two commissioners had been appointed, they could not legally perform the duties required of a full board, and if, after the appointment of three, one had died, resigned, or become otherwise disqualified, the remaining two could not act until a successor to the third was appointed; and it is clear beyond question that, if two of the board of three had undertaken to act without notice to the third, their proceedings would be nugatory. In land condemnation proceedings the efficient act is the filing of the report of condemnation and award. The filing of such report is the making of it. The writing of it out is clerical only; the signature to it, its formal attestation; the previous agreement to it, only an agreement as to what it

shall be when it passes out of the hands of the commissioners. Until it has been filed, it is fully within the control of those who make it, and is subject to revision and change. Until then it may be substantially altered or made up anew. The delivery of such report is not the act of the one commissioner who may chance to carry it to the legal custodian, but is the joint act of all the members of the board, and, until so delivered, is subject to recall by a majority, and to dissent by any one of the members. This view of the law is set forth in *Wentworth v. Farmington*, 49 N. H. 119, and other cases hereafter cited. If, therefore, the filing of the report is to be regarded as the act of the board as originally constituted, it was ineffectual, because Mr. Hacker, one of the members, did not and could not join therein; and the two remaining members could not perform such act because the concurrence of the third was lacking, and not to be obtained. If, on the other hand, the filing of the report is to be regarded as the act of the board, newly constituted by the substitution of Mr. Dassler in the place of Mr. Hacker, such act was likewise nugatory, because Mr. Dassler did not join in the making or act of filing, and had been given no opportunity to approve the report or concur in the making of the same. The defendant in error, until the final act of the condemnation proceedings,—until the filing of the report, which in law is its making,—was entitled to the judgment of a full board as to the damages by him sustained.

The plaintiff in error, however, to uphold the report, replies upon the statutory rule of construction to be found in the fourth paragraph of section 1, c. 104, Gen. St. 1889, which reads as follows: "Words giving a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority." This statute, however, gives no aid to the plaintiff in error. It does not provide that boards or tribunals authorized to be made of three or more persons may nevertheless be made of a majority of such number, without the appointment of the full number, or that a majority of the full number may act without notice to, or in disregard of, the right of the remainder to participate in the action taken. It declares nothing more than that a majority of a body of three or more, actually in existence as members of a tribunal, may determine the action of such tribunal without the concurrence of the others. The case of *Paola & F. R. Ry. Co. v. Commissioners of Anderson Co.*, 16 Kan. 302-310, was determined in accordance with this view of the statute in question, and the authorities cited to us upon this point support the same construction. *Wentworth v. Farmington*, 49 N. H. 119; *Schenck v. Peay*, 1 Dill. 208, Fed. Cas. No. 12,451; *Schenck v. Peay*, Woolw. 176, Fed. Cas. No. 12,450. Other cases less directly in

point, but supporting the same general view, are *Inhabitants v. Lord*, 51 Me. 599; *Cassin v. Zavalla Co.*, 8 S. W. 97, 70 Tex. 419; *State v. Pinkerman*, 28 Atl. 110, 63 Conn. 176; *Keeler v. Frost*, 22 Barb. 400. We do not regard the decision in *Quayle v. Railroad Co.*, 63 Mo. 465, as opposed to the views herein expressed. In that case the power of two of a body of three, one of whom had resigned before the action in question was taken to condemn land for right of way purposes, was affirmed. Unlike the law of this state, there was no statute providing for the filling of vacancies in such boards; and upon the score of such fact the court distinguished the case before it from an earlier one, in which a contrary view had been taken because of the existence of a statute providing for the filling of vacancies in the kind of board then under consideration. That which is a sufficient consideration, as against any claims of technicality in the rule here announced, is the fact that proceedings to condemn the land of a citizen for right of way purposes are in invitum. They are against his will and for the sequestration of his property. The authority for such proceedings must be strictly pursued. The remarks of Mr. Justice Miller, presiding at the circuit in *Schenck v. Peay*, supra, state a rule of unquestioned existence and authority: "Nothing is better settled in the law of this country than that proceedings in pais for the purpose of divesting one person of title to real estate, and conferring it on another, must be shown to have been in exact pursuance to the statute authorizing them, and that no presumption will be indulged in favor of their correctness."

Questions are raised by the plaintiff in error as to the qualifications of certain jurors, and as to certain instructions asked in its behalf, and as to others which were given over its objection. A question is also raised as to the competency of a certain witness to testify to land values. And objections are made that testimony was erroneously introduced in proof of damages caused by the washing out of a ford under a railroad bridge, on account of the manner in which the piles of the bridge were driven, and that testimony was erroneously received to establish a claim for damages caused by cattle trespassing on the land of defendant in error, through fences which the railroad company threw down and left open in the construction of its road, and also for damages caused by the digging of pits upon the land outside the right of way. As to one of these last two claims of damage, it does not appear to be within the allegations of the petition. As to the other, the proper method of proof was not employed. The largest sum estimated as to one of them by any witness is \$75, and as to the other is \$108.80. The plaintiff in error is not entitled to a reversal of the case on account of the erroneous admission of evidence in support of these two

claims of damage. How much, if anything, may have been allowed therefor by the jury, cannot be told; certainly nothing beyond the largest estimates made by the witnesses. These amounts can be eliminated from the judgment, with the interest thereon, and it is ordered abated to such extent.

As to the other claim for damage, it is sufficient to say that the jury, in reply to an interrogatory upon the subject, stated that they found nothing for defects in the construction of the road. Consequently the plaintiff in error has not been prejudiced by the admission of testimony concerning the destruction of the ford through the faulty construction of the bridge. As to all the other claims of error, it is sufficient to say that none of them are substantial, and the judgment of the court below, modified as above indicated, is affirmed. All the justices concurring.

(68 Kan. 339)

LANCASHIRE INS. CO. v. BOARDMAN.

(Supreme Court of Kansas. June 5, 1897.)

INSURANCE—MORTGAGE CLAUSE—CONSTRUCTION—BREACH OF CONDITIONS.

Where a policy of insurance is issued to a mortgagor, and at the same time a mortgage clause is attached, by which it is stipulated that the loss, if any, shall be payable to a mortgagee therein named, or its assigns, and that the insurance as to the mortgagee shall not be invalidated by any act or neglect of the owner, and that the provisions of the mortgage clause shall take precedence over the provisions of the policy, *held*: (1) That the mortgage clause will be liberally construed, and that a breach of the terms of the original policy which have especial relation to the risk as between the mortgagor and the insurer will not invalidate the policy in a suit brought by the mortgagee, unless the provision violated is consistent with the mortgage clause; (2) that the commencement of a suit to foreclose the mortgage, and the appointment of a receiver to take charge of the property, are not such a breach as will avoid a policy containing a clause providing that the policy shall be avoided upon the commencement of proceedings of foreclosure, or any change in title or possession, whether by legal process or judicial decree, such a clause being inapplicable to the risks as between the insurer and the mortgagee whose interest in the insured property is not impaired or diminished by such proceedings.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by W. F. Boardman against the Lancashire Insurance Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Thos. C. Wilson and Myron H. Beach, for plaintiff in error. Holmes & Haymaker, for defendant in error.

ALLEN, J. Boardman brought suit on a policy of insurance issued by the plaintiff in error to Flora Cowley, on the 5th day of December, 1889, for \$2,500, alleging in his petition the execution of the policy, payment of the premium, and the destruction of the property insured by fire. It was also alleged that

the Sedgwick Loan & Investment Company loaned Flora Cowley the sum of \$2,500, for which she executed her bond, secured by mortgage covering the property insured; that the said Flora Cowley, with the consent of the duly-authorized agent of the defendant, assigned the policy of insurance as additional security for the loan to the Sedgwick Loan & Investment Company; that said investment company duly assigned the mortgage and debt secured thereby to the plaintiff; and that the defendant's agent attached to the policy what is denominated a "mortgage clause," which bears date the day on which the policy was issued, and the essential parts of which read as follows: "Policy No. 1,510,005, in Name of Flora Cowley, Agency at Wichita, Kansas. Loss, if any, payable to the Sedgwick Loan and Investment Company, mortgagee or trustee, or its assigns, as its interest may appear, as herein provided. It being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided, that the mortgagee or trustee or assigns shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy; and provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee or trustee or assigns on reasonable demand, and after demand made by this company upon, and refusal by, the mortgagor or owner to pay, according to the established schedule of rates. It is also agreed that whenever this company shall pay the mortgagee or trustee or assigns any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor exists, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be made, under any and all securities held by such party for the payment of such debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured, or said company may, at its option, pay the mortgagee or trustee or assigns the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive, from the party to whom such payment shall be made, an assignment and transfer of said debt, with all securities held by said parties for the payment thereof. The foregoing provisions and agreements shall take precedence over any provision or condition conflicting therewith contained in said policy. This clause is attached to, and is made a part of, the said policy, from the fifth day of December, 1889." For a seventh defense, the defendant set up in its

answer: "That the said policy of insurance issued by it, bearing date December 5, 1889, and numbered 1,510,005, contains the following provision, condition, and agreement, constituting a part thereof, and one of the considerations therefor, to wit: '(1) * * * Upon the commencement of proceedings of foreclosure, or upon a sale under a deed of trust, * * * or any change take place in the title or possession, except in case of succession by reason of the death of the assured, whether by legal process or judicial decree or voluntary transfer or conveyance, * * * then, and in every such case, this policy is void.' That the said W. F. Boardman, plaintiff herein, heretofore, to wit, on or about the first day of January, 1891, brought suit against the said Flora Cowley and others in this court, to foreclose the mortgage referred to in the petition in this action." It was then averred that, on the application of the plaintiff, a receiver had been appointed, who took possession of the mortgaged property, and that, by reason thereof, the policy was rendered void, and the defendant discharged from all liability thereunder. To this part of the answer the plaintiff demurred, and the demurrer was sustained by the court.

The only question presented is as to the correctness of this ruling. An extended argument has been made, and elaborate briefs are filed, on behalf of the plaintiff in error, citing many authorities supposed to have application to the case. The contention is that, while the mortgage clause provides that no act or neglect of the mortgagor shall invalidate the policy, the act of the mortgagee in commencing foreclosure and obtaining the appointment of a receiver avoids it. The language in the answer copied from the policy of insurance is picked out from a long provision, stating many grounds of forfeiture. The concluding sentence of the mortgage clause is: "The foregoing provisions and agreements shall take precedence over any provision or condition conflicting therewith, contained in said policy." The policy and mortgage clause appear to have been issued contemporaneously. The policy of insurance proper is written on a blank form adapted to the insurance of the owner against loss. The provisions contained in the clause from which the excerpt copied in the defendant's answer is taken are applicable to a policy issued to the owner, but many of them are wholly inapplicable to a policy issued to a mortgagee. The mortgage clause attached changes the insurance contract in the very essential particular of making the mortgagee the beneficiary of the policy so long as the mortgage debt remains unpaid, and he alone is entitled to recover in case of a loss. *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682. The purpose of the clause in the original policy, so far as it is lawful and enforceable, is to protect the insurance company against any material change of the situation calculated to increase the hazard of the insurer. It provides against transfers of the

property, foreclosure, or change in title or possession; and it is readily apparent that the insurer might be unwilling to continue a risk when the title of the insured was becoming impaired, either by a transfer of his interest, by its incumbrance, or by the institution of legal proceedings for the purpose of effecting a transfer of the legal title based on his own default in a mortgage contract. But these provisions appear in an entirely different light when construing the policy with the mortgage clause attached, in an action brought by the mortgagee. The commencement of proceedings to foreclose a mortgage by the mortgagee is not prohibited by the express terms of the mortgage clause, nor by any fair implication therein contained. If prohibited at all, it must be by reason of the provisions of the policy quoted. Construing both the original policy and the mortgage clause together, in the light of the plain purpose to insure the interest of the mortgagee, the commencement of foreclosure proceedings cannot be held to be a violation of any stipulation forbidding the mortgagee. The insurer must have known when attaching the mortgage clause that it might become necessary for the mortgagee, in order to protect his interest under the mortgage, to commence foreclosure proceedings; that this would not have a tendency to diminish the interest of the mortgagee in the property, but rather to increase it. It is settled that an increase of the interest of the insured is no ground for a forfeiture of the policy. *Insurance Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079.

Nor does the appointment of a receiver to take charge of the property amount to such a change of possession as would vitiate the insurance. The receiver takes possession as an officer of the court, for the benefit of the parties interested in the litigation. *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019.

We have examined the authorities cited by counsel for plaintiff in error, and, while there is some language used in some of the cases tending to support his contention, no case is brought to our attention that seems controlling in this. The case of *Dodge v. Insurance Co.*, 4 Kan. App. 415, 46 Pac. 25, was on a policy with a similar mortgage clause attached, and the questions involved in this case were there resolved adversely to the contention of the plaintiff in error. We find no error in the ruling of the court sustaining the demurrer, and it is affirmed. All the justices concurring.

(58 Kan. 355)

MENDENHALL v. BURNETTE, District Judge, et al.

(Supreme Court of Kansas. June 5, 1897.)

DEATH OF JUDGMENT DEBTOR—EXECUTION—LEVY—MANDAMUS TO CLERK.

1. After a judgment rendered against the debtor in his lifetime has been duly revived against his executors, who hold the legal title to the lands belonging to his estate, by the terms of his will, execution may issue on the judgment against

such lands as are bound by the lien of the judgment; and no resort to the probate court, either for a classification of the plaintiff's demand, or for an order for the sale of the property, is necessary.

2. The execution on such a judgment can only be levied on the property bound by the lien of the judgment. It cannot be levied on personal property which passed into the hands of the executors, nor on lands to which the lien did not attach.

3. The clerk of the district court, having custody of the record of such a judgment, may be compelled by mandamus to issue execution thereon, where it appears that an application to the judge of the district court of the county for an order for such execution would be fruitless.

(Syllabus by the Court.)

Application by W. S. Mendenhall for a writ of mandamus against J. A. Burnette, judge of the district court of Cowley county, and others. Writ awarded.

Asp, Shartel & Cottingham, Waggener, Horton & Orr, and McDermott & Johnson, for plaintiff. Madden & Buckman, for defendants.

ALLEN, J. This is an action to compel the clerk of the district court of Cowley county to issue an execution on a judgment rendered in favor of the plaintiff against M. L. Read and numerous other parties in the lifetime of said Read, who died soon after the rendition of the judgment. The judge of the district court and Read's executors are made parties defendant; it being alleged that, in a suit brought by the executors against the sheriff to restrain the service of a former execution, Burnette, as judge of the district court of Cowley county, had held that execution could not lawfully be issued to enforce the judgment. The question as to the propriety of making the judge of the district court and the executors parties defendant, where no performance of duty is demanded of them, is suggested, but not seriously urged as a ground for dismissal of the action. Whatever may be said in that respect, it is clear that the principal question in the case is one concerning the duty of the clerk to issue execution, and that he is a proper and necessary party to the determination of the case. There certainly is no impropriety in making the executors, whose interests are at stake, also parties to the proceeding, in order that they may be heard and protect their interests. The judgment sought to be enforced was rendered on the 16th of July, 1891. M. L. Read died on the 30th of September, 1891. On the 19th of September, 1892, the judgment was revived against W. C. Robinson and S. H. Myton, as executors of Read's will. Prior to that time proceedings in error had been instituted in this court to reverse the judgment, and a bond had been duly given to stay execution. The petition in error was afterwards dismissed. Thereafter, on the 11th of June, 1896, the plaintiff caused an execution to issue on the judgment, which was levied by the sheriff on various tracts of real estate in Cowley county owned by Read at the time of his death, and on which the judgment was then a lien. The executors on the 9th of

July, 1896, made application to the probate court for authority to sell the same lands for the payment of debts, expenses, and legacies, which was granted on the 27th of July. On the following day the executors brought suit in the district court of Cowley county against the sheriff to enjoin him from selling the property levied on. On their petition the probate judge granted a temporary injunction, which the judge of the district court, on motion heard before him, refused to vacate, and on a demurrer to the petition in the injunction case the district court made a like ruling overruling the demurrer.

The question involved in the case is a nice one. May a judgment rendered against a person in his lifetime be enforced by execution against his lands after his death, and after revivor against his executors? Very full and satisfactory briefs are presented by counsel, and we have the satisfaction of an able presentation of both sides of the controversy. On behalf of the defendant it is claimed that the jurisdiction of the probate court over the estate of a deceased person is exclusive, except as to property subject to a specific lien. Attention is called to various provisions of the statutes bearing on the management of estates of deceased persons. By paragraph 2116, Gen. St. 1889, it is provided that "the probate courts shall * * * have and exercise the jurisdiction and authority provided by law respecting executors and administrators, and the settlement of the estates of deceased persons." By the act respecting executors and administrators, and the settlement of estates of deceased persons, executors and administrators are required to return an inventory, not only of the personal estate to be administered, but also of the real estate of the deceased. Section 114 of said act provides, "As soon as the executor or administrator shall ascertain that the personal estate in his hands will be insufficient to pay all the debts of the deceased, and the charges of administering the estate, he shall apply to the probate court for authority to sell the real estate of the deceased, or any interest he may have in any real estate situated within this state, subject to the payment of debts." By section 80 of the same act, demands against the estate of a deceased person are classified, the fourth class being "judgments rendered against the deceased in his lifetime; but, if any such judgments shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid without reference to classification, except the classes of demands mentioned in the first and second subdivisions of this section shall have precedence of such judgments." Section 86 provides that a demand against an estate may be established by judgment of a court of record, and a copy of the judgment exhibited to the probate court, but the estate shall not be liable for costs in a proceeding commenced within one year after the date of the letters of administration. Provision is al-

so made in section 134 of the act for the sale by executors and administrators, under the direction of the probate court, of the lands of the decedent, for the payment of his debts, and the application of the proceeds of such sale. "Sec. 134. The money arising from the sale of real estate shall be applied in the following order: (1) To the discharge of the costs and expenses of the sale and percentage and charges of the executor or administrator thereon, for his administration of the same. (2) The payment of mortgages and judgments or other liens, or claims upon the estate sold, according to their respective priorities, so far as the same operated as a lien on the estate of the deceased at the time of his death, which shall be apportioned and determined by the court. (3) To the discharge of claims and debts, in the order mentioned in article 5 of this act."

It is contended that by these provisions the legislature has confided the entire management of the estate of a deceased person not incumbered with specific liens at the time of his death to the probate court; that divided control is not desirable, and was not contemplated by the legislature, but that it is the policy to vest in one tribunal full jurisdiction, to the end that the property may be best preserved and distributed to those entitled to it, or to the proceeds of the sale of it. On the other hand, the plaintiff cites section 439 of the Code of Civil Procedure, which reads: "If either or both parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered, and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party." And also section 512, which provides: "The death of a person under arrest in an execution does not satisfy the judgment; but an execution may issue thereon as if no arrest had been made." It is contended by counsel for the plaintiff that ever since the enactment of St. 13 Edw. I. c. 45, the English practice has been to revive a judgment by a writ of scire facias against the personal representatives, and thereupon to award execution absolutely against them, unless they could show a lack of assets, and that the practice of revivor by scire facias, and of awarding execution against the property of the deceased, still prevails in England and most of the United States. This view seems to be well supported by the authorities cited. Black, *Judgm.* §§ 490, 493; *Crow. Ex'rs & Adm'rs*, §§ 701, 717; 21 *Am. & Eng. Enc. Law*, 870; *Denege v. Haun*, 13 *Iowa*, 240; *Humphreys v. Lundy*, 37 *Mo.* 320; *Lavell v. McCurdy's Ex'rs*, 77 *Va.* 763; *Frierson v. Harris' Heirs*, 94 *Am. Dec.* 220. That the district court has jurisdiction of actions to enforce specific liens on the real property of a deceased person is well settled, and not controverted by counsel in this

case. *Brenner v. Bigelow*, 8 *Kan.* 406; *Shoemaker v. Brown*, 10 *Kan.* 383; *McLean v. Webster*, 45 *Kan.* 644, 28 *Pac.* 10. Indeed, the powers of the probate court would be quite inadequate to the adjustment of all the various liens, claims to, and interests in real estate which are frequently necessary to be determined in actions for the foreclosure of a mortgage or other specific lien. In this case the lien of the judgment extends to all of the lands owned by the debtor at the time of his death, in the county in which the judgment was rendered, and is created by section 419 of the Code of Civil Procedure. That the lien of a judgment on the realty of the judgment debtor continues after his death is explicitly recognized by the sections of the statute relating to executors and administrators above quoted. It is not merely given preference of payment because the claim was reduced to judgment in the lifetime of the debtor, but the continuing force of the lien is expressly recognized. Read alone, section 439, *Code Civ. Proc.*, would seem to authorize the revivor of a judgment, and an award of a general execution against real or personal property, or both, and section 512 seems to strengthen that construction. The contention of counsel for defendant in error that the Code must be construed in the light of the other statutes bearing on the subject, and that, so far as possible, full force and effect must be given to all provisions of the statutes, is undoubtedly sound. The task before us is to harmonize as far as possible the provisions of the act relating to executors and administrators with those of the Code. It has already been settled by the cases above cited, and others following them, that the jurisdiction of the probate court over the estates of deceased persons is not entirely exclusive, but that the district court may take cognizance of such matters in a proper case. We are cited to the cases of *Johnson v. Cain*, 15 *Kan.* 532, *Stratton v. McCandless*, 27 *Kan.* 296, and *Carter v. Christie*, 57 *Kan.* 492, 46 *Pac.* 964, as sustaining the proposition that, where jurisdiction of the probate court properly attaches, it is exclusive. Other cases are also cited holding that where there is no lien at the time of death the jurisdiction of the probate court in making distribution of the property is exclusive. The cases of *Halsey v. Van Vliet*, 27 *Kan.* 476, *Kothman v. Skaggs*, 29 *Kan.* 5, and *Markson v. Kothman*, 29 *Kan.* 515, are more nearly in point. In the case of *Halsey v. Van Vliet*, *supra*, it appears that two executions were issued on the judgment after the death of the debtor. Afterwards, and more than a year after the date of the judgment, it was revived with the consent of the administrator, the journal entry of revivor closing with the words: "That said judgment and interest and costs of this proceeding be paid in due course of administration of said estate." Afterwards, and more than five years after the date of the judgment, two other executions were issued. It was held: "First, that the language at the close of the order of revivor

did not have the effect to prevent the issue of execution, or the collection of the judgment in the ordinary way; second, that the lien of the judgment was not lost, although the judgment was not revived until more than a year after the death of M." But it was also held that the judgment was dormant when the last execution was issued, and therefore the sale under it was a nullity. In the case of *Kothman v. Skaggs*, supra, in speaking of a judgment which was set up by the creditor in an action to foreclose a mortgage after the death of the debtor, it was said by Mr. Justice Valentine: "The judgment then ceased to be a judgment against any living person, but it did not become a nullity. It was still a judgment, in a limited sense. It was a judgment in abeyance, a dormant judgment, and one that might at any time within one year from Myers' death, or from the appointment of his administrator, be revived against the representatives or successor of the deceased; and this without their consent. And it might also be so revived at any subsequent time, with the consent of such representatives and successor; and, when it should be revived, it would be revived with all its attributes, with all its force and efficacy, and, indeed, with everything which it possessed on the day prior to the decease of the judgment debtor." In *Markson v. Kothman*, supra, it was held that upon the foreclosure of a mortgage, and sale of the mortgaged premises, it was not necessary that the proceeds should be returned into the probate court, but that they would be applied directly by the district court to the satisfaction of the liens on the property, including a judgment lien. Some of the language used in these decisions would seem to imply that a general execution might issue, after a revivor of the judgment, against all of the property of the decedent, without reference to any lien; but, as the court was speaking in each case with reference to a judgment that was a lien on the property in controversy, the authority of the decisions must be limited to the precise point involved. The case of *Achenbach v. Coal Co.*, 2 Kan. App. 357, 42 Pac. 734, is not in conflict with these decisions. Though some of the language used tends to support the defendant's contention, it must be considered as applying to the case under consideration. Various definitions of the word "lien" are to be found in the books: "A hold or claim which one person has upon the property of another as a security for some debt or charge." Bouv. Law Dict. "A tie that binds property to a debt or claim for its satisfaction." And. Law Dict. "A right to possess and retain property until some charge attaching to it is paid or discharged." Bur. Law Dict. "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." Code Civ. Proc. Cal. § 1180. By giving a judgment creditor a lien on the lands of the debtor within the county, the legislature must have intended to confer on the creditor the right

to resort directly to the property subject to the lien for the payment of the debt. Without this, how could the creditor be said to have any hold on the property? The case of *Kothman v. Skaggs*, supra, holds that the judgment creditor may set up his judgment lien in an action brought by a mortgagee having a junior lien, and that the land may be sold, and the proceeds applied to the payment of the claims in the order of their priority. This being so, if the proceeds of the land should be insufficient to pay the judgment the sale would needs be for the benefit of the judgment creditor only, and the mortgage lien would be without force or value. We are unable to perceive how the plaintiff's right to proceed against the land can be increased by the action of a third party who chances to hold an inferior incumbrance. Section 134 of the Code, concerning executors and administrators, clearly recognizes the right of creditors having liens by mortgage, judgment, or otherwise to payment in the order of priority. The fourth clause of section 80 does not in any manner conflict therewith, for it refers to judgments, whether liens on property of the debtor or not, and places all that are not such liens in the fourth class. There can be no sound policy in requiring further proceedings in court after a judgment has been revived and execution authorized. The ordinary process of execution issuing on the judgment is as direct, simple, and inexpensive as any other, and may be employed by the creditor to enforce his lien. So far as the cases relied on by the plaintiff give countenance to the proposition that a general execution may issue against property on which the judgment creditor has no lien, we think the language used was obiter dictum, and that it was never the purpose of the legislature to authorize an execution against personal property not seized or subject to any specific lien at the time of the death of the creditor, or against lands on which the judgment was not a lien prior to the debtor's death. The execution authorized is special to enforce the lien, not general against all the property.

It is claimed that the action is barred because the judgment was not presented to the probate court for classification within three years, but it necessarily follows from the conclusion reached that it was not necessary for the plaintiff to resort to the probate court at all. He had a right to proceed directly against the land by execution. His right to payment out of the land depended only on the condition of the real estate as to incumbrances. Whatever priority his claim had, he had a right to insist on and enforce. For aught that appears in the case, his is the only claim to which the land is subject. The action pending in the district court to enjoin the sheriff from selling the land, and to which the plaintiff was not a party, does not in any manner affect the plaintiff's right to have another execution issued. *Easter v. Traylor*, 41 Kan. 493, 21 Pac. 606. A peremptory writ

will be awarded against the clerk, requiring him to issue execution on the judgment, to be levied on the lands owned by Read at the time of his death, in Cowley county. All the justices concurring.

(3 Kan.App. 883)

PRESTON v. BARBER ASPHALT-PAVING CO.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1897.)

APPEAL — JURISDICTION — CERTIFICATE OF JUDGE.

The certificate of the judge of the district or superior court trying a case involving less than \$100, to confer jurisdiction, must be incorporated in the record presented to this court.

(Syllabus by the Court.)

Error from district court, Sedgwick county.

Action by F. P. Preston against the Barber Asphalt-Paving Company. Judgment for defendant, and plaintiff brings error. Dismissed.

Bentley & Hatfield, for plaintiff in error. Stanley & Vermillion and Kos Harris, for defendant in error.

SCHOONOVER, J. Plaintiff in error commenced an action in justice's court against defendant in error to recover \$18, with interest from the 1st day of August, 1893. The answer of the defendant alleges that plaintiff is indebted to it in the sum of \$110, with interest from the 1st day of June, 1893. In the district court, defendant objected to the introduction of any evidence to prove the allegations in plaintiff's bill of particulars, for the reason that the facts stated in said bill of particulars were not sufficient to constitute a cause of action against the defendant and in favor of the plaintiff. The court sustained the objection. The plaintiff excepted. No further evidence was offered. Judgment was rendered in favor of defendant for costs. The plaintiff brings the case here, and the defendant moves to dismiss for the following reasons: "First. The petition in error of the said plaintiff in error filed in said action, and the record filed therewith, fails to show that this court has jurisdiction of the subject-matter of said action. Second. That the petition in error in said action filed by said plaintiff in error, and the record filed therewith, shows upon its face that the amount in controversy, exclusive of costs, does not exceed the sum of one hundred dollars; and there is no certificate, incorporated in the record or attached thereto, of the judge of the district court of Sedgwick county, Kansas, wherein the said case was tried, and wherein the judgment sought to be reversed in this action was rendered, that this case involves the tax or revenue laws, or the title to real estate, or that it is an action for damages, in which slander, libel, malicious prosecution, or false imprisonment is declared upon, or that it involves the constitution of this state, or the constitution, laws, or treaties of the United States." The defendant below is satisfied with the judgment. The amount in controversy is less than \$100, exclusive of costs. plaintiff's appeal therefore rests upon the certificate of the district judge trying the case, which is as follows: "In the District Court of Sedgwick County, Kansas. F. T. Preston, Plff., vs. The Barber Asphalt-Paving Company, Deft. Cause No. 17,237. Certificate of Jurisdiction. I, C. Reed, judge of the district court of Sedgwick county, Kansas, hereby certify that the above-entitled action was tried or heard upon objection to the introduction of evidence in support of plaintiff's claim; that, while the claim of plaintiff is less than one hundred dollars, defendant has a counterclaim or set-off for more than one hundred dollars; that the real question involved in the action is a constitutional one, involving the constitution of the United States of America and the constitution of the state of Kansas, thereby conferring jurisdiction for a hearing on appeal before the supreme court, as provided in section 542a of the Code. C. Reed, Judge of the District Court of Sedgwick County, Kansas." The above certificate was not incorporated in or attached to the original record. The original record was filed in the supreme court November 20, 1893. The certificate of the clerk of the district court attached to the record bears date November 17, 1893. The above certificate of the judge of the district court trying the case is not dated, does not appear to have been filed in the district court, and was not filed in the supreme court until the 15th day of December, 1893, more than 20 days after the record in the case was filed. The defendant had no notice of the filing of the certificate. No permission was given by the supreme court to file it, or to attach it to the original record. Section 542a of the Code of Civil Procedure provides, "And when the judge of the district or superior court, trying the case involving less than \$100.00, shall certify to the supreme court that the case is one belonging to the excepted classes." While this section does not expressly provide within what time the certificate shall be made and filed, it is clearly intended that it should be made at the time of, or prior to, the settling of the case-made. There is nothing in the record to indicate that this certificate was made at the time of, or prior to, the settling of the case-made. It never was attached to the record, or formed a part of it. We think this practice cannot be upheld. The certificate of the judge of the district or superior court trying a case involving less than \$100, to confer jurisdiction, must be incorporated in the record presented to this court. The case will be dismissed. All the judges concurring.

(5 Kan. App. 692)

HARDWICK v. RUTTER.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1897.)

PLEADING—BILL OF PARTICULARS—APPEAL—REVIEW.

1. A bill of particulars which says: "Wm. Hardwick, Dr., to H. Rutter. For loss of cattle by Texas fever, and damage to pasture, three hundred dollars (300)."—is sufficient to challenge the judicial examination of the justice; and it is not error for the district court to allow such a bill of particulars to be amended in a case which has been appealed to said court.

2. When certain exhibits which were introduced in evidence are not contained in the record, we cannot say that the evidence is not sufficient to sustain the verdict.

(Syllabus by the Court.)

Error from district court, Greenwood county.

Action by H. Rutter against William Hardwick. Judgment for plaintiff, and defendant brings error. Affirmed.

Clogston & Fuller, for plaintiff in error. R. P. Kelley, for defendant in error.

DENNISON, P. J. This action was originally begun in justice's court by H. Rutter, as plaintiff, against William Hardwick, as defendant, by the filing of the following bill of particulars: "Wm. Hardwick, Dr., to H. Rutter. For loss of cattle by Texas fever, and damage to pasture, three hundred dollars (300)." The defendant below filed a motion to dismiss the action for the reason that no proper bill of particulars had been filed. The justice overruled the motion, and the case proceeded to trial, and judgment was rendered against the defendant below for \$112 and costs; and he appealed the case to the district court of Greenwood county, Kan., where the motion to dismiss, upon the same grounds set forth in the justice's court, was renewed. The motion to dismiss was by the court sustained, and, before an order of dismissal was made, plaintiff below was permitted to file an amended bill of particulars. Judgment was rendered against Hardwick, and he brings the case here for review.

The plaintiff in error contends that the bill of particulars filed before the justice of the peace is not sufficient to challenge the judicial examination of the court, and is, for that reason, not subject to amendment. After a careful examination of the statutes and the decisions of our supreme court, we are satisfied that the court properly permitted the bill of particulars to be amended. The amended bill of particulars alleges that the defendant below placed upon the open range, and in plaintiff's pasture, about 395 head of wild and undomesticated cattle, which were infected with, and liable to impart and communicate, Texas, splenic, or Spanish fever, all of which said defendant below had reason to, and did, well know; also, that the cattle of plaintiff below became infected with said disease from the cattle of said defendant, and six cows and heifers died, and others became sick with said

disease, thereby greatly lessening their value, all to the damage of plaintiff below in the sum of \$300. The plaintiff in error contends that there is no allegation in the bill of particulars, and the record contains no evidence, that these cattle were diseased or liable to impart the disease, and, if they were, that there was no evidence that he had any knowledge of such facts. The amended bill of particulars certainly contains sufficient allegations. Exhibits A and B, which the record (on pages 6 and 7) shows were introduced in evidence, do not appear in the record. We cannot tell what they contained, and cannot therefore say that the evidence is not sufficient to sustain the verdict. The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 610)

WALKER et al. v. BLOUNT.

(Court of Appeals of Kansas, Southern Department, E. D. June 9, 1897.)

APPEAL—PARTIES.

Where a money judgment was rendered against three parties, two of whom were declared to be liable as principals, and one as surety, *held*, that the latter is a necessary party to the proceedings in error brought to reverse such judgment.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by F. M. Blount against R. L. Walker, Frank Playter, and others. Judgment for plaintiff, and defendants Walker and Playter bring error. Dismissed.

B. F. Pursel, W. C. Webb, and Frank Playter, for plaintiffs in error. Van Gundy & Cliggett, for defendant in error.

MILTON, J. A motion to dismiss has been filed in this case, based on an alleged defect of parties, it being contended that Harriet Holden should have been made a party to the proceedings in error. It appears that the defendant in error, in June, 1892, brought an action in the district court of Crawford county, against Harriet Holden, Frank Playter, and others, to recover a personal judgment against them, and to foreclose a real-estate mortgage. The mortgage and note sued on had been executed by Mrs. Holden and her deceased husband, and Playter had purchased the real property from her under a bond for a deed, in which he agreed to assume and pay the existing mortgage on said property and all taxes subsequent to the year 1888. On December 7, 1892, a judgment was rendered against Mrs. Holden in the sum of \$880.75, and for foreclosure of the mortgage, and the case was continued for service as to Playter. On March 6, 1893, Mrs. Holden filed her answer and cross petition, which states it was done by leave of the court as to Playter and R. L. Walker. The latter had not been made a party, but she asks in her cross petition that he be made a party defendant. The tran-

script does not show that such an order was made by the court, but a summons was issued on April 24, 1893, upon a *præcipe* filed by Mrs. Holden's attorney, for service on Walker, the return showing that he was served with the summons on April 29, 1893. The answer and cross petition of Mrs. Holden set up the contract of sale between herself and Playter of the mortgaged premises, hereinbefore mentioned, and that, before he had performed the conditions of the bond for deed, said Playter sold the real property to Walker, and that a deed had been made by Mrs. Holden, at Playter's request, conveying said property to Walker, who, by the terms of said deed, assumed and agreed to pay the mortgage thereon. On June 8, 1893, an order of sale was issued under the decree of foreclosure of December 7, 1892. On July 6th the court rendered another judgment in the action. The journal entry shows that Playter and Walker had each been duly served with summons, in time to have pleaded, but had failed to do so, and wholly made default. The court then proceeded to render judgment as follows: "It is therefore ordered, adjudged, and decreed that plaintiff have and recover of and from the defendant Harriet Holden, as surety, and the defendants Frank Playter and R. L. Walker, as principals, the full sum of \$942.40, with interest thereon at the rate of twelve per cent. per annum from the 6th day of July, 1893." After a further finding in regard to taxes, the court rendered and entered the following judgment: "It is therefore ordered, adjudged, and decreed that plaintiff, F. M. Blount, have and recover of and from the defendants Harriet Holden, Frank Playter, and R. L. Walker the sum of \$126.10, and execution is awarded therefor, in the order herein-after provided." The mortgaged property was sold by the sheriff on July 10, 1893, for \$100.

The question presented is: Would the reversal of the judgment of the trial court, which is here sought by Playter and Walker, prejudicially affect Mrs. Holden, who is not a party to these proceedings? It seems plain that such would be the effect of a reversal. If the judgment were reversed as to Walker and Playter, it would still be in force against Mrs. Holden. But counsel for plaintiff in error say that the judgment rendered in December, 1892, was a separate judgment against Mrs. Holden, and was for all the relief the plaintiff below sought against her, and that no other judgment could be rendered in the same action against her; also, that the fact that the court included her in the judgment entered July 6, 1893, against Playter and Walker, neither increased nor diminished her liability as to plaintiff below. While this may be true, it is also true that neither Walker nor Playter could complain of the personal judgment entered against Mrs. Holden in December, as they are not parties to it. They are seeking to reverse a joint judgment, in which they are declared to be principals, and Mrs.

Holden a surety. She is deeply interested in the proceedings, but plaintiffs in error have failed to make her a party. This case comes clearly within the rule so frequently announced by our supreme court and by this court. *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911; *Paving Co. v. Botsford*, 50 Kan. 381, 31 Pac. 1106; *Mortgage Co. v. Lowe*, 53 Kan. 39, 35 Pac. 829; *Pierce v. Downey*, 56 Kan. 250, 43 Pac. 223; *Hyde Park Inv. Co. v. First Nat. Bank*, 56 Kan. 49, 42 Pac. 321; *Matthewson v. Senior*, 3 Kan. App. 117, 42 Pac. 827; *Bonebrake v. Insurance Co.*, 3 Kan. App. 708, 41 Pac. 67; *Lumber Co. v. Haines*, 3 Kan. App. 316, 45 Pac. 97; *Douglass v. Heady* (Kan. App.) 47 Pac. 134, following *Manufacturing Co. v. Richardson* (Kan. Sup.) 47 Pac. 537. The petition in error will be dismissed. All the judges concurring.

(5 Kan.App. 591)

CITY OF PAOLA v. HAMPTON.

(Court of Appeals of Kansas, Southern Department, E. D. June 9, 1897.)

REVIEW ON APPEAL—INSTRUCTIONS.

1. An appellate court cannot inquire into the question of negligence in a damage action, where the issue was properly submitted by the trial court, and no exceptions were taken by either party to the instructions given, and the trial court rendered judgment for the plaintiff upon the verdict of the jury, which was in his favor, the evidence tending to prove the allegations of the plaintiff's petition.

2. The instructions which were refused were either included in the general charge, or were not applicable under the facts proven, and were properly refused.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by Mary C. Hampton against the city of Paola. Judgment for plaintiff. Defendant brings error. Affirmed.

W. B. Crossan and A. Lane, for plaintiff in error. W. T. Johnston and George Kingsley, for defendant in error.

MILTON, J. This action was brought by Mary C. Hampton against the city of Paola, a city of the second class, for damages alleged to have been sustained by her on December 20, 1890, caused by her falling into a basement stairway which projected into a public sidewalk on Peoria street, in said city. Said street extends east and west, and the building under which the basement in question is located stands on the north side of the street, and faces south. The stairway leading to said basement begins in the sidewalk (which is about 12 feet wide) in front of said building, and about 4 feet from the same. That part of the stairway which occupies a part of the sidewalk is guarded by an iron railing on the east and on the west side thereof, with the south end of the stairway open for passage to and from said basement. The door leading to the first floor of said building is immediately east of the east side of said stairway. The

basement had been used, until very recently before the injury complained of, as a retail clder store, and prior to that, for about two years, as a second-hand store. The first floor was occupied by a merchant. It appears that Mrs. Hampton was approaching the front door of this store, when several men, who were carrying a stove out of it, came suddenly in front of her, when she quickly stepped back, and fell into the stairway. The fall rendered her unconscious, and she remained so for several hours. Her head and shoulders were injured, and her collar bone broken, and she suffered much pain for a long time. It was several months before she recovered the full use of her left arm. She was 62 years old, and resided with her husband on their farm near Paola. She presented a duly-verified claim for \$1,000, as damages for her injuries, to the mayor and city council of Paola, and said claim was rejected. Afterwards she brought this action to recover \$1,000 as damages, in her petition alleging that the city had "knowingly, willfully, negligently, and unlawfully permitted the sidewalk" along the south side of the building, where the injury was received, "to be and remain in an unsafe and dangerous condition for persons to travel thereon, by permitting to be constructed upon said part of said sidewalk an open cellar stairway of the depth of six feet"; and that "by reason of said part of the sidewalk being in an unsafe condition, as aforesaid, without any fault or negligence on her part, the plaintiff fell in said open cellar stairway, and was thereby greatly injured," etc. Defendant answered with a general denial, and also averred that the cellar stairway was properly guarded by an iron railing, and that the stairway had been so protected from the time it was built, and that the injury, if any, resulted from plaintiff's own negligence. It was not shown that the city had ever passed any ordinance or made any regulation concerning encroachments on sidewalks or the building of basement ways. The jury returned a verdict in favor of plaintiff below for \$300, and the court entered judgment therefor.

Counsel for plaintiff in error have really made only one assignment of error, which is that the court erred in refusing to give two instructions asked for by the plaintiff in error. Neither party excepted to any of the instructions given. Counsel argue two other propositions: That the city was not negligent, and that the injury, if any, was caused by Mrs. Hampton's own negligence.

We cannot consider these claims, as the question of negligence on the part of plaintiff or of defendant was for the jury, and their verdict shows that they have found that the city was negligent, and that the defendant in error was not negligent. But counsel say that the city had a right to permit property owners to use part of the sidewalks for the purpose of trade and commerce, and to enhance the value of their property, if such use does not render the sidewalk dangerous to those who use ordi-

nary care in passing over them; that no basement on a public street can be used without using a part of the sidewalk; that this is the ordinary way in the city of Paola, and probably in most cities in Kansas; and that said stairways leading to basements, guarded as this one was, are not dangerous to the public. It is easy to see that, if it is left to property owners to determine what is necessary or convenient to themselves in the matter of using the sidewalks in front of their buildings, the public may be obliged to use the middle of the street for safety. We are not called upon to decide the questions thus raised except in this particular case. The jury viewed the premises, and the court instructed them that, in the absence of any ordinance regulating the construction of cellar ways projecting into the sidewalks of the city, it was a question of fact for them to determine from the evidence whether or not the cellar way in question was such an opening in the sidewalk as to materially endanger and subject to risk of personal injury those traveling on said sidewalk. The jury found for the plaintiff, and their finding concludes all inquiry as to the dangerous character of the opening in the sidewalk.

One of the instructions asked for by the plaintiff in error related to the measure of damages. We think this matter was fully and properly presented in the instructions given, and that the instruction offered was properly refused. The other instruction was to the effect that persons passing over a sidewalk in a city "are bound to take notice of the existence of such obstructions as the necessity of commerce and the convenient occupation of residences or other buildings render common, and, if injured by them, they cannot recover; and that, if the jury found the stairway in question to have been constructed and guarded in the usual manner, the plaintiff could not recover." The trial court properly instructed the jury as to the duty enjoined upon a city of the second class in respect to keeping its streets and sidewalks in a reasonably safe and suitable condition for public travel, and limited the inquiry to the street and cellar way in question. We think the instruction asked for was improper, under the facts in the case, and that it was properly refused. No error appearing in the record, the judgment of the trial court will be affirmed. All the judges concurring.

(5 Kan.App. 586)

HACKETT et al. v. PRATT et al.

(Court of Appeals of Kansas, Southern Department, E. D. June 9, 1897.)

RIGHTS OF SURVIVING PARTNER—LIMITATIONS—CONSTRUCTIVE TRUST.

1. A surviving partner is not entitled to reimburse himself out of the partnership estate for money collected by the deceased partner upon notes intrusted by such surviving partner to deceased for collection only, where the latter failed to account for the money so collected.

2. If a constructive trust was created in favor of the surviving partner by the action of his co-

partner, it was in 1885, and the pleadings show that no claim of this character was made in court until more than five years had elapsed, and disclose no cause for the delay. The action is therefore barred.

(Syllabus by the Court.)

Error from district court, Allen county; L. Stillwell, Judge.

Action by C. H. Pratt and T. S. Stover, administrators of B. H. Dayton, against J. H. Hackett and others. These proceedings in error were brought to reverse a judgment rendered in the district court of Allen county, in favor of the defendants in error, and against plaintiffs in error, in the sum of \$1,552.40, upon a bond executed by J. H. Hackett, principal, and the other plaintiffs in error as sureties. Affirmed.

The findings of fact and conclusions of law made by the trial court are as follows:

"Findings of fact: The following facts are admitted by the pleadings: (1) That one B. H. Dayton died, intestate, in Allen county, Kansas, in October, 1885, and that the plaintiffs are duly acting and qualified as administrators of his estate. (2) Prior to and up to the time of the death of said Dayton, he and the said defendant J. H. Hackett were partners in the business of loaning money, the name of the firm being B. H. Dayton & Co. (3) In November, 1885, M. J. Dayton, widow of the said B. H. Dayton, was appointed administratrix of the estate of B. H. Dayton, and she duly inventoried and caused to be appraised the property of the late partnership of B. H. Dayton & Co., and she turned the same over to the defendant Hackett, the surviving partner, who, with the defendants herein, executed the bond sued on, and attached by copy to plaintiffs' petition; and thereupon said Hackett entered upon the discharge of the duties devolved upon him by the acceptance of said trust. (4) On May 13, 1886, the probate court of Allen county, Kansas, duly allowed a claim of said Hackett's against the individual estate of B. H. Dayton, in the sum of \$3,312.55. And from the evidence introduced on the trial I find the following facts: (5) The partnership mentioned in finding No. 2 herein was entered into under and by virtue of the terms of a written agreement between said Dayton and Hackett, of the date of May 7, 1884, which agreement contained (among other things) the following provisions: 'The party of the first part (to wit, Dayton) guarantees to the party of the second part (to wit, Hackett) against any loss of capital by such partnership.' (6) The amount of capital invested in said partnership was sixteen thousand dollars, eight thousand dollars being invested by Hackett, and eight thousand dollars by Dayton. (7) The amount and value of property received by said Hackett as surviving partner from the administratrix of Dayton was \$14,960.57, the same consisting of promissory notes obtained by Dayton in the business of the firm. (8) Hackett collected on these notes the sum of \$11,824.90,

of which a sum in the neighborhood of \$834 was interest, which had accumulated on said notes after the same had been inventoried and turned over to Hackett. (9) In the collecting of said notes, and in the discharge of his trust generally, Hackett reasonably and necessarily incurred personal expenses amounting to the sum of \$1,368.40. (10) He also, in said business, incurred a liability for attorney's fees amounting to the sum of \$354.05. (11) Hackett turned most of the notes over to Mr. E. A. Barber, an attorney of Humboldt, Allen county, Kansas, who was also connected with a bank at that place, and the greater part of the moneys collected on said notes was collected by Mr. Barber, as Hackett's attorney, and through the said bank. (12) Hackett, on September 17, 1889, filed a report in the probate court of Allen county, Kansas, as surviving partner of B. H. Dayton & Co., and in this report he claimed a credit (in addition to these mentioned in findings Nos. 9 and 10 herein) of \$591.90, as a commission of five per cent. on the sum of \$11,824.90, being the entire amount of money collected on said notes. It was agreed between Mr. Hackett and Mr. Barber that this claim for a commission should be equally divided between them; Hackett to receive one half, and Mr. Barber the other half. The probate court allowed this claim for commission, also the other claims mentioned in findings Nos. 9 and 10 herein. (13) I find that \$225, commission for collections made on said notes, in connection with the \$354.05, allowed for attorney's fees, is a reasonable and sufficient allowance on that head; the \$225 commission mentioned herein (as between defendants Hackett and Barber) to be allowed to E. A. Barber. (14) In the aforesaid report to the probate court made by Hackett, he also claimed and was allowed by said court \$320, as compensation for his personal services rendered in the discharge of his said trust. (15) The amount of said notes turned over to Hackett, and remaining uncollected after due diligence on his part, is \$3,984.60. (16) Hackett, in the discharge of his duties as surviving partner, obtained the title to a tract of land which he holds as trustee to the late partnership. The value of said land is \$350, and it was agreed on the trial of this action that the court should charge him with the said \$350, and that the title to said land should vest in Hackett in fee simple. Said land is known as the Cowdrey land, and is described as the northwest fractional eighty acres of the southwest quarter, and the southwest quarter of the northwest quarter of section nineteen, township twenty-seven, range fifteen, in Wilson county, Kansas. (17) The claim of Hackett against the individual estate of Dayton, mentioned in finding No. 4 herein, was based on the amount of two notes, the property of Hackett, which he had sent to Dayton for collection. Said notes were Hackett's individual property, and never belonged to the firm. Dayton collected the notes, and converted the

proceeds to his own use. Hackett ascertained and knew of this the day Dayton was buried. Hackett filed his claim for this amount in the probate court, as before stated, on May 13, 1890, and it was allowed by the court as a fifth-class claim, and classified as such. The probate court has ordered paid a dividend of twenty-five per cent. on the face of the amount of all fifth-class claims against the individual estate of Dayton, but no part of this claim of Hackett's has been paid. (18) This action was commenced October 31, 1890. (19) At the time of the commencement of this action, there were no outstanding debts or obligations of said partnership of B. H. Dayton & Co., and said estate had been fully administered, except that Hackett had failed and neglected to pay over to the administrators of the individual estate of B. H. Dayton the amount he was legally liable to pay.

"Conclusions of law: And from the foregoing findings of fact I deduce the following conclusions of law: (1) Hackett is chargeable, in the first instance, with the amount of the notes received by him, viz. \$14,069.57; accrued of interest collected, \$334; and charged against him in finding No. 16. \$350,—total, \$16,153.57. He is entitled to credits as follows: His half of the \$16,000 capital, being \$8,000; uncollected notes, \$3,984.69; expenses in collecting notes, \$1,368.49; attorney's fee and commission allowed attorney, \$579.05,—total, \$13,932.23; leaving a balance due of \$2,221.34, on which six per cent. interest should be computed from the time of the commencement of this action, to wit, October 31, 1890, to this date, January 11, 1892, said interest amounting to \$159.19; principal and interest amounting to \$2,380.53. On this, Hackett is entitled to a credit of \$823.13, that being the amount of the twenty-five per cent. dividend ordered to be paid by the probate court on the face of the fifth-class claims, and which is the amount on that basis that he is entitled to be paid on his claim, against the individual estate of Dayton, mentioned in finding No. 4 herein; leaving the amount for which Hackett and the other defendants are liable in this action, \$1,552.40. (2) Hackett is not entitled to have the said claim against the individual estate of said Dayton treated and held as a trust fund in this action. Any alleged right in that regard is barred by the statute of limitation. (3) Hackett is not entitled to interpose, as a set-off in this action, his claim against the individual estate of Dayton, further than the twenty-five per cent. thereof which the probate court has ordered paid. He is not entitled to the sum claimed and mentioned in finding No. 14, for his personal services in closing up the partnership estate. Judgment will therefore be rendered in favor of plaintiffs against the defendants for \$1,552.40 and the costs, and that defendant Hackett turn over to plaintiffs the uncollected notes mentioned herein."

Thereupon the court rendered final judgment in favor of the plaintiffs, and against the de-

fendants below, in the sum of \$1,552.40 and costs, and ordered the defendant Hackett to turn over to plaintiffs the uncollected notes mentioned in the findings. Motion for a new trial was duly filed by the defendants, and the same was overruled by the court.

S. S. Kirkpatrick and J. D. McCleverty, for plaintiffs in error. T. S. Stover and J. B. F. Cates, for defendants in error.

MILTON, J. Counsel for plaintiffs in error in their brief say that there is but a single question presented by the record, viz.: "Is the surviving partner entitled to payment out of the partnership estate of the moneys collected on Hackett's individual notes by the deceased, or must he turn over the balance in his hands, and look to the individual estate for the same?" In their answer, defendants had alleged that certain notes, aggregating \$3,500, had been placed by Hackett in the hands of Dayton for collection only, and that the deceased had collected said notes without notice or knowledge on the part of Hackett, and had failed to account to the latter for any part of the proceeds thereof, and that said funds had gone into the estate of said Dayton. This was the only allegation in the pleadings in respect to a trust on the part of the deceased as to said notes. In their reply, plaintiffs set up the statute of limitation. Counsel, in their briefs, state that there is no dispute as to the facts in the case. In the case of Shattuck v. Chandler, 40 Kan. 516, 20 Pac. 225, our supreme court declared that article 2, c. 37, Comp. Laws 1885 (the same in Gen. St. 1889), provides for the winding up and settlement of partnership estates, and precludes the settlement of such estates in any other manner. The case of Carr v. Catlin, 13 Kan. 393, is therein cited, and the following language quoted in respect to a surviving partner who has given bonds to administer the partnership estate: "He is neither more nor less than a special trustee as to this property and to this class of debts." He is a trustee for the benefit of the creditors of the partnership, and for the administrator of the deceased partner's individual estate, and his disposition of the partnership property must be consistent with his duty as such trustee. The legal title to the unascertained interest of the deceased partner is vested in the administrator of his individual estate, and the surviving partner has no right to apply such interest to the payment of an individual debt owing by the deceased to him.

It is contended by the plaintiffs in error that the partnership funds were increased to the extent of the amount collected by Dayton from the notes placed in his hands by Hackett, and that Hackett had the right to take this into account in closing up the partnership affairs; that he was under no legal obligation to turn over to Dayton's administrator any of the moneys of the partnership estate, unless there should be a surplus after the full adjustment of the partnership business, including the

moneys collected on these notes; that Hackett was charged with the duty of winding up the partnership, and turning over to the administrator the balance remaining after the partnership affairs were settled, retaining the amount due himself, including that which was due him from his deceased partner; that the surviving partner, in making the accounting, should determine the amount due each of the partners; and that, in adjusting the accounts between himself and his deceased partner, he should charge the latter with all moneys paid to him, including the proceeds of the note in question. Counsel further says that the laws governing the matters of set-off and of constructive trusts have no application here. Since both the pleadings and findings of fact show that the notes in question were the individual property of Hackett, which were sent for collection only, and were not to be put into the partnership business, it follows that Hackett had no right to consider the proceeds thereof as forming any part of the partnership estate. This was the conclusion reached by the trial court, and is undoubtedly correct. Hackett must have held this view at the time he filed his claim against the individual estate of Dayton. The law required him to make oath that the demand presented was due to him from the estate of Dayton after allowing all just claims and offsets in favor of said estate, and the fact that he took such oath indicates that he had no expectation at that time of making the claim which is now made.

It is hardly necessary to discuss the matter of set-off in this connection, in view of the statement of counsel for plaintiffs in error that no such question arises in the case. In the case of *Moffatt v. Thompson*, 57 Am. Dec. 737, we find the following: "A surviving partner cannot set off a private debt due him by his deceased co-partner against his share of assets collected since the dissolution of the co-partnership. The effect of such a set-off would be to give a preference among creditors of equal degree." See, also, *Wat. Set-Off* (2d Ed.) p. 83.

The trial court rightly concluded that any right on the part of Hackett to have his claim against the individual estate of the deceased treated as a trust fund in this action was barred by the statute of limitation. It was not sufficiently pleaded, and the defendants' answer itself showed the claim was barred under both the second and third subdivisions of section 18 of the Code. *Main v. Payne*, 17 Kan. 611; *Railway Co. v. McCormick*, 20 Kan. 107. The judgment of the district court will be affirmed. All the judges concurring.

(3 Kan. App. 700)

ATCHISON, T. & S. F. R. CO. v. SNEDEGER.
(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1897.)

JURY—COMPETENCY—OPINION EVIDENCE—DEPOSITIONS—APPEAL—CASE-MADE.

1. That a person has "served once already on a jury, as a talesman, on the trial of any cause,"

is by statute a principal ground of challenge, and it was error in this case to overrule challenges on that ground.

2. In an action for the recovery of damages on account of personal injuries, it is error to permit a witness, over objection, to give his opinion as to the amount of damages suffered by plaintiff.

3. Where a witness resided in the county where the trial was held, and where it appeared that he was present in the county at the time of the trial, and that no effort was made to secure his attendance at the trial, and no reason was shown for his nonattendance, it was error to permit his deposition to be read in evidence over the objection of the defendant.

4. It was error to admit the evidence of a non-expert witness as to expectancy of life of plaintiff.

5. The case-made in this action examined, and held sufficient, as against a motion to dismiss.

(Syllabus by the Court.)

Error from district court, Barber county.

Action by John P. Snedeger against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

John P. Snedeger, plaintiff in the lower court, in his petition, filed in the district court of Barber county, claimed that on the 10th day of October, 1889, while employed by the railroad company as a section hand, and while engaged in shoveling dirt on its side track at Kiowa, Kan., he was injured and damaged by the negligence of said company, its servants and agents, co-employees of said plaintiff, in the sum of \$5,000. The company answered, making a general denial, and also a plea of settlement and satisfaction. The evidence shows that Snedeger was working between the main track and the side track, and that a train came down the main track from the north, and, having stopped a few minutes north of the switch target, moved down the main line, past where Snedeger was, and, in passing the switch connection, threw a car of coal, by the act known as a "flying switch," upon the side track where he was at work. He failed to get out of the way of the approaching car, and was struck and hurt about the breast and arm. The accident happened about noon. Snedeger had been working at the same work, and near the same place, for about 10 days before he was hurt. He was somewhat deaf. There was nothing to prevent him from seeing the approaching car. He knew that trains were frequently passing, and that much switching was done at that point. Kiowa was a coaling station, and coal cars were switched from this track to the place where the coal was kept, and all engines passing through Kiowa ran in over this side track to be supplied with coal. One of the brakemen rode on the car after it was detached from the engine, and called to Snedeger, and some of the section men who were working with Snedeger also called, and warned him to look out for the cars. This was when the car was some 15 or 20 feet from him. The car was handled in the usual manner, and was running at probably 6 or 8

miles an hour at the time he was struck by it. After Snedeger was hurt, he was dazed for some minutes, but walked to his home shortly afterwards,—a distance of a quarter of a mile. He suffered somewhat from the nervous shock, as well as from the other injuries, and was confined to his bed, and under medical treatment, for a few days. He then worked for the railroad company for four days, and was discharged by the foreman. After he was discharged by the railroad foreman, he worked with a threshing machine, and performed such other common labor as he was able to procure. On the 21st day of October, 1889,—in the morning of the day,—he resumed work on the railroad. Snedeger made a written contract of settlement, which is attached to the answer of the company. Snedeger, in his reply, claims that this release was procured by false and fraudulent representations, in that the company represented that unless he signed the release he would be discharged from the employ of the company, and never re-employed by it, but that, if he signed it, the defendant would, in consideration thereof, continue to furnish him such work as he, in his physical condition, could perform, and pay him therefor sufficient for him to make a living. The case was tried by a jury, and resulted in a verdict and judgment of \$1,000 against the railroad company, and the latter brings these proceedings in error to reverse such judgment.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. Martin & McNeal, for defendant in error.

MILTON, J. (after stating the facts). Defendant in error has moved to dismiss the petition in error, and claims that a case-made should contain a transcript of the record, duly certified by the clerk. Counsel are in error in this contention. *Muscott v. Hanna*, 26 Kan. 770. The word "case-made" has a well-defined technical meaning, and the question raised was settled by the case we have cited. Another point in the motion is that the judge's certificate makes no reference to the evidence in the case. This is not necessary, and is no proper part of the certificate. See *Eddy v. Weaver*, 37 Kan. 548, 15 Pac. 492. This case-made, in the proper places, contains the following expressions: "Plaintiff's testimony," followed by the testimony of several witnesses; "Plaintiff rests," followed by a demurrer to the evidence, a statement that it was overruled, and that defendant excepted; then, "Defendant's testimony;" and, after its testimony, "Defendant rests." Besides this, on the page next after the words "Defendant rests" appears this statement: "And this was all the evidence introduced by either party in the trial of said action." We hold that the consecutive numbering of the pages sufficiently identifies this statement, which stands alone on the page it

occupies, as referring to the evidence preceding it.

Again, counsel contends that there is nothing to show that the case-made which was served on plaintiff's attorney is the case-made which the judge settled and signed. The acknowledgment of the service does not give the title of the cause, but it is signed by the attorneys for plaintiff within the time granted for serving the case-made. On the next page after this acknowledgment of service is a waiver, signed by the attorneys for plaintiff, which names the cause and says: "We do hereby waive notice of the time and place of the settling and signing of the foregoing case-made, and consent that the foregoing be settled, signed, and allowed by the Hon. G. W. McKay, judge of the district court of Barber county, Kansas, as the case-made in the said action." This waiver is silent as to amendments, but we think the defendant in error is estopped by it to raise any question as to the omission from the judge's certificate of mention of amendments. His counsel agreed that his presence was not necessary at the settlement of the case-made, and that "the foregoing be settled, signed, and allowed as the case-made in said action." This language is equivalent to a statement that the case-made is true and correct, and that no objections or amendments are, or are to be, offered by the defendant. The motion to dismiss must be overruled.

Defendant in error has filed no brief in the case. Plaintiff in error has made six specifications of error.

It appears that the railroad company challenged several jurymen for the reason that they were not legally drawn as jurors, and for the further reason that each of said jurymen had served once already on a jury, as a talesman, in the trial of another cause in the same court during the term. The record is not very clear as to this matter, but it appears that the court stated that there was no order upon the county clerk for the drawing of the names of these jurors, and that there had been no process of law to bring said jurors into court, except the following: "Medicine Lodge, Kansas, November 18th, 1891. To the Sheriff of Barber County, Kansas, Greeting: You are hereby commanded to summons the following good and lawful men to serve as petit jurors during the November term, 1891, of the district court of Barber county, Kansas. [Here follows a list of eleven names.] [Signed] G. W. McKay, Judge District Court." Six of the jurors so summoned were challenged by plaintiff in error upon the grounds stated, and it appears that these parties had served as jurors in other cases, prior to this case, during the same term of court. Plaintiff in error exhausted its peremptory challenges. We think the challenge to these jurors should have been sustained on the second ground stated, and that it was error to overrule the challenges.

Complaint is made that the court erred in the admission of certain testimony of the witness Clark, a section hand, who was permitted to testify, over the objection of plaintiff in error, that a certain doctor was said to be the railroad surgeon, and that Snedeger said, after he signed the paper (release), he had not understood it at the time he signed. We think the admission of the statement about the railroad surgeon was improper, but it was an unimportant matter in this case. The testimony as to Snedeger saying that he had not understood the release at the time he signed it was incompetent, and its admission error, as it tended to influence the jury in favor of defendant in error, as against plaintiff in error.

Another error assigned is that the court permitted the defendant in error to read in evidence the deposition of Dr. C. H. Downtain, who was then a resident of and in the county where and when the case was tried. Evidence was offered which showed that this witness had lived for several years in Barber county, being a practicing physician in the city of Kiowa; that he was rarely out of the county; that he was at home the day before his deposition was read; and that one of the attorneys trying the case had telegraphed the doctor to be present at the trial, and, within 20 minutes before the deposition was read, had received a telegram from him inquiring whether it would not do for him to appear and testify in the case on the Saturday following. There was no evidence that defendant had subpoenaed the witness, or attempted to secure his attendance. The admission of this deposition was error, and, as it contained the only competent testimony as to the nature and extent of Snedeger's injuries, its admission was material error.

By agreement, the affidavit of G. M. Martin, one of the attorneys for plaintiff below, for a continuance of the cause on account of the absence of plaintiff, was read as the deposition of Snedeger. Plaintiff in error claims that the court erred in overruling certain objections made by it to certain portions of this affidavit, which contains statements to the effect that "plaintiff had no reason to believe that a car would be placed on the switch at that time," and that "his expectancy of life, if uninjured, would be, as shown by the tables of actuaries, twenty-nine years"; that "he had therefore been damaged in the sum of five thousand dollars"; and that "as soon as defendant ascertained that plaintiff was unable, by reason of his injuries, to perform a full day's labor, or earn good wages, it discharged him." Some of these statements were mere conclusions, and that as to his expectancy clearly incompetent. It was error to overrule the objections made thereto. *Roberts v. Commissioners*, 21 Kan. 248; *Railroad Co. v. Wilkinson*, 55 Kan. 83, 39 Pac. 1043.

Dr. V. R. Burney testified as to the permanent character of the injuries defendant in error had received by being struck by the car. The witness stated that he examined Snedeger

as he would a person who was going to be examined for a pension. He also stated that according to the pension laws the capacity of Snedeger to earn wages at manual labor was diminished about one-third by the injuries he had received; that it was the duty of the witness, as a pension examiner, to rate men according to their disabilities; and that, according to the present pension laws, Snedeger would be entitled to \$12 a month on account of the injury. The last statement was made in answer to an inquiry as to the value of the loss of one-third of the capacity to earn a living by manual labor. The doctor did not seem to testify to any considerable extent from his knowledge as an expert, but mainly from his knowledge of the provisions of the pension laws. His testimony ought to have been excluded from the jury.

Counsel for plaintiff in error urges that the trial court erred in permitting the witness T. A. McNeal, who disclaimed expert knowledge of the subject, to read from a book called "Gaskell's Compendium," and to testify concerning statements contained in said book as to the expectancy of life of a person at plaintiff's age, and to give his understanding as to the effect and meaning of statements contained in said book. The witness read from this book what he called the "Carlisle Tables of Expectancy." While the Carlisle tables, if properly identified, might have been read to the jury, yet the record fails to show that these tables were even offered in evidence. All the testimony, therefore, of the witness McNeal, including what he read from the book, was incompetent, and ought to have been excluded.

It is contended that the court ought to have sustained a demurrer to plaintiff's testimony. We do not agree with this claim, as there was some evidence to sustain the allegations of the petition.

Counsel claim that the company's answer set up a complete defense to the cause of action stated in the petition, and that it was not overcome by the testimony of plaintiff. As the case will have to be reversed for the reasons already stated, we shall refrain from commenting further in respect to the matter of the release, which was a very important feature in the case. For the errors appearing, the judgment of the district court will be reversed, and a new trial granted. All the judges concurring.

(5 Kan.App. 694)

WICHITA NAT. BANK v. WEEKS.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1897.)

BANKS AND BANKING — INSOLVENCY — DEBTS — ATTACHMENT — GROUNDS.

While the liability of the officers and directors of a bank, under paragraph 406, Gen. St. 1889, for receiving deposits or contracting debts while the bank is insolvent, is in the nature of a penalty, and may be immediately enforced against such bank officers without first proceed-

ing against the bank itself, it does not authorize an attachment action against a director on a contingent liability of the bank growing out of its having indorsed and guaranteed the payment of notes of a third party which have not yet matured, notwithstanding an allegation in the petition that the maker of the note "is insolvent," and that the bank was insolvent, and known to the director who is sued to have been insolvent, when the notes were so indorsed and guaranteed, and the money for them paid by plaintiff to the indorser.

(Syllabus by the Court.)

Error from district court, Butler county.

Action by the Wichita National Bank against F. S. Weeks. From a judgment vacating an order of attachment obtained by plaintiff, plaintiff brings error. Affirmed.

These proceedings in error were brought to reverse a ruling of the district court of Butler county, vacating an order of attachment which had been obtained by plaintiff in error at the commencement of its action against the defendant, F. S. Weeks. Plaintiff's petition, which was filed January 31, 1891, is as follows:

"Plaintiff, for cause of action against said defendant, alleges: That it is now, and at all times hereinafter mentioned was, a banking corporation duly organized and existing under and by virtue of the laws of the United States, and doing business in the city of Wichita, Sedgwick county, Kansas, and more particularly under the 'Bank Act.' That the Farmers' State Bank of Augusta, Kansas, was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the state of Kansas, doing business in the city of Augusta, Butler county, Kansas. Plaintiff alleges that now and at all times hereinafter mentioned the Augusta Mercantile Company was a corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and doing business in the city of Augusta, Butler county, Kansas, and that said Augusta Mercantile Company is insolvent, and totally unable to pay any or all or any part of its just indebtedness. That said Farmers' State Bank at times hereinafter mentioned was insolvent, and in failing circumstances, and unable to pay its liabilities to its just and legal creditors. Plaintiff further alleges that the officers of said banking institution were as follows: John Jacks, president, F. S. Weeks, vice president, and E. R. Grant, cashier,—who were duly appointed and elected and constituted a board of directors of said bank. Plaintiff further alleges that F. S. Weeks, vice president, E. R. Grant, cashier, and John Jacks, were the board of directors of said bank known as the Farmers' State Bank of Augusta, Kansas, doing business in the city of Augusta, Kansas. Plaintiff alleges that now and at all times hereinafter mentioned the Farmers' State Bank of Augusta, Kansas, was insolvent, and in failing circumstances, and unable to pay its liabilities to its just creditors, all of which the said John Jacks, president, F. S. Weeks, vice president, and E. R. Grant, cashier, individually and as a board of direct-

ors of said bank, having full knowledge of such insolvency, the said defendants did create a debt to the Wichita National Bank, Wichita, Kansas, plaintiff herein, in the sum of \$1,000 on the 3d day of January, 1891, and did give as evidence of such indebtedness two promissory notes,—one signed January 3, 1891, due February 7, 1891, for the sum of \$500, a true copy of which note is hereto attached, marked 'Exhibit A,' and made a part of this petition; one dated January 3, 1891, due on the 4th day of March, 1891, for the sum of \$500, a true copy of which note is hereto attached, marked 'Exhibit B,' and made a part of this petition. Plaintiff further alleges that it is the owner and holder of said notes, and that the same shall become due and payable at the times stated in this petition. That said S. F. Weeks, by reason of his having been vice president and director of said banking institution, knew the same to be insolvent, and in failing circumstances; and, creating said debt on the 3d day of January, 1891, is liable to the plaintiff personally for the amount of said notes, Exhibits A and B, by virtue of the statute in such cases made and provided. Wherefore plaintiff prays judgment against said defendant, F. S. Weeks, for the sum of \$1,000 and interest, when said notes shall become due and payable, and for costs of this action. Ed O'Bryan, Aikman and Brooks, Plaintiff's Attorneys."

Exhibit A: "Augusta, Kansas, Jan. 3rd, 1891. \$500.00. For value received on the 4th day of Feb., 1891, we promise to pay to the order of Farmers' State Bank the sum of five hundred dollars at the Farmers' State Bank in Augusta, Kansas, without interest if paid when due, but, if not paid when due, then to draw interest at ten per cent. per annum from date. For a valuable consideration we waive all benefits derived from and under the exemption laws of the state of Kansas. The Augusta Mercantile Company, E. R. Grant, Sec'y and Treas. No. 95,769. Due Feb. 7/91. P. O. Augusta, Kansas." Indorsed: "For value received we hereby guaranty payment of the within note, and waive demand and notice of protest on same when due. Farmers' State Bank, by E. R. Grant, Cashier."

Exhibit B is an exact duplicate of the above except the date of maturity, which is March 4, 1891.

Defendant's answer admitted the averments of the petition "that plaintiff is a corporation as alleged in plaintiff's petition; also that the Farmers' State Bank of Augusta is a corporation as alleged; also that the Augusta Mercantile Company is a corporation as alleged, and that John Jacks, F. S. Weeks, and E. R. Grant were directors and officers of the Farmers' State Bank, as alleged in plaintiff's petition; and denied generally all the other allegations of the petition.

Upon an attachment affidavit filed by the plaintiff's attorney an order of attachment under section 230 of the Code was granted by the probate judge of said county. Among other

things, this affidavit stated: "Said affiant further says that said claim against said defendant will become due as follows: First, five hundred dollars and interest on the 7th day of February, 1891; second, five hundred dollars and interest on the 7th day of March, 1891." On the — day of February, 1891, defendant filed his motion to discharge said attachment, which motion contained eight grounds, and affidavits were afterwards filed by both parties concerning certain of said grounds. The district judge heard this motion at chambers on April 6th upon the first six grounds, not considering those requiring evidence: "First, for the reason that no sufficient affidavit of attachment has been filed by the plaintiff herein; second, for the reason that no sufficient bond or undertaking in attachment has been filed by the plaintiff; third, for the reason that the pretended order of attachment issued in this action is void upon its face; fourth, for the reason that the pretended order of attachment issued in this action was issued without authority or right in law, and is wholly void; fifth, for the reason that the petition filed by the plaintiff herein does not state facts sufficient to constitute a cause of action against this defendant; sixth, for the reason that the court has no jurisdiction of the subject-matter of this action."

Fred. W. Bentley and David Smyth, for plaintiff in error. J. V. Daugherty, for defendant in error.

MILTON, J. (after stating the facts). The issue before the trial judge was this: Was the action prematurely brought? The briefs of counsel also present the same issue to us. Under paragraph 406, Gen. St. 1889, when an insolvent bank contracts a debt, the same becomes the debt of each of the officers who had knowledge of the bank's condition, or who, in the discharge of his duties, ought to have known its condition; and, if such officers were sued in a proper case, the only defenses would be that the bank was not insolvent, or that they did not know its condition, and could not have known it by the exercise of proper care. It will be necessary for us to inquire somewhat as to the nature of the bank's obligation upon the two notes which are the basis of this action. By the indorsement in the nature of a guaranty the bank became both an indorser and a guarantor of the notes. Considered as an indorser (and the briefs of both parties proceed on this idea), the bank's liability on the notes was conditional. In *Swartz v. Redfield*, 13 Kan. 556, Justice Brewer, in the opinion of the court, quotes the following from 2 Smith, Lead. Cas. 61: "It is a well-settled principle that bankruptcy or notorious insolvency will not excuse notice [to the indorser]." And in the same case Justice Brewer says: "The indorsement effectuates two things: It transfers the title and creates a conditional liability. The first is often, in the contemplation of the parties

at the time of the transaction, the only thing sought, and if afterwards recourse is sought on the indorser he may well insist on an exact compliance with all the steps necessary to change the conditional into an absolute liability." And in the same case it is stated by a quotation from Kent's Commentaries that knowledge in the indorser, when he indorsed the paper, of the insolvency of the maker of the note or drawer of the bill, does not dispose of the necessity of notice to charge such indorser. In *Doolittle v. Ferry*, 20 Kan. 231, the court, by Justice Brewer, says: "That from such indorsement [to John Doe or order] the law implies a well-defined contract, and that that contract casts a conditional liability on the indorser is conceded." And again: "The law gives to an indorsement a twofold force: It operates to transfer title; it is the assumption of a conditional liability." As a guarantor, the bank's liability of course differs from that of an indorser, and, as is said by a text writer, "It is more onerous." In section 1753 of Daniel on Negotiable Instruments it is said: "The guarantor's liability is secondary and collateral, and, in general, the guarantor contracts to pay if, by the exercise of due diligence, the debt cannot be made out of the principal debtor." We observe that the petition does not allege that the maker of the notes was insolvent when they were made or indorsed, nor that the indorser knew such to be the fact. So far as we can gather, the action was brought on the theory that the defendant's liability had accrued at the time and by reason of the indorsement of the notes by the bank. In view of the fact that the bank's liability, either as indorser or guarantor, was conditional or collateral, an action could not have been brought against it upon the notes until they were due. Hence it would seem to follow that this action to recover under section 406 could not be maintained until the primary liability of the bank had accrued. Section 190 of the Code provides that the plaintiff in a civil action may have an attachment against the property of the defendant upon certain grounds. The ninth ground is that the debt was fraudulently contracted, or the obligation fraudulently incurred. The provisions of section 230 allow an action upon a claim before it is due, and an attachment for causes therein stated, but these causes do not embrace the ground as to fraud stated in section 190. It seems proper, therefore, to regard the indorsement and guaranty in this case as being governed by the rules ordinarily applicable to such transactions. We conclude that the petition and affidavit in attachment were insufficient to support the attachment proceedings, that the action was prematurely brought, and that the ruling of the trial court upon the motion to discharge the attachment was correct. The order and judgment discharging the attachment will be affirmed. All the judges concurring.

(5 Kan. App. 707)

ATCHISON, T. & S. F. R. CO. et al. v. ANDERSON.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1897.)

APPEAL—JURISDICTIONAL AMOUNT—CASE-MADE—AMENDMENT—CERTIFICATE OF TRIAL JUDGE—EVIDENCE.

1. That the amount or value in controversy exclusive of costs exceeds \$100 is a jurisdictional question, and cannot be inferred. It must affirmatively appear in the record presented to this court, or the judge of the district or superior court trying the case must certify that it is one belonging to the excepted classes.

2. When a case-made has been allowed, certified, signed, attested, and filed as a case-made for the supreme court, the judge trying the case cannot, of his own motion, without notice, withdraw the case, and add thereto another and different certificate, although the time allowed by the court for the settlement of the case has not expired.

3. When a case-made has been settled, signed, and certified by the district judge trying the case, and the same attested and filed as a case-made for the supreme court, it has passed beyond his control, and cannot thereafter be amended, altered, or changed by any order he may make. *Lewis v. Linscott*, 15 Pac. 158, 37 Kan. 379.

4. The certificate of the judge of the district or superior court required by section 542a of the Code of Civil Procedure, where the amount involved is less than \$100, to confer jurisdiction, must be incorporated in the record presented to this court.

5. Where a case is brought to this court upon the certificate of the judge of the district or superior court trying the case that it is one belonging to the excepted classes, the certificate confers jurisdiction, and evidence aliunde the record is not admissible to prove that the amount or value in controversy, exclusive of costs, exceeds \$100.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Ejectment by R. A. Anderson against the Atchison, Topeka & Santa Fé Railroad Company and another. From a judgment for plaintiff, defendants bring error. On motion to dismiss. Granted.

A. A. Hurd, O. J. Wood, and F. W. Bentley, for plaintiff in error. A. A. Richards and James Lawrence, for defendant in error.

SCHOONOVER, J. This is an action in ejectment, without demand for rents or profits, for the recovery of a strip of land which had been condemned by the Le Roy & Western Railway Company for a right of way. Judgment of ouster. The case is now before this court upon a motion to dismiss for want of jurisdiction; that the amount or value in controversy, exclusive of costs, does not exceed \$100; and that there is no certificate of the judge of the district or superior court trying the case that it is one belonging to the excepted classes.

We have examined the record for the purpose of ascertaining the amount or value in controversy. It cannot be determined, unless we accept the report of the condemnation commissioners, as affirmatively showing the

same. They report: "Value of land taken, \$76.50; amount of damages to land not taken, \$90.00; total, \$166.50." This action is to recover the land taken, and the value of the leasehold of plaintiff in error, or the value of the defendant in error's legal or equitable estate therein, is the amount in controversy. We cannot say from this report that the amount or value in controversy, exclusive of costs, exceeds \$100. That the amount or value in controversy, exclusive of costs, exceeds \$100, is a jurisdictional question, and cannot be inferred. It must affirmatively appear in the record presented to this court, or the judge of the district or superior court trying the case must certify that it is one belonging to the excepted classes.

It was ordered by the trial court that the case-made be signed and settled on or before the 20th day of April, 1894. On the 15th day of March, 1894, the parties plaintiff and defendant entered into the following agreement and stipulation: "The plaintiff above named has no amendments to suggest to the above and foregoing case-made, and agrees that the same is true and correct in all particulars and as a whole, and it is stipulated and agreed by and between the parties above named, both plaintiff and defendants, that the above and foregoing case-made may be brought on before the Hon. James A. Ray, the judge of the district court of Sumner county, Kansas, who tried said cause at the time therein specified, for signing, settlement, and allowance as a true and correct case-made at any time hereafter, but within the time now specified by the order of said court, and that notice of such time and place of presenting said case-made to said judge for signing, settlement, and allowance and the service of said notice is hereby expressly waived by said plaintiff. Dated this 15th day of March, A. D. 1894." In pursuance of this stipulation the case-made was presented, settled, allowed, certified, signed, attested, and filed as a case-made for the supreme court on the 16th day of March, A. D. 1894. When this was done, the agreement was completed. The stipulation gave the judge of the district court no authority over the case-made after it was settled, allowed, and filed; and when it was filed it passed beyond his control. He could not thereafter, of his own motion, without notice, withdraw the case, and add thereto another and different certificate, although the time allowed by the court for the settlement of the case had not expired. It is well settled that neither the district judge nor the supreme court can amend, change, or add to a case-made after it has been settled, signed, and attested. *Graham v. Shaw*, 38 Kan. 734, 17 Pac. 332. And when the case-made was settled, signed, and certified by the district judge trying the case, and the same attested and filed as a case-made for the supreme court on the 16th day of March, 1894, it passed beyond his control, and could not thereafter be amended, altered, or changed by

any order he might make. *Lewis v. Linscott*, 37 Kan. 379, 15 Pac. 158.

On the 29th day of March, 1894, the case was withdrawn from the files of the district court, without notice to plaintiff below, and the following certificate inserted, and the case refiled: "In the District Court of Sumner County, Kansas. R. A. Anderson, Plaintiff, vs. Atchison, Topeka, & Santa Fé Railroad Company and the Chicago, Kansas & Western Railroad Company, Defendant. I, James A. Ray, who was judge of the district court of Sumner county, Kansas, at the time the above-entitled cause was tried, and who tried said cause as such judge, do hereby certify that the above-entitled cause, and the issues therein joined and contained, involves the title to real estate situate and being in Sumner county, Kansas, and that said case is one belonging to the excepted classes, as mentioned and described in the statute in such case made and provided. Witness my hand this 29th day of March, A. D. 1894. James A. Ray, Judge of the District Court of Sumner County, Kansas, who tried the above cause." This certificate was written on a blank page following the page on which the certificate of the district judge settling and allowing the case was written, without notice to plaintiff, 13 days after the case-made was settled, signed, and filed, but before the time fixed by the trial court for the settlement of the case had expired. Plaintiff contends that this is sufficient, and in time; that the certificate of the judge of the district or superior court required by section 542a of the Code of Civil Procedure "should be made by the judge of the lower court and sent to the supreme court to be filed with the petition in error and case-made"; that it is not necessary that the certificate be filed in the lower court, or incorporated in the record; that it is sufficient if filed with the petition in error and case-made in this court. We think this is not a correct view of the statutes. This court has heretofore held: "When the record shows that the amount or value in controversy is less than \$100, there must be incorporated in the record a certificate of the district judge showing that the case is within the exception of the statute; and a mere statement to that effect, signed by the judge, and affixed to, but forming no part of, the record, confers no jurisdiction upon this court." *Clark v. City of Ottawa*, 1 Kan. App. 304, 40 Pac. 1071. While the certificate in the case we are now considering was written on the record, and filed in this court with the record, it is no part of, and is not incorporated in, the record. The record had passed beyond the control of the judge at the time the certificate was written, and he had no authority at that time to add to or take from a record settled, signed, attested, and filed as a case-made to this court. We think it is clearly intended that the certificate of the judge of the district or superior court required by section 542a of the Code of Civil Procedure, where the amount involved is less than \$100, should

be made at the time of, or prior to, the settling of the case-made. It must be incorporated in the record, that all parties may know what their rights are; it confers jurisdiction; it becomes the basis of an appeal. Our supreme court has said: "Where a case is brought to the supreme court upon the certificate of the district judge that there is a constitutional question involved in the action, and the amount sued for is less than \$100, exclusive of costs, no other question can be considered than the one assigned in the certificate of the judge." *Railway Co. v. Kimball*, 48 Kan. 384, 20 Pac. 604. It is insisted that this court should hear evidence allunde the record to establish the fact that the amount in controversy, exclusive of costs, exceeds \$100. There may be cases in which evidence allunde the record to establish a jurisdictional fact is admissible; but in a case brought to this court upon the certificate of the judge of the district or superior court trying the case that the case is one belonging to the excepted classes, as provided by section 542a of the Code, the certificate confers jurisdiction, and evidence allunde the record to prove that the amount in controversy is more than \$100, exclusive of costs, is not admissible. The case will be dismissed. All the judges concurring.

(5 Kan.App. 531)

MISSOURI PAC. RY. CO. v. HARTMAN et al.

(Court of Appeals of Kansas, Southern Department, E. D. June 9, 1897.)

VOLUNTARY PAYMENTS—REIMBURSEMENT—PLEADING.

The court properly rendered judgment against plaintiff upon his statement of his case, such statement showing that he was not entitled to the relief sought. *Noble v. Frack* (Kan. App.) 48 Pac. 1004, distinguished.

(Syllabus by the Court.)

Error from district court, Bourbon county; J. S. West, Judge.

Action by the Missouri Pacific Railway Company against M. D. Hartman and Ina Mead, administratrix of the estate of J. D. Mead, deceased. From a judgment for defendants, plaintiff brings error. Affirmed.

These proceedings in error are brought to reverse a judgment rendered by the district court of Bourbon county, in September, 1892, in favor of M. D. Hartman and J. D. Mead, copartners under the firm name of M. D. Hartman & Co., against plaintiff in error, in an action brought by the latter to recover the sum of \$357.68. Defendants answered the petition, and plaintiff filed a reply. When the case came on for trial, a jury having been waived, counsel for plaintiff made a statement of its case to the court as follows:

"Statement.

"In the year 1890, M. D. Hartman and J. D. Mead were partners doing business under the firm name and style of M. D. Hartman & Co.;

that some time in June, 1890, the said Hartman & Co. entered into an agreement and contract with the plaintiff whereby they agreed to build and construct at their own expense, and without cost to the plaintiff, a railroad grade from the main line of plaintiff's track, in the city of Ft. Scott, Kan., to the ice house owned, used, and operated by them in said city; that, in consideration of the construction of said grade by said defendants, said plaintiff agreed to lay the ties and iron rails on said grade, thus making a spur track from the main line of plaintiff's railroad track to said ice house, in said city; that one of the purposes of the construction of this spur track was for the accommodation of the defendants in and about shipments; that, in pursuance of the agreement, the defendants Hartman & Co. entered into a contract with one T. K. Martin for the construction of this grade; that T. K. Martin had no contract with the railroad direct for the construction of the grade; that, after making his contract with Hartman & Co., said T. K. Martin employed a large number of laborers to perform the work necessary for the construction of the grade; that, after the grade was constructed, the plaintiff fully performed its agreement by laying the ties and iron rails upon the same; that none of said laborers who constructed the grade were paid by Hartman & Co., or by T. K. Martin; that the value of the labor of those laborers for the construction of this grade was \$357.68; that, after the grade had been constructed by the laborers who were employed as aforesaid, the amounts earned by each of them being due and unpaid, they instituted actions against the plaintiff, the Missouri Pacific Railway Company, in a court of competent jurisdiction, and obtained judgments against the plaintiff in this case; that those actions, one of those actions, at least, was appealed to the district court of Bourbon county, and was again decided in favor of the laborers; that all of the judgments, which amounted to said sum of \$357.68, rendered in favor of said laborers and against this plaintiff, were for work and labor performed in the construction of said grade; that the defendants in this action at all times have failed and refused to pay any of said laborers or any of said judgments, and have failed and refused to pay this plaintiff the amount which it was forced to pay in settlement of said claims or judgments, though often requested by this plaintiff so to do; that no bond was taken by the Missouri Pacific Railway Company from the defendants Hartman & Co. On the above statement the plaintiff claims that the defendants Hartman & Co. are indebted to it in the sum mentioned. The spur track was to be operated by the railroad company to the ice house after completed."

Thereupon the court found that under said statement plaintiff was not entitled to a recovery, and rendered judgment accordingly, and in favor of defendants for costs.

Plaintiff's petition and its statement set forth the same facts, with these exceptions: The

petition gave the names of the laborers and the wages each claimed, and showed that only one of the judgments rendered against the company by the justice of the peace was appealed from, the same being for \$15.90 and costs, while a judgment for \$264.73 in favor of the assignee of a large number of the claims was not appealed from, and did not contain the averments to the effect that Hartman & Co. had entered into a contract with one Martin for the construction of the grade; that Martin had no contract with the railroad company direct; that he employed the laborers; and that no bond was taken by the railroad company from Hartman & Co. The answer averred that defendants agreed to and did build the grade; that they had fully paid therefor, and owed plaintiff nothing; and denied generally plaintiff's allegations. Plaintiff replied by a general denial. Motion for a new trial was filed and overruled, plaintiff excepting. After the proceedings in error were begun, the defendant J. D. Mead died, and the action was revived in this court in the name of the administratrix of his estate.

J. H. Richards and C. E. Benton, for plaintiff in error. J. D. McCleverty, for defendants in error.

MILTON, J. (after stating the facts). The only question for our determination is, were the defendants below entitled to judgment upon the statement of the case made by plaintiff's counsel? It does not appear from the statement of the petition that this contract was in writing, and we are not informed concerning the ownership of the land upon which the grade was constructed. It would be reasonable to infer that the defendants were the owners of the land, and that they were to own the grade when it should be built. Thus viewed, it is difficult to see how there could be any obligation on the part of the railroad company to pay for the construction of the grade. It may be that the laborers could have secured liens upon it against the defendants under the mechanic's lien law for unpaid wages, but they were not performing any labor for the railroad company or its constructor. Martin, the contractor, had no contractual relation with the company, and it would not have been liable to any laborers except under a contract with it and upon which it was originally liable. As to the judgments obtained against the company, we note that one was for the sum of \$264.73, more than two-thirds of the amount of all the judgments. This was settled in the justice court, although the company had here an opportunity to test the question of its liability by successive appeals, if need be. It may be that the company lost the cases because of its own negligence in respect thereto, or because of its expectation of a recovery from Hartman & Co. As the defendants were to build their own grade, and afterwards the company was

to lay the ties and iron for their accommodation. It seems clear that the company could not be held liable for anything that the defendants were to do. Not being obligated in any wise for the debts of the defendants, it could not voluntarily pay such debts, and then obtain reimbursement by suing therefor. Paragraph 1257, Gen. St. 1889, is as follows:

"1257. Protect Laborers, Etc. That whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made, a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics and material men, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the register of deeds in each county where the work of such contractor shall be; and if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

Prior to the passage of this statute a railroad company was not liable in any way for such debts. Whoever seeks to enforce it must show all the facts required by the statute, one of which is that a contract was entered into by the railroad company. *Railroad Co. v. Cuthbert*, 14 Kan. 215; *Railroad Co. v. Brown*, Id. 560. It follows that, since there was no contract relationship between the railroad company and the defendants, there could be no liability on the part of the railroad company nor any right of action over against the defendants. Neither the petition nor the statement of facts claims that the defendants had failed to pay the contractor, Martin. If they paid the contractor, and he failed to pay the laborers, they might be liable under the law concerning mechanics' liens. If the defendants had not paid their contractor, he or his assignee, and not the railroad company, would have had a right to sue the defendants. The statement specifically alleged that Martin had no contract with the railroad company, and that after making his contract with Hartman & Co. he employed the laborers, and that no bond was taken by the company from Hartman & Co. This case comes within the doctrines laid down by our supreme court in the case of *Lindley v. Railroad Co.*, 47 Kan. 432, 28 Pac. 201, where it is said that a defendant is entitled to a judgment against the plaintiff, upon his statement of the case, only when such statement "admits or states facts the existence of which absolutely precludes a recovery by him," as it seems plain that plaintiff was not entitled to a recovery under its statement and petition. In the

case of *Noble v. Frack* (just decided by this court) 48 Pac. 1004, we held that such a statement should be liberally construed, and that a demurrer to it should be overruled if the statement were merely incomplete, and if it, when supported by the allegations of a good petition, set forth facts sufficient to constitute a cause of action. In this case the petition and statement together do not come within the rule thus announced. The judgment of the district court will be affirmed. All the judges concurring.

(5 Kan.App. 593)

CITY OF FT. SCOTT et al. v. PECK.

(Court of Appeals of Kansas, Southern Department, E. D. June 9, 1897.)

MUNICIPAL CORPORATIONS—STREETS—RAILROADS—BRIDGES—NEGLIGENCE—PROVINCE OF JURY—ABATEMENT.

1. Where, in an action for damages brought by an administrator, plaintiff's intestate was killed by being crushed between the timbers of a railroad trestle above a public street in a city of the first class, and the top of an omnibus on which the deceased was riding while engaged in his business as driver of the vehicle, on a bright moonlight night, and where the evidence shows that the deceased was familiar with the streets in question, and had frequently driven hacks and wagons under said trestle, but fails to show that he had ever driven an omnibus thereunder, or that his attention was ever called by any one to the risk of so doing, *held*, that the demurrer to plaintiff's evidence, on the ground that it proved such contributory negligence on the part of the deceased as to prevent a recovery, was properly overruled.

2. Where the evidence tended to prove that a railroad trestle which passed over a public street in a city of the first class was always so low that it necessarily impaired the usefulness of the street, and that the city permitted such trestle to be built and maintained, and where the evidence further tended to prove that the injury alleged in plaintiff's petition resulted from the insufficiency of the height of such trestle above the street, *held*, that the whole question of the responsibility of the railroad company and of the city, and of their negligence in respect to the trestle and street, was properly left to the jury, and that their verdict upon conflicting evidence, having been approved by the trial court, will not be disturbed by this court.

3. Where an oral objection was made to proceeding with the trial of this action, for the reason that the same was then pending in the supreme court on defendant's appeal from the action of the district court of Bourbon county (where the case was first tried) in granting plaintiff a new trial, and no plea in abatement was filed, and no evidence offered in support of such objection, the same was properly overruled.

(Syllabus by the Court.)

Error from district court, Allen county; L. Stillwell, Judge.

Action by C. G. Peck, administrator of the estate of D. O. Peck, deceased, against the city of Ft. Scott and the Kansas City, Ft. Scott & Memphis Railroad Company. From a judgment for plaintiff, defendants bring error. Affirmed.

Wallace Pratt, Chas. W. Blair, W. C. Perry, W. P. Dillard, and J. H. Crider, for plaintiffs in error. J. D. McCleverty and J. S. West, for defendant in error.

MILTON, J. This action was brought by C. G. Peck, as administrator of the estate of his son, D. O. Peck, deceased, under paragraph 4518, Gen. St. 1889, against the city of Ft. Scott and the Kansas City, Ft. Scott & Memphis Railroad Company, jointly, to recover damages which said plaintiff alleged he had sustained by reason of the death of his son, as plaintiff alleged, being due to the fault and negligence of the defendants. At about 3 o'clock a. m., on November 30, 1890, D. O. Peck was driving an omnibus going east on Third street, in Ft. Scott, taking a passenger from the Missouri, Kansas & Texas Railroad depot to his home. The vehicle was nine feet two inches in height. Over and across Third street, which extends east and west, was a trestle bridge, built in 1870 or 1871, which formed a part of the railroad of the litigant company. At the point where the usual passage of wagons took place, this trestle bridge was nine feet and six inches above the surface of the street on the west side, and nine feet above on the east side. The railroad company constructed a fill across this street in 1869, but the next year, on demand of the city, cut an opening through the embankment, and put in this structure, which we shall refer to as the "trestle," and removed the fill down to or slightly below the natural surface of the ground, and down to the grade line established by the city engineer. About fifteen feet east of this trestle the railroad company dug a ditch for drainage purposes, and covered it with a small wooden bridge. Some years after this bridge was built, it was raised from six to ten inches. The trestle was several times repaired by the company, and there was evidence to the effect that, in uncovering the timbers, quantities of dirt were thrown into the street under the trestle, thus filling up and raising the street somewhat under the trestle; and there was evidence to show that on one or two occasions employes of the city had scraped dirt from the surface of the street under it. The land surface is such in the vicinity of this trestle that drainage is not easy, and the evidence is conflicting as to the possibility of lowering the street under the trestle, and at the same time making it passable in wet weather. Deceased was sitting in the driver's usual seat, on the top of the omnibus, and his body was caught between the timbers of the trestle and the top of the omnibus, crushing him so terribly that he died in a very few minutes after the injury was received. No one saw the accident. The passenger, Mr. Hubbard, a postal clerk, says the vehicle stopped, and he heard a crash on top of it; that he immediately got out, and found the driver lying on top of the omnibus, between the central portion of the roof (which is the highest part of the vehicle) and one of the side railings, between the two stringers of the trestle, with his face up, and his feet near the driver's seat. He was struggling, as if dying. In some way, Mr. Hubbard got him down to the ground, and shortly afterwards other persons came; but the in-

jured man died before he could be taken to his room. He was conscious after the injury, and, in answer to a question by Mr. Hubbard as to whether he realized where he was, said that he did, but was too sick to talk. The night was bright and clear, the moon being almost at its full. Third street, where he passed over it, from Scott avenue to the trestle, is a moderate decline for about four blocks, and there was nothing to obstruct a view of the trestle. The railroad at this point is the dividing line between Ft. Scott proper and East Ft. Scott, the business portion of the city being west of the railroad. Deceased had lived for years in East Ft. Scott, and had passed under the trestle with great frequency. He had driven his own transfer wagon for a long time, and had worked for two years or more for the Terry Bus Company, at different times, being a driver of the baggage wagon mainly, but frequently driving a hack. During the month immediately preceding his death, he frequently drove an omnibus. He had often driven a hack or baggage wagon under the trestle, but it does not appear that he had ever passed under there on an omnibus; and it was proven that, in order to remove the one on which he was crushed, it was necessary to back it out, and that it had been drawn by the team very hard against the stringer on the east side of the trestle. Several of the bus company's employes testified that they were in the habit of ducking their heads when driving under the trestle on a hack, although there was no real necessity for so doing. There is nothing to show that the deceased ever did this. Much testimony was received to show that numerous accidents had happened at the trestle to drivers and loads. Third street was much traveled, and its use was necessary for the convenience of a great number of people. There were two other practicable routes from the depot to Hubbard's residence, but the one under the Third street trestle was, for some reason, considered the best. It was not shown that complaints were made at any time to the city or railroad company in regard to this trestle. Deceased was 31 years old, and unmarried, but was engaged to be married. His father was 57 years old, and a widower, and was temporarily earning \$1.50 per day and expenses, while deceased was receiving \$45 per month for his work. His estate inventoried only \$36. He had given about \$200 to his father in the three years preceding his death, and it had been arranged that, after he should marry, his father would live with him.

The defendant city alleged in its answer that, if there was any injury to plaintiff's intestate, it was caused solely by the insufficient height of the trestle of the defendant company, whose duty it was to place and maintain a suitable crossing at the intersection of its said road and the line of the street. There was a large amount of testimony on this point, which will be hereinafter noticed. It was clear from the evidence that both the city, in its corporate capacity, and the railroad company,

had knowledge of the condition of the trestle continuously from the time of its erection to the time of the casualty. The answer of the defendant company, among other things, averred that, when the city sought to operate said street, it agreed with the railroad company that said city would assume all the liability and responsibility of the manner and mode of the construction of the trestle. At the first trial, in Bourbon county, a demurrer to plaintiff's evidence was sustained, but it was afterwards set aside, and a new trial ordered. Shortly thereafter, the Honorable J. S. West, one of the plaintiff's attorneys, having been elected judge of that district, the case was sent to Allen county for trial. Verdict and judgment in favor of plaintiff, and against both defendants, for \$2,000, and the defendants bring these proceedings to reverse said judgment.

Objection was made by the defendants to proceeding to trial in Allen county, for the alleged reason that the same case was then pending in the supreme court upon proceedings brought by the defendants to reverse the ruling of the court granting a new trial to plaintiff. No plea in abatement was filed, and no testimony of any kind was offered in support of this objection. It will not, therefore, be considered by this court. See 8 Am. & Eng. Enc. Law, p. 555, and cases there cited.

The principal questions presented are these: First. Ought the trial court to have sustained the demurrer to plaintiff's evidence on account of contributory negligence of plaintiff's intestate? Second. Was there liability on the part of the defendants, or either of them, because of negligence?

1. The able counsel for each of the plaintiffs in error have given the first question much attention in their briefs. They say that the deceased had lived in Ft. Scott for 10 years, and had driven under the Third street trestle very frequently with wagon or cab, both by day and by night; that there were two other routes on which it was safe to drive; that the night was bright, and there was nothing to obstruct his view for some time before he reached the trestle; and that the other employes of the bus company knew the trestle was low, and were in the habit of "ducking" their heads in going under it, even when driving hacks (counsel, however, say that there was no necessity for so doing); and that the presumption is irresistible that the deceased was acquainted with the height of the trestle. They conclude from these facts that deceased must have driven against the trestle without care or precaution, thus making out a case where contributory negligence is so clearly shown that the trial court should have sustained the demurrer to the evidence of plaintiff. In support of this claim, a large number of cases are cited, and copious quotations given. The case of *Finlayson v. Railroad Co.*, 1 Dill. 584, Fed. Cas. No. 4,793, is not applicable, as it appears that the injured party was strolling along a railroad track, "in a state of abstraction, care-

less of what might happen," practically inviting harm. In this case deceased was going where he had a right to be, in the performance of his work. Counsel have said that it was not necessary, though somewhat customary, for drivers of hacks to duck their heads when going under this trestle. It follows, then, that it would not be negligent for a driver of such a vehicle to omit such action there; and, since it is not shown that deceased actually knew that the trestle was dangerously low, it could not be said, as a matter of law, that he was guilty of contributory negligence in not getting down from the seat in driving up to the trestle. The very fact that he had so often driven under it with perfect safety and convenience may have prevented close inquiry on his part as to the actual height of the structure. Besides this, it was not shown that he had ever before driven an omnibus under the trestle, or that he knew anything about the danger of so doing. Certainly, the one he was driving could not have been driven through the passageway under it. The case of *Dewald v. Railroad Co.*, 44 Kan. 586, 24 Pac. 1101, differs materially from this case, for in that it was clear intestate contributed directly to his injury, in that he alighted from a train while it was moving rapidly, before it reached its usual stopping place. The court, in considering the claim of counsel that the case ought not to have been taken from the jury, used this language: "It is true that a jury may infer ordinary care and diligence on the part of an injured person from the love of life, or the instinct of self-preservation, and the known disposition of men to avoid injury; but in this case the presumption that the deceased was in the exercise of due care is overcome by proof to the contrary, and this appears without any conflict of evidence from plaintiff's own case." We observe that there is no evidence as to actual negligence on the part of the deceased in the case at bar.

It is strongly argued that the case of *Railway Co. v. Montgomery* (Tex. Sup.) 19 S. W. 1015, furnishes an adjudication by the court of final resort that facts such as exist in this case conclusively prove contributory negligence, and bar any right of recovery. The fourth division of the syllabus reads: "Plaintiff was injured by being caught between the timbers of the trestle and the load of wood on which he was riding, the ground being higher on the side opposite which he entered. Held, that having passed under the trestle before, hauling wood, and being used to the way, he was guilty of contributory negligence in not foreseeing the danger." The distinction is plain between the case cited and the case in hand. The trestle was not over a highway, and the court found that the company was not bound to provide a crossing at the point where the trestle was located. Whether or not it was intended for a passage was an issue in the case. The court also found that the injured party was accustomed to pass under the trestle with loads of wood,

and held that he thus knew, from experience, in hauling similar loads, the danger from driving under the trestle with a load of wood.

It is claimed that the contributory negligence of the deceased was shown by his not choosing a safer way when such was open to him; and the case of *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973, is cited as supporting this contention. Part of the syllabus reads as follows: "One who attempts to cross over a sidewalk as part of a road known to him to be dangerous, when this dangerous place could have easily been avoided, as by passing around it, or by taking another side, is wanting in due care, and the court may so declare as a matter of law." It will be noticed that the fact of the knowledge of the dangerous character of the place is assumed. Besides, this is not in accordance with the doctrine of our supreme court. See *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38. Other cases are cited, but the same distinction appears in all of them. We think this case much like that of *Railroad Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010. Rowan was killed by being struck by the timbers of a low bridge while he was on top of a furniture car, in the performance of his duties as a brakeman. We quote the following from the opinion in that case: "It is contended that, as Rowan had frequently passed under this bridge and two others of the same height, he knew, or should have known, that the bridge was too low to permit him to stand upon the top of furniture cars while passing through or under the bridge. It is insisted, therefore, that the court could declare, as a matter of law, that no recovery can be had in this case. We are of the opinion that the testimony was sufficient to send the case to the jury, and that it cannot be said that the findings of fact do not justify a recovery. When the injury and the fault of the company had been proved, the burden of showing that Rowan had knowledge of the risk, or that he failed to exercise ordinary care in the matter, rested upon the company. In the absence of evidence to the contrary, it will be presumed that Rowan was free from contributory negligence, as it is held that a jury may infer ordinary care on the part of an injured person from the love of life or the instinct of self-preservation and the known disposition of men to avoid injury." *Dewald v. Railroad Co.*, 44 Kan. 591, 24 Pac. 1101. And again: "While he had ridden over this section of the road for a year or more, no one has been produced to show that he had ever ridden upon one of the high cars, nor that his attention was ever called by any one to the risk of so doing." The demurrer to plaintiff's evidence was properly overruled so far as it relates to the contributory negligence of the deceased.

2. As to the liability of the defendants below for negligence in respect to the trestle: Certainly, that was a dangerous trestle, and one that impaired the usefulness of the street at the time of the casualty. Responsibility for its condition rests somewhere. There was

negligence on the part of one or both of the defendants below. Both had a duty fixed by statute. The city of Ft. Scott owed to the public the duty of keeping the streets within its limits in a safe condition for use in the usual manner by travelers, and was liable in a civil action for injuries resulting from the neglect to perform this duty. *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38; *Jansen v. City of Atchison*, 16 Kan. 358; *City of Salina v. Trospen*, 27 Kan. 544. The railroad company had a duty also, under the fourth clause of paragraph 1207, Gen. St. 1889, which reads: "Fourth. To construct its road across, along or upon any stream of water, watercourse, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness." Counsel for the railroad company say that the company might have either restored the street to its former state, or have restored it to such a state as to have not necessarily impaired its usefulness, and that it did both, by taking out the embankment down to, or even below, the natural surface, and by putting the street into a usable state, fit for public use, by making a clear space of between 12 and 13 feet between the surface of the street and the trestle, by raising the trestle, and by digging below the surface of the street. They say there can be no question that the space was 12 or 13 feet in 1871, immediately after the street was opened there, as the only witnesses who testified as to the height of the bridge at that time so testified. Counsel for the city called attention to the fact that the petition in this case alleged that the negligence of defendants consisted in the fact that the company had, with full knowledge and permission of the city, placed and maintained an obstruction over Third street, the said obstruction being a bridge or trestle, which was elevated at such a height (only about nine feet above said street) as to obstruct the passage of many vehicles in common use, when attempting to pass along said street. They say that these allegations mean that the railroad company constructed a bridge only nine feet above the street, and that the city had permitted it to remain at that height; that this is the only negligence charged; and that such allegations did not justify the admission of any testimony to prove that the space between the street and the trestle had been lessened by the street being since filled up from any cause. They cite the case of *Talbot v. Taunton*, 5 N. E. 616, in which the supreme court of Massachusetts said: "Where a railway is built over a highway which a city is bound to keep in repair, and the surface of the street is so raised that passengers cannot pass under it safely and conveniently, the city is liable for injuries caused by such defect in the highway, if the grade of the street was raised, and the city had no-

tice of it. If the railway bridge alone constituted the defect, the city is not liable." We remark that the case before us was tried on the theory that the space may have been originally insufficient, and that it was lessened by the acts of the railroad company in putting dirt in the street, and from other causes, and that the city was negligent in not preserving the proper space.

Very few objections to the introduction of evidence were made in this trial, and we are not advised by counsel where the objectionable testimony is to be found. The testimony occupies over 250 pages of the record. The objections as to irrelevancy cannot be considered.

We are unable, after careful and repeated examinations of the evidence, to agree with counsel for the railroad company as to the original height of the trestle above the street. Two or three years after the trestle was put in, the track was raised there possibly one foot, but it is not shown that the bents of the trestle were lengthened, as the blocking was done on top of the bents. This had the effect to lift the stringers higher above the street. When the company's employes rebuilt the little bridge just east of the trestle, some years after it was first laid, they raised it and the grade of the street there six inches or more. The net gain in the height of the passageway under the trestle from the two operations was not to exceed six inches. The testimony of James Nulty, which the railroad company relies on as to the original height of the trestle, shows that, at the time it was first put in, he was doing street grading near the trestle for the city, and that he estimated the height of the trestle at 12 feet, but did not measure it. He stated that he thought the street had filled up from 18 inches to 2 feet from that date to the time of the trial, as the mudsills were formerly on the surface of the ground, and during the trial he had dug down some distance to reach them. At the latter date he made certain measurements, and found that the distance from the top of the mudsills to the bottom of the stringer was 12 feet, and from the bottom of the mudsills to the stringer it was from 12 feet 10 inches to 13 feet. He states that the surface of the street in 1870 was at the bottom of this mudsill. The mudsills were on the surface of the street when the trestle was made, but the testimony of Mr. Spafford, superintendent of bridges for the railroad company, shows that, about 12 years before the date of the trial, he put in a new trestle; that he found the mudsills on the surface, and put new ones about 2½ feet below the surface of the street, making longer bents, and setting them down into the ground. He stated that the bents were about 12 feet long, and the other dimensions 12 by 12 inches, and that they rested on the mudsills. The witness Deamer, who testified in regard to the height of the trestle when he raised the track in 1872 or 1873, stated that

he thought it was 10 or 12 feet, but that he had never measured it. From the foregoing, in connection with the undisputed evidence that the trestle was from 8 feet 10 inches to 9 feet 4 inches in height just after the casualty, it will be seen that the space between the bottom of the street and the stringers could never have been greater than 10½ feet; and, if the witness meant that he put the mudsills down so that their upper surface was 2½ feet below the street level, then the passageway was never more than 9½ feet in height, for the sinking of the mudsills below the surface of the street, and putting in longer bents, did not affect the height of the stringers above the street. Thus having a means of fairly accurate measurement, we may say that this bridge was never of sufficient height above the street, and that it necessarily impaired the usefulness of the street. But this street, from various causes, kept filling up, and was occasionally scraped down and lowered somewhat by the employes of the city. That it was filled somewhat at the time of the casualty is beyond any question, but it is impossible for us to determine, and the jury could not have ascertained with certainty from the evidence, to what extent the surface of the street had been raised. We think they were justified in finding that there was negligence on the part of the railroad company by reason of its failure to comply with the statutory requirements, and that there was a continuing duty on the part of the city, in respect to the street under the trestle, to put it in a safe condition for use by the public, and that its failure to discharge its duty rendered it liable in an action for injuries resulting from its negligence.

The counsel for the city contend that the doctrine of the case of Talbot v. City of Taunton, supra, should govern in this case. We observe that, in the case just referred to, the action was against the city alone. We think this decision is applicable under our statutes, which declare the duties of cities and railroad companies in relation to public streets. In the case at bar we cannot say that the city was not responsible for the condition of the street under the trestle, for the reason that the evidence indicated that there was an accumulation of dirt to some extent above the natural surface of the street, and that it failed to require the street to be put into such condition as not to have necessarily impaired its usefulness at the time the trestle was built. Nor could the city relieve the railroad company from the consequences of its failure to comply with the law, by any agreement between the city and the railroad company. We cannot say that the railroad company should not be held liable, unless the evidence clearly and without any material conflict showed that it had performed its duty under the law. This was not shown. All these issues were submitted to the jury, and its verdict upon conflicting evi-

dence has received the approval of the trial court.

We are not warranted in disturbing the verdict and judgment in view of the foregoing considerations, unless we should find that the instructions of the court were improper, or that the court's refusal to give certain instructions was erroneous. One of the instructions asked was that the jury should return a verdict for the defendants. Another was in respect to the knowledge or means of knowledge on the part of the deceased in respect to the height of the trestle above the surface of the street, and of the height of the omnibus, and also his knowledge as to other convenient and safe ways whereby he could have reached his destination, declaring that, if such knowledge or means of knowledge existed, deceased was guilty of such contributory negligence that the verdict should be for the defendants. Another instruction directed the return of a verdict for the defendants if the jury believed from the evidence that the night was light and clear, and that the deceased, as he approached the trestle, could have seen it by using his eyes. Another instruction refused was to the effect that if there were other routes of travel that were safe and convenient, and if the deceased had knowledge of them and the condition of Third street at the trestle, or had reasonable opportunity to know them, he was bound to take one of such other routes, and, failing to do so, the plaintiff could not recover. Of course, the first instruction was properly refused. The second instruction was an incorrect proposition, and told the jury exactly what constituted negligence, thus invading their province. The next instruction refused is subject to the same objection, and it was also very incomplete. The last instruction, whose refusal is complained of, is objectionable for the foregoing reasons, and it is not a good declaration of law. Counsel for the city complain of instruction No. 18, which was given by the court. This related to the inference of the exercise by the deceased of ordinary care and prudence upon the instinct of self-preservation, in the absence of evidence as to what he may or may not have done immediately prior to the injury he received. This instruction is drawn from the language of the supreme court in the case of *Dewald v. Railroad Co.*, hereinbefore cited, and has been recently employed in the case of *Railroad Co. v. Rowan*, also cited herein.

It is further contended that the verdict is excessive, in view of the small amount which the deceased had contributed to his father in the three years preceding his death. We should be inclined to adopt this view were it not for the fact that the defendant in error was to make his home with his son when the latter should marry. No doubt, the jury regarded that as the important element in the matter of damages. We are not prepared to say that the sum awarded was excessive

from this point of view. The judgment of the trial court will be affirmed. All the judges concurring.

ALEXANDER v. WINTERS et al. (No. 1,496).

(Supreme Court of Nevada. June 19, 1897.)

WATERS AND WATER COURSES—RESERVOIR—FLOWING LANDS—RIGHT OF OWNER TO DAMAGES.

In an action for damages caused by defendants opening the gates of a dam, thereby causing a creek to flood plaintiff's land, it appeared that the dam was built by a ditch company under an agreement between the promoters and one of the defendants that the dam should not raise the waters above the level of the lake at high-water mark, and that he should have the absolute control of the flood gates and water ways of said dam after July 1st in each year; that plaintiff, acting as the agent of her immediate grantor, was one of such promoters, and had knowledge of such agreement, and participated in the proceedings of such corporation; that at the time of the injury complained of she was a stockholder of the company; that the corporation ratified such contract, and such defendant exercised the rights given him by it from the time the dam was constructed,—a period of seven years; and that the flooding of plaintiff's land was caused by his opening the gates of the dam, as he had a right to do under such contract. *Held*, that plaintiff could not recover.

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Action by E. L. Alexander against Theodore Winters and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Trenmor Coffin and Curler & Curler, for appellant. Robt. M. Clarke and William Webster, for respondents.

MASSEY, J. The appellant brought this action to recover a judgment for damages against the respondents, caused by flooding water. From the judgment in favor of the respondents, and from an order denying appellant's motion for a new trial, this appeal has been taken.

The complaint charges that in May, 1896, the respondents opened the gates of the dam used for storing water in Washoe Lake, and discharged large quantities of water therefrom in excess of what was necessary to irrigate lands, thereby increasing the flow in Steamboat creek, and causing the creek to overflow its banks, and to flood the appellant's land, and to wash sand and gravel on the said land, and to wash out the head gates and irrigating boxes, and to fill up her irrigating ditches, making it impossible for her to save her hay crop. It is further charged in said complaint that on the 12th day of July, 1896, respondents again opened the gates of said dam and discharged into said Steamboat creek large quantities of water in excess of what was necessary to irrigate the land lying below said lake, thereby causing said creek to overflow its banks, and to wash sand

and gravel upon the appellant's meadows, making it impossible for the appellant to cut and save her crops of hay. The respondents filed separate answers denying the averments of the complaint, and by way of new matter alleged, in substance, that the Washoe Lake Reservoir & Galena Ditch Company had constructed a dam at the outlet of Washoe Lake for the purpose of holding back the waters to irrigate lands, and that the appellant was a member of said corporation, and as such assisted in the construction and maintenance of said dam, and used the waters thereby restrained to irrigate her lands and the crops growing thereon. The facts disclosed by the record, in brief, are: That in the summer of 1896, and before that time, the appellant owned and occupied certain lands in the lower end of Steamboat valley, which were irrigated by the waters of Steamboat creek. She and her grantors have claimed and owned said land since about 1860, and have raised and harvested crops of hay thereon since that date. Steamboat creek is a natural water course, with its principal source in Washoe Lake, flowing over and through the lands of the appellant. Brown's creek and Galena creek are tributaries of Steamboat creek, the waters thereof flowing into Steamboat creek above the appellant's land. Huffaker's creek is also tributary to Steamboat creek, and flows therein on the appellant's lands. Many gulches and ravines discharge their waters into Washoe Lake and Steamboat creek and its tributaries above appellant's lands during the spring season and times of freshet. The volume of water flowing into Steamboat creek is variable, at times being very large, and at other times not sufficient to irrigate the lands of the farmers residing thereon, and exercising the right to use the waters for that purpose. Ordinarily, three or four thousand inches of water flow naturally out of Washoe Lake into Steamboat creek, and in flood times that creek carries about 10,000 inches. The lands of the appellant are in the lowest portion of Steamboat valley, and during the times of high water are flooded. In 1860 the parties claiming to own these lands, and certain other parties, constructed a ditch from a point in Steamboat creek about one mile above the appellant's said land, and over a part thereof, to Huffaker's creek. This ditch was constructed for the purpose of turning the waters of Steamboat creek out of its natural channel below the head of said ditch, thereby drying and making available for hay and grazing the lands adjacent to the said channel, and for the further purpose of irrigating the lands of the parties constructing said ditch. This ditch was constructed upon grounds higher than those through which the natural channel passed. The action of the water flowing through this ditch had gradually deepened and widened the same from the point where it connected with the creek to and partially across the appellant's land. This ditch for a considerable distance above

Huffaker's creek is shallow and narrow. Since the waters of Steamboat creek were turned into this ditch in 1860, the old channel has filled with sediment, and become nearly obliterated. The appellant and her immediate grantor, for whom the appellant was agent, had constructed and maintained dams in this ditch above appellant's lands, thereby retarding the flow and holding back the waters so that the same overflowed the banks thereof, spread over said lands, and irrigated the same. These dams caused a sediment to settle in the ditch, and fill the same, and in 1895 the appellant caused to be constructed upon her own land in said ditch a dam for this purpose. She also caused ditches to be constructed at right angles with the channel from this dam, and caused bulkheads to be put in each. These ditches have less fall than the channel which was obstructed, and were not sufficient in size to carry the water in times of high water, and thereby caused the channels both below and above to fill up with sediment, in consequence whereof the water overflowed appellant's land. The waters of Steamboat creek being insufficient to irrigate the lands thereon during seasons of scarcity, it was determined by the farmers residing thereon to build a dam at the outlet of Washoe Lake for the purpose of storing the waters therein during the winter and spring months, and at times when there was more water than was needed for irrigation. In pursuance of this purpose notice was posted by a portion of the farmers claiming the surplus water of Galena creek, and an easement or ditch to conduct the same into Little Washoe Lake, and the right to construct and maintain a dam at the outlet of Little Washoe Lake, for the purpose of storing the waters therein. The respondent Winters owned the land where the dam was to be built, and the land on the border of the lake, which would be flooded by the building of the dam, and he objected to the construction of the dam unless upon condition and subject to his control. These conditions were accepted by the ranchers, and were contained in a written agreement between the parties, whereby Winters granted to the farmers the right to make a dam of solid masonry across the outlet of Washoe Lake of such dimensions in height as the farmers may deem proper for the purposes of flowing water back upon said lake for storage purposes. He also granted the right to make and construct a ditch over his land for the purpose of carrying the waters from Galena creek into said lake to be stored for use in irrigation. It was further provided that the dam should not raise the waters above the level of the lake at high-water mark. It was also further provided that Winters should have the absolute control over the flood gates and waterways at all times, and also control over the flood gates and waste ways of said dam at any time after the 1st of July in each year. This agreement was made on the 18th day of May, 1889. On the 5th day of Septem-

ber, 1889, the farmers locating and claiming the right to construct the dam and ditches above referred to, conveyed their rights to the respondent Winters, which conveyance was duly recorded. On the same date certain of the farmers locating and claiming the rights above referred to made and filed articles incorporating the respondent the Washoe Lake Reservoir & Galena Ditch Company. The purpose of said incorporation, as expressed in the certificate thereof, was to construct a dam at the outlet of lower Washoe Lake, and to construct and maintain a ditch to divert water from Galena creek to lower Washoe Lake, and there store the same for stock, domestic, irrigation, and mechanical uses. Certain farmers owning land upon Washoe and Steamboat creeks were the promoters of this corporation, and the appellant, acting as the agent of her immediate grantor, was also one of the promoters of the same. It also appears that at the time of the injury complained of, and for some time previous thereto, appellant was an owner of the stock of said corporation; that for a long time previous, acting as agent for her immediate grantor, she had participated in the proceedings of said corporation, and had claimed the benefits thereof. She admits that she had knowledge of this agreement between Winters and the farmers. In 1889 the corporation constructed the dam at the outlet of Little Washoe Lake, since which time said corporation has exercised the right for which it was created under the agreement with the said Winters. The appellant has participated in the meetings of the corporation either as agent of her immediate grantor or as a stockholder thereof during these years, and has paid the assessments levied upon the stock by herself and her grantor.

The year of 1896, respecting the water supply about Washoe Lake and its vicinity, was unusual. The snows upon the adjacent mountains remained longer than usual; unusual and heavy storms prevailed in May, and Steamboat creek and its tributaries were full, and at times overflowed their banks, during the months of May, June, and July of that year. On the 20th day of May a great storm filled the banks of these streams, overflowed the same, carried away dams, bridges, and bulkheads, and washed sediment and debris over the flooded lands. On the 5th day of May, 1896, the gates of the dam at the outlet of Washoe Lake were raised by the agent of the corporation upon the direction of the respondent Winters, and were kept open until the 15th of June, at which time they were closed. It seems that the lands flooded by the dam on the borders of Washoe Lake belonging to Winters were meadow lands, and the hay growing thereon is usually harvested during July. On the 12th day of July of that year the gates of the dam were again raised by the company, at the request of Winters, pursuant to said agreement, and there were discharged therefrom for some time

about 3,500 inches of water into Steamboat creek. At this time the lands of the appellant were partially flooded, and the waters discharged from the lake ran down upon and spread over a part of appellant's meadow, and prevented her from harvesting the same. The natural channel of Steamboat creek above the ranch of the appellant is sufficient to carry within its banks all the water turned therein during July and August, 1896, and has been since 1889, except a small part thereof. The part not sufficient to carry the water has been obstructed and filled with sediment and debris, which has settled therein by reason of the dams and bulkheads maintained by the appellant and her grantor. It further appears that in the latter part of June or early in July the bulkhead and dam on appellant's ranch were out of repair; that the water was running under the bulkhead and over her lands, and could not be controlled under the conditions of the channel. Prior to 1896 the quantity of water which came down Steamboat creek was not sufficient to do appellant much, if any, injury, and was often insufficient to irrigate her lands. It further appears that the very large quantity of water stored in 1896 in Washoe Lake, and that the very large quantity of water flowing into Steamboat creek from said lake, and from streams and ravines tributary to Steamboat creek, was due to the causes above set out. The record also discloses that the appellant, before the commencement of this action, had commenced an action against certain other parties for damages growing out of flooding waters during this season, but, as the facts connected with this suit will not in any manner affect the decision of this case, they are omitted. Upon the facts above set out, the court found that the appellant had been damaged by not being able to harvest her crop in the sum of \$500, but gave judgment for the respondents.

The errors assigned are: First, that the findings, conclusions, judgments, decisions, and decrees of the court are not supported by the evidence, and are contrary to the evidence; second, error of the court in rendering a decision, judgment, and decree in favor of the respondents. Without passing upon all the contentions presented by the briefs, we find in the record reason for affirming this judgment. The appellant was a promoter of the project to construct a dam at the outlet of Washoe Lake for the purpose of storing water for irrigation, either as owner of some interest in said land or as the agent of her immediate grantor. She was in control of the land as the owner of some interest therein, or as the agent of her immediate grantor, before and at the time of the construction of the dam. She was present at the meeting when the corporation was formed. Before the formation of the corporation she was anxious to have an interest in the project, and was then informed of its purpose and objects. She requested the witness Crane to obtain such an interest. She discussed the height of the proposed dam. She subscribed

for stock in the name of her immediate grantor. She paid assessments upon this stock for the purpose of constructing the dam. The dam was discussed by her during its construction. She attended some of the meetings of the stockholders, and took part therein. She accepted the benefits of the stored waters to irrigate the land during the dry months of the year. She was cognizant of the agreement with Winters. The dam could not have been constructed without obtaining a concession from the defendant Winters, and she must have known this fact. It is also apparent from all the facts that the dam was constructed by the corporation under the contract with Winters; that the waters so stored were used thereunder, and the flow of the water was regulated thereby. It is a well-settled proposition of law that a corporation may ratify an agreement made by its promoters. Such ratification may be implied from the acts of the corporation without an express acceptance. The liability of the corporation under these circumstances does not rest upon a supposed agency of the promoters, but upon the immediate and voluntary act of the company. If the contract is within the corporate powers of the corporation, it may, when organized, expressly or impliedly assume the responsibility of the same, and thus make it a valid obligation of the corporation. This is especially true if the agreement appears to be a reasonable means of carrying out any of the corporate powers or authorized purposes. *Pratt v. Natch Co.* (Wis.) 62 N. W. 84; *Bindery Co. v. Kittleson* (S. D.) 57 N. W. 233; *Railroad Co. v. Granger* (Tex. Civ. App.) 23 S. W. 425; *Water Co. v. Adams* (Colo. App.) 37 Pac. 39; *Bruner v. Brown* (Ind. Sup.) 38 N. E. 318; 2 Cook, Stock, Stockh. & Corp. Law, § 797. The respondent the Washoe Lake Reservoir & Galena Creek Ditch Company ratified by its acts the Winters contract. This contract is clearly within the powers of this corporation. The purposes of the corporation could not have been accomplished without the concessions contained in this contract. The conditions of the contract whereby Winters reserved the right to control the head gates of the dam for the purpose of protecting his own property are reasonable, and the corporation, having accepted the benefits of this agreement, cannot repudiate its burdens. Those rights were exercised by Winters from the date of the construction of the dam up to the time of the alleged injury. The appellant during all these times, either as agent of her immediate grantor, who was a stockholder of said corporation, or as a stockholder of said corporation, accepted the benefits arising under this contract in the irrigation of said land, and acquiesced in the exercise by Winters of those rights reserved in the contract. It is well settled that a person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part. 2 Herm. Estop. § 1028, citations in note. The same doctrine is forcibly

stated by this author in section 1049 and section 1050 of the same volume, wherein he says: "A person shall not be allowed at once to benefit by and repudiate an instrument, but, if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes. No person can accept and reject the same instrument. * * * He who accepts a benefit under a deed, a will, or other instrument, must confirm the whole instrument, conforming to all its provisions, and renouncing every right inconsistent with them." The appellant and her grantor considered it necessary that this dam should be constructed for the purpose of storing water to irrigate said lands. The dam was constructed under the Winters contract. She and her grantor accepted the benefits of this contract, and she must now accept the burden imposed by it. Whatever damages she sustained in May and July by reason of the acts of the respondents arise from the exercise of the rights under this contract, and the appellant, as a stockholder, under the peculiar circumstances of this case, cannot complain of these acts. For these reasons the judgment of the district court will be affirmed.

BELKNAP, C. J., and BONNIFIELD, J., concur.

STATE ex rel. KEITH v. WESTERFIELD,
State Treasurer. (No. 1501.)

(Supreme Court of Nevada. June 18, 1897.)

GENERAL SCHOOL FUND—APPROPRIATION TO
PAY TEACHERS IN STATE ORPHANS'
HOME—VALIDITY.

1. Const. art. 11, §§ 2-6, provide that the legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district six months in each year; that the proceeds derived from designated sources are "pledged for educational purposes, and shall not be transferred to any other fund for other uses, and shall be from time to time, apportioned among the counties"; that the legislature shall provide for the investment of all proceeds derived from said sources in certain kinds of bonds; that the interest only "shall be used for educational purposes, and any surplus shall be added to the principal sum, provided that such portion of said interest as may be necessary may be appropriated for the support of the state university"; that the legislature shall establish such university, and may establish normal schools and such different grades of schools, from the primary department to the state university, as it deems necessary; and that it shall provide a special tax, not exceeding two mills, in addition to the other means provided for the support of said university and common schools. *Held*, that no part of the general school fund can be appropriated to pay teachers at the state orphans' home, and St. 1897, p. 82, in so far as it attempts such appropriation, is void.

2. St. 1897, p. 82, § 1, provides that the following sums are appropriated "for the purposes hereinafter named, and for the support of the" state government for the fiscal years 1897 and 1898: "For the salary of the governor, \$8,000." Forty other sums are named for as many purposes, without designating any fund. Section 34

is: "For the salary of one teacher and one assistant teacher at the state orphans' home, \$2,400, payable out of the general school fund," *Id.*, that though the last clause of section 34 is in conflict with the constitution, and void, the remainder of the section is not affected by such fact, and makes a valid appropriation.

Original application by the state, on the relation of Florence M. Keith, for a writ of mandamus to compel W. J. Westerfield, state treasurer, to pay a warrant in relator's favor, drawn by the state controller.

J. Poujade and Geo. W. Keith, for relator. J. R. Judge, Atty. Gen., William Woodburn, and A. J. McGowan, for respondent.

BONNIFIELD, J. The relator brings this action to compel, by writ of mandamus, the respondent, as state treasurer, to pay a certain warrant drawn in her favor by the state controller for the sum of \$45, in payment of her salary for the month of April last, as assistant teacher at the state orphans' home. The warrant was drawn on or made payable out of the general school fund, pursuant to the terms of the act making an appropriation for the payment of the salaries of the teachers at said home, passed at the last session of the legislature. St. 1897, p. 82. The question of the constitutionality of said appropriation is raised by the pleadings. The contention of counsel for respondent is, in effect, that the moneys belonging to the general school fund, in contemplation of the constitution, can be used only for the support of the common schools and the state university, and not for any purposes of the state orphans' home. Counsel for relator argues to the effect that, as the constitution pledges these moneys for educational purposes for the benefit of all the children of the state, the appropriation of a due proportion of it for the payment of the teachers at the state orphans' home is permissible under the terms of the constitution; that such use of it is applying it to educational purposes; and that no child can be properly deprived of the benefits of said moneys by reason of its being placed in said home; and that the educational department of said home may properly be considered a part of the common school system. As we view the terms of the constitution and the former decisions of this court, we do not think the above contention is tenable on the part of the relator. Sections 2 to 6 of article 11 of the constitution provides "that the legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year"; that the proceeds derived from certain designated sources "shall be, and the same are hereby, solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses, and shall be, from time to time, apportioned among the counties"; that the legislature shall provide for the investment of all proceeds derived from any of said sources in certain

kinds of bonds; "that the interest only of the aforesaid proceeds shall be used for educational purposes, and any surplus interest shall be added to the principal sum: provided, that such portion of said interest as may be necessary may be appropriated for the support of the state university"; that the legislature shall provide for the establishment of a state university, which shall embrace departments for agriculture, mechanical arts, and mining; that the legislature shall have power to establish normal schools and such different grades of schools, from the primary department to the university, as, in their discretion, they may deem necessary; and that the legislature shall provide a special tax, which shall not exceed two mills on the dollar of all taxable property in the state, in addition to the other means provided for the support and maintenance of said university and common schools. The educational system of this state consists of the above-named departments of education, and the above provisions are made for the support of this system or these departments. In *State v. Rhoades*, 4 Nev. 312, the court held "that section 3 of article 11 of the constitution prohibits the legislature from using the funds arising from the sale of the public lands, which were granted for educational purposes, for any other branch of state expenditure, except that immediately connected with the educational system, but (that) it does not prohibit the use of a part of the trust estate for the purpose of making the rest available." The above construction of said section 3, that the legislature is prohibited from using the funds arising from the sale of lands which were granted for educational purposes for any other branch of state expenditures, except that immediately connected with the educational system, except, etc., is applicable to all moneys arising from the proceeds from the several sources named in said section, whether it be principal or interest, as all such moneys or funds are, by the same terms, included in the prohibition. In *State v. Dovey*, 19 Nev. 306, 12 Pac. 910, the court held: "In the apportionment of the school fund as required by the constitution (article 11, § 3), the wards of the state at the orphans' home should not be counted as a part of the children of Ormsby county, as their education is provided for by the state orphans' home, and they have not the right to attend the public school." It was clearly the opinion of the court in that case that the educational department of the state orphans' home was foreign to the educational system of the state, as provided for by said article 11; that the apportionment of the school moneys required by the constitution to be made among the several counties could in no manner be affected by anything pertaining to said home; and that the wards of the state in said home had no interest in said moneys; and that they could not be considered in connection therewith. The court said: "The controlling thought was to give to each coun-

ty an equal sum for each child in the county entitled to attend and enjoy the public schools;" that the children in the orphans' home were not entitled to attend the public schools; that "they are no tax upon the public school fund. The school is not affected by them. It would be the same if they did not exist, or if they resided in a foreign country." It is true that, if a portion or all of these moneys were appropriated to the education of the children in said home, it would be applying them to educational purposes; but the constitution does not include the education of these children in the term "educational purposes." The constitution requires the interest derived from the said several sources to be apportioned among the counties, except such part as the legislature may deem necessary for the support of the state university. The special tax required to be levied as above named is for the support of said university and common schools. The said interest and the proceeds of said tax constitute the general school fund. Then, certainly, no part of this fund can be used to pay the warrant of relator in question, without disregarding the mandates of the constitution.

We are of opinion, upon reason and the above authorities, that the appropriation made by the legislature for the payment of the salaries of the teachers at the state orphans' home, in so far as the same is made payable out of the general school fund, is unconstitutional, null, and void; and it follows that the warrant in question, in so far as it is made payable out of said fund, by the terms thereof, is null and void. But it does not follow that said appropriation or said warrant, or either of them, is otherwise null and void. We hold that the legislature has made a valid appropriation for the payment of the salary in question, and that the same is payable out of the general fund in the state treasury, the same as the salary of the governor and most of the other state officers, and the same as other appropriations in which no specific fund is named. Section 19 of article 4 of the constitution provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law." It will be observed that it is not required that the fund out of which the appropriations are to be made shall be named in the appropriation act. Usually, if not always, other acts or the constitution show what fund the money appropriated is to be drawn from. Section 1 of the said act of 1907 appropriates various sums for different purposes. It reads: "The following sums of money are hereby appropriated for the purposes hereinafter named, and for the support of the government of the state of Nevada for the fiscal years 1897 and 1898;" and then follows: "For the salary of the governor, eight thousand dollars;" and 40 other sums are named, for as many different purposes, without designating any fund. Section 34: "For salary of one teacher and one assistant teacher

at the state orphans' home, twenty-four hundred dollars (\$2,400), payable out of the general school fund." The last clause of this section is null and void, for the reasons hereinbefore given; but it does not invalidate said section 1, nor the balance of said section 34. Cooley, in his *Constitutional Limitations*, says: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. * * * Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall." See cases cited by Cooley. "If a law be passed by the legislature, constitutional in part, but unconstitutional as to some of its provisions, that which is constitutional will be sustained, unless the whole scope and object of the law is defeated by rejecting the objectionable features." *State v. Eastabrook*, 3 Nev. 173; *Evans v. Job*, 8 Nev. 322; *State v. Swift*, 11 Nev. 129. The numerous other authorities which hold to the same effect need not be cited.

It seems to us that it cannot be reasonably inferred that the appropriation for said salaries, and the designation of the fund out of which the same should be paid, are so dependent on each other that the legislature would not have made the appropriation without making the salary payable out of said fund. The main object of the legislature was to provide for the payment of said salary, and for some reason they thought it advisable to have the payment made out of that fund. It is evident to our mind that the legislature would have as readily made the appropriation out of the proper fund if it had occurred to the members that it could not properly be made out of the general school fund. We therefore conclude that there is a valid appropriation made for the payment of said salary out of what is known as the "general fund" in the state treasury, and that it is the duty of the state treasurer, the respondent, to so pay said salary and said warrant. We understand that the respondent objects to paying said warrant out of the general school fund, and was not aware that he could pay it out of any other fund, under the terms of said appropriation. We do not deem it necessary to make any order in this case at this time, as the respondent will undoubtedly pay said warrant as indicated in this opinion.

BELKNAP, C. J., and MASSEY, J., concur.

SEARS v. LYDON.

(Supreme Court of Idaho. May 31, 1897.)

SHERIFFS AND CONSTABLES—TRESPASS—JUSTIFICATION UNDER WRIT—EVIDENCE PROVING FRAUD.

1. An officer, to justify the seizure of chattels under a writ of attachment against a stranger to such writ, must show a valid writ, by showing the existence of all of the jurisdictional facts that must exist before the writ can issue; and he must do this by the record, or a duly-authenticated copy thereof, or the attachment suit.

2. To justify a sale under an execution, as against a stranger to the writ, an officer seeking to justify thereunder must prove a valid judgment.

3. When a stock of merchandise is sued for, the measure of damages is the cost of such stock in like quantity at the place of the alleged trespass, if purchasable there in such quantity; otherwise, the wholesale price of such goods on the nearest markets where they can be purchased in like quantity, with necessary cost of transportation added.

4. Although an officer cannot fully justify a seizure under a writ of attachment or execution valid on its face, as against a stranger to such writ, without proving the jurisdictional facts upon which such writ issued, under section 3021, Rev. St., by showing absence of an actual and continued change of possession, yet he may, in such case, to protect himself against exemplary damages, show that the chattels seized by him under such writ were recently in possession of the defendant to the writ, and in connection therewith he may also show a lack of change of possession; but such showing will only protect him from exemplary damages when he fails to prove the jurisdictional facts necessary to the issuance of a valid writ. He is permitted to make this showing to prove his good faith in making the seizure.

5. Circumstances are admissible to prove fraud, *ex necessitate*, that would not be admissible in ordinary cases.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action of trespass by Frank D. Sears against Harry Lydon, growing out of the seizure by him, as sheriff of Nez Perces county, of a stock of goods under attachment, and sale thereafter under execution. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

James W. Reid, for appellant. James E. Babb, for respondent.

QUARLES, J. On the 23d day of August, 1895, a writ of attachment was issued out of the district court of the First judicial district of Idaho, in and for Shoshone county, in an action there commenced by Mary E. Goddard, as plaintiff, against H. P. Barger and C. F. Sears, as defendants, in favor of said plaintiff and against the said defendants, to secure a debt alleged to be due to said plaintiff from the said defendants, in the sum of \$1,127, which writ of attachment was directed to the sheriff of Nez Perces county; and the same was on the 28th day of August, 1895, placed in the hands of the appellant, as sheriff of Nez Perces county, who on the same day seized under said attachment a stock of merchandise, consisting of harness, saddles, bridles, and such goods as are usually kept in a

saddle and harness store. Afterwards said stock of merchandise was sold under an execution that issued in the aforesaid action, and sold by the appellant, as sheriff, at execution sale. On October 29, 1895, the respondent, as plaintiff, commenced this action against the appellant, as defendant, to recover damages for the alleged conversion of said stock of merchandise. The defendant answered, and sought to justify under said attachment and execution; denied plaintiff's ownership; alleged the property in question to have been, at the time of the seizure thereof under said attachment, owned by C. F. Sears, one of the defendants in said attachment; and averred specific acts tending to show that C. F. Sears had fraudulently attempted to transfer said stock of merchandise to the plaintiff a few days prior to said levy, but alleged that there had been no actual or continued change of possession of the said stock of merchandise between plaintiff and said C. F. Sears. The cause was tried before a jury on the 2d day of June, 1896, and a verdict returned in favor of the plaintiff for the sum of \$1,700.

In his complaint the plaintiff avers the property in question to have been at the time of the seizure of the value of \$1,600, and says that by reason of said conversion he was damaged in the sum of \$2,500, for which he demands judgment. The evidence adduced on the trial is set forth at length in the transcript, and from the evidence many facts tending to show fraud in the transaction between the plaintiff and C. F. Sears appear. In fact, we find in this transaction many of the earmarks of fraud, which in law vitiate such transactions. The defendant's justification failed for the reason that he failed to prove the jurisdictional facts authorizing the issuance of the writ of attachment under which he seized the property in question. As between himself and the defendants to the writ, the writ itself would be sufficient, but as between the defendant and the plaintiff in this action, the latter being a stranger to the writ, it was necessary for the defendant, in order to justify his seizure under said writ of attachment, to go back of the writ, and show the existence of the necessary jurisdictional facts, to wit, that complaint was filed, summons issued, proper affidavit for attachment made and filed, and sufficient undertaking on attachment executed and approved, writ issued, and levy and return of the writ; and all these facts could only be shown by the record, or duly-authenticated copies thereof. Then, to protect himself against said sale under execution, the defendant should have proved the judgment in the action upon which the execution was issued, by producing the judgment roll, or duly-authenticated copy thereof. Failing to produce such evidence, his seizure and sale of the property in question are not justified. Still, we think that the defendant, on the trial, should have been permitted to prove any fact tending to show that C. F. Sears had been, prior to the levy of the attachment, the owner and in possession of the prop-

erty seized, and that the transfer to the plaintiff was fraudulent. He could do this in mitigation of damages, and as a defense to punitive damages. An officer who seizes, under a writ valid on its face, property recently owned by the defendant to such writ may show such fact; and he may also show any facts tending to show want of an actual and continued change of possession of said property between the defendant in the attachment and a third party claiming to have purchased such property, for the purpose of showing his good faith, and in mitigation of damages. In the case at bar the plaintiff is a brother of C. F. Sears, one of the defendants to the attachment. C. F. Sears owned the stock of goods seized, and was doing business with the same until a few days prior to the seizure of the goods under the attachment. Plaintiff had been, as he himself testifies, managing the business, and, in his own language, "ran the business" from June 30, 1893, until the seizure complained of; from June 30, 1893, to April 19, 1894, for C. F. Sears and A. Cohen, under the name of the Lewiston Harness & Saddle Company; and from April 19, 1894, up to the 10th of August, 1895, as manager for his brother C. F. Sears, conducting the business under the name of the Sears' Saddlery Company. Plaintiff claimed to have bought the entire stock of goods for a debt due himself for wages earned during the time he had been manager of the business, and an alleged debt from C. F. Sears to A. Cohen, for which he was surety, in the sum of \$500; giving his note to said C. F. Sears for \$220, alleged balance of purchase price. It also appears in the evidence that in the month of August, 1895, said C. F. Sears and the firm of Barger & Sears, of which he was a member, were in falling circumstances, and that said C. F. Sears was then transferring different parcels of property to relatives of his, under suspicious circumstances. The theory of the defense, and the one upon which the levy was evidently made, was that there had not been such a transfer and change of possession of the chattels in question, between C. F. Sears and the plaintiff, as would satisfy the statutes of Idaho relating to similar transactions, and, for that reason, that the alleged sale to plaintiff was void as to the attaching creditor, Goddard. But, to sustain this theory and defense, it was necessary for the defendant to establish the relation of creditor and debtor between the plaintiff in the said attachment and said C. F. Sears, in the manner hereinbefore suggested. And, if this had been done, then the defendant would have presented a complete defense to the action by showing that there had been no actual and continued change of possession as required by section 3021, Rev. St. Idaho, as construed by this court in *Harkness v. Smith*, 2 Idaho, 952, 28 Pac. 423. The instructions of the court were contradictory, and therefore erroneous, submitting at one time the question of fraud for want of change of possession, and taking at another time from the jury the

same question, and the jury were doubtless confused by such instructions.

Under the showing made by the defendant, he was not liable for exemplary damages. The measure of damages in the case at bar is correctly stated by 3 *Suth. Dam.* (2d Ed.) § 1098, in the following language: "Where a quantity of merchandise is sued for, the retail price would be unjust; for the merchant, in fixing that price, takes into consideration, not only the first cost of the goods, but store rent, clerk hire, insurance, and probable amount of bad debts, and adds to all these a percentage or profit. This must be understood of a considerable quantity, not of a single article. The owner must be entitled to recover at such rate as he would have to pay in the nearest market where a like quantity could be bought to replace the property taken. Added to this, no doubt, should be the expense necessarily incurred in getting the property so purchased to the place where the trespass was committed." This rule was adopted by the supreme court of California in *Nightingale v. Scannell*, 18 Cal. 315. The evidence in the case failed to show what were the nearest markets that a like quantity of the goods in question could be purchased in, or the price of similar goods in like quantity on such nearest markets. It was incumbent on plaintiff to have shown what were the nearest markets in which similar goods to those in question could have been purchased, and the market value of same purchased in like quantity on such markets, and this he failed to do. The necessary data from which only the legal measure of plaintiff's damage could be ascertained being absent, the verdict of the jury was unauthorized and against law, for the reason that such damage must be ascertained by the measure of damages recognized by law, and by such measure only. It is true that the plaintiff, in his testimony, says that he has indicated alongside the items in the inventory (doubtless the one attached to the sheriff's return) "the market value of those items in numerals in Lewiston, Idaho, on the 28th day of August, 1895." Continuing he says, "I have indicated the price at the wholesale markets, and then there is a percentage of freight added." It cannot be ascertained from the evidence how much the plaintiff "added" for freight, on what market the goods were purchased, at what price they were purchased. It is usual for persons buying goods at wholesale to receive invoices showing the items and prices thereof, and to receive, when they pay freights, expense bills from common carriers showing the freight charges. Plaintiff did not produce invoices from the seller showing the prices, nor did he show that such invoices had never been received, or, if received, that they had been lost or mislaid. Nor did he produce, nor show why he failed to produce, expense bills showing the freights that had been paid on the goods in question. Plaintiff, on redirect examination, testified: "I included with-

in the term 'stock of goods,' as worth \$1,796.87, the harness, saddles, bridles, whips, spurs, and buggy robes, and fixtures, the tools, and everything in and about the harness and saddle business, the book accounts, and the notes, and each and every asset of that business,—everything that was connected with it." The consideration named in the bill of sale under which the plaintiff claims is \$1,796.87. The inventory attached to the sheriff's return shows that the accounts of the business due from divers persons amounted to more than \$500. It does not appear in the record how many notes plaintiff had in connection with the business, or their value, and there is no evidence in the record showing the value of said accounts. In the absence of evidence showing the value of said accounts, they are presumed to be of their face value. If the chattels seized were worth, judged by the legal measure laid down above, the full amount alleged in the complaint, to wit, \$1,600, then the verdict of the jury is contrary to law, in this: Said verdict is for more than the value alleged in the complaint, and is based in part, at least, upon exemplary damages, to which the plaintiff was not entitled. We think that said verdict embraced, not only what the jury believed the goods to be worth, but also the value of the notes and accounts belonging to the business, which is unauthorized in law, for the reason that there is no evidence in the record showing that the defendant collected the notes and accounts, or any part thereof.

The first ground for a new trial mentioned in the appellant's notice of intention to move for a new trial is not well taken, for the reason that it was his duty to point out or specify therein wherein the evidence was insufficient to justify the verdict and judgment, which he failed to do.

The court refused to permit the plaintiff to answer questions showing that he and his brother C. F. Sears, while doing business together, had transferred their property to prevent paying debts, and upon such action the first and second errors assigned by the appellant are based. Such evidence was proper, and such acts on the part of plaintiff and the said C. F. Sears, under whom the plaintiff claimed the goods in question in this action, if proven, were proper circumstances to be considered by the jury in determining whether the transfer from C. F. Sears to plaintiff was an honest or a fraudulent transaction. If such transfer was made with the intent on the part of C. F. Sears to evade payment of his debts, and such intent was known to the plaintiff, then such transfer was void, under section 3020, Rev. St., although the said C. F. Sears may have been indebted to plaintiff, and the plaintiff desired to secure himself. It is a difficult matter to prove fraudulent acts by direct or positive evidence; hence the law permits a wider scope; gives the attacking party more latitude in introducing evidence in cases of fraud than in ordinary cases. Mr. Walt, in his work on Fraudulent Convey-

ances (at section 13), says: "Direct proof of positive fraud in the various kinds of covinuous alienations which we are to discuss is not, as we shall presently see, generally attainable, nor is it vitally essential. The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested parties as witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguards of secrecy thrown about it. Hence it must be scrutinized and judged by all the surrounding circumstances of the case. The evidence is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony. In such cases, when fraud is in issue, the field of circumstances ought to be very wide. From the nature of the case, it can rarely ever be proved otherwise than by circumstantial evidence. And if the facts and circumstances surrounding the case, and distinctly proven, are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires."

The third error specified consisted in the court sustaining an objection to the following question asked plaintiff by counsel for defendant, viz.: "Well, why were you so careful in the last situation of things, and so careless in the first situation that I have mentioned?" Such question was immaterial, and too much in the nature of argument, and the court properly sustained the objection.

The fourth error specified was based on the action of the trial court in refusing to permit plaintiff, while a witness in his own behalf, to answer this question: "How many saddles did you sell between the 8th and 28th of August?" The action of the court in this regard was proper. The only measure of damages proper in the case, so far as the stock of merchandise in question is concerned, has been stated above; and the measure of damages as to the fixtures and tools could only be based on their value at the time and place of seizure, having due regard to their then condition; and, as to the measure of damages as to the notes and accounts garnished, the basis would be the actual amount realized thereon by the defendant, and said question would throw no light on either of those matters.

As to the fifth error assigned, we think the court properly refused to permit the witness Goddard to answer the question as to how much of the indebtedness claimed by her had been paid, as such matter was immaterial, so far as the defendant in this case is concerned, and, if admissible at all, only as rebutting evidence on the part of the plaintiff. The court properly refused to permit the witness Goddard to testify to a conversation between herself and C. F. Sears in May, 1895, in regard to the title in question, as such conversation would throw no light on the questions involved in the case.

The court erred in refusing to permit the defendant to introduce in evidence certified copies of deed of Barger and Sears to Jesse R. Sears, deed of Charles F. Sears to his sister-in-law Muggie Sears, deed of C. F. Sears to his sister-in-law Muttie E. Sears, and of declaration of homestead of C. F. Sears, as such documentary evidence showed that said defendants in the attachment under which the seizure in question was made were, a short time prior to the issuance of said attachment and levy thereof, transferring their property to relatives, and such acts, taken in connection with the relation of principal and agent which existed between the plaintiff and C. F. Sears, the fact that they were brothers, and other facts shown, were proper circumstances to be considered by the jury in determining the character of the transfer from C. F. Sears to plaintiff of the goods in question.

Numerous errors are assigned as to the action of the trial court in giving and refusing to give instructions to the jury. Without taking up these specifications of error in detail, we deem it sufficient to say that the court erred in not giving the jury the rules by which they were to measure the damages, as hereinbefore set forth. The court should have instructed the jury as to the liability of the defendant for exemplary damages under the rules above given. It appears that the defendant asked certain instructions, which were refused, and of which refusal he complains. But such instructions requested by the defendant do not appear in the record, and we are unable to say whether they should have been given or not. If defendant desired this court to consider such requests, and the action of the trial court thereon, he should have incorporated the same in his statement on motion for new trial.

The appellant complains that the court erred in refusing to let the jury take with them a certified copy of the writ of attachment under which the seizure was made. Such action of the court was error, as the jury had the right to take said paper, under the provisions of section 4388, Rev. St., and for the further reason that it was an exhibit attached to defendant's answer, and a part of that pleading, and was evidence of the good faith with which he made said levy, considered with the other evidence.

The court, on motion, struck out of the defendant's answer certain allegations, properly, we think, for the reason that such matters were evidentiary, and, as respondent in his brief says, "was at any rate, at best, matter of evidence only, and admissible under the other portions of the answer," and under the issue of fraud.

The twenty-fifth and twenty-sixth specifications of error are based upon the action of the lower court in excluding from the evidence the depositions of Frederick Maitland and J. G. Boyd. It does not appear in the record for what reason the said depositions were excluded. By the transcript it appears that a motion had been made to suppress the deposition of Boyd. Whether these depositions were sup-

pressed, or whether excluded for want of notice, or for want of the certificate of the notary taking same, as required by the act of March 6, 1893, we are unable to say; but if there was no such notice, or no certificate to said depositions, the court was probably justified in excluding them; otherwise such action was error.

A careful consideration of the evidence in this case convinces us that, in estimating the damages awarded to the plaintiff, the jury allowed the plaintiff somewhere from \$100 to \$600 in exemplary damages, and that such action of the jury was against law. The court should have granted the defendant a new trial. The order denying the defendant a new trial, and the judgment in the action, are reversed, and the cause remanded for further proceedings consistent with the views herein expressed. Costs of appeal to the appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(June 24, 1897.)

HUSTON, J. Counsel for the petitioner seems to have an idea that the appellate court, in its consideration of causes presented, is limited to the argument of counsel, either written or oral. The appellate court, in the proper exercise of the powers conferred upon it by the constitution and the laws, is not only authorized, but is instructed, to do many things "of its own motion." Counsel say in their petition for a rehearing that a "conclusion arrived at without the aid of argument is erroneous." With all deference to the learned counsel, we must insist again that, highly as we esteem the aid of argument by learned counsel, we cannot submit to having our consideration of cases circumscribed thereby. We are admonished by the law we are called upon to administer that, overlooking mere technicalities, we must construe the laws "with a view to effect their objects and to promote justice." Counsel insists that the question of exemplary or punitive damages was not an issue in the case, and that, therefore, the refusal to admit testimony "in mitigation of damages, and as a defense to punitive damages," was not error. This was an action in trover for conversion, not replevin, and the complaint states the value of the property alleged to have been converted at \$1,600, and then claims damages in the sum of \$2,500. The verdict of the jury was for \$1,700. There was no claim for interest in the complaint, and the assumption of counsel that the excess in the verdict over the alleged value in the complaint is for interest is not supported by the record. There is nothing in the instructions of the court in regard to interest. The plaintiff testifies that he valued the stock, including "book accounts and notes, and each and every asset of that business,—everything that was connected with it,—at \$1,796.87." The sheriff's return shows that 'here were attached book accounts

of the value of over \$500. What the value of the notes and other assets were, aside from the stock proper, does not appear, nor does it appear what disposition was made of such assets. We must, as we conceive our duty in the premises, decide the case upon the record, uninfluenced by any post-mortem argument of counsel, and, ignoring mere technical errors, endeavor to do substantial justice between the parties, and we still think that the decision already rendered will subserve that end. The petition for rehearing is denied.

SULLIVAN, C. J., and QUARLES, J., concur.

(15 Utah, 22)

ANDERSON v. DALY MIN. CO.

(Supreme Court of Utah. May 18, 1897.)

APPEAL—REVIEW OF FACTS—MASTER AND SERVANT—NEGLIGENCE.

1. Where issues on questions of negligence and contributory negligence have been fairly submitted to a jury, and the jury have found in favor of one of the parties to the action, and there is evidence to support the verdict, the appellate court will not set it aside on a question as to the weight of the evidence.

2. Where the master has knowledge of the risks and dangers, not discernible, that are incident to the work to be performed by a servant, and he is also aware of the servant's inexperience, and fails to inform him of the precautions and care necessary for him to take in order to avoid injury, and the servant is injured without any negligence on his part, the master will not be allowed to exonerate himself from liability by showing that the servant failed to exercise the same degree of skill to avoid injury as his more experienced fellow workmen.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Andrew Anderson against the Daly Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bennett, Harkness, Howat & Bradley and H. J. Dinniny, for appellant. Moyle, Zane & Costigan, for respondent.

McCARTY, District Judge. This action is brought to recover damages for personal injuries alleged to have been received by plaintiff, a miner, while working in defendant's mine. The complaint, in substance, alleges that plaintiff was working in the bottom of a shaft that was being sunk by defendant in its mine; that there were three shifts, and each shift was in charge of a shift boss, and in charge of all the shifts was the foreman of the mine; that said shifts were engaged in blasting in said shaft; that it was the duty of each shift boss, when the shift went off work, to report any blasts in the ground that had not been discharged; that the shift boss on the 24th day of June, 1895, left certain undischarged blasts in the ground which were not set off by reason of the shift boss being ordered by the foreman to quit blasting and do other work in the mine; that no report was

made, to the shift on which plaintiff was employed, of the blasts left in the ground; that the blasts were covered up, so that they could not be seen, and because of these acts of negligence of defendant one of the blasts exploded while the plaintiff, in the exercise of due care, was engaged in working in said shaft, and in consequence plaintiff received the injuries complained of. The answer denies negligence on the part of the defendant, and alleges negligence on the part of the plaintiff and his co-employees.

Appellant contends that there is no evidence to support or justify the verdict. The evidence, in substance, is as follows: The defendant, at the time alleged in the complaint, was sinking a shaft in its mine, and power drills were used in drilling holes in the bottom of the shaft. On the 20th day of June, 1895, plaintiff, who was a miner, and in defendant's employ, and who never had any experience in running drilling machines or sinking shafts, which inexperience was known to the defendant, was put to work by defendant on the drilling machines in the shaft. Three eight-hour shifts were employed in sinking the shafts, and each shift consisted of six men, one of whom was known as a "pusher," who worked with the other men, and whose duty it was to oversee, control, and direct the work in the shaft, and to see that the men worked to the best advantage. The work in the shaft was more dangerous than ordinary mining, and the men working therein received 75 cents per day more than the other miners, except the pushers, who received 50 cents per day more than the other men employed in the shaft. The danger consisted in drilling and setting off blasts. It was the custom and rule for the pusher going off, if any blasts were fired, to report all missed shots to the oncoming pusher. If no report was made of missed shots, it was assumed by the oncoming pusher and his men that there were none. On June 26, 1895, Michael Wynn, one of the pushers, with his men, went to their work in the shaft, cleaned up and hoisted the loose dirt therein, found two missed holes filled with powder, and several "pot holes,"—holes that had been blasted, but the powder failed to break the ground and rock to the full depth of the holes. Wynn, the pusher, went out of the shaft for powder and fuse with which to blast these holes. When he arrived on top he met James Quinn, the foreman, overseer, and manager of the mine, who directed him to let the holes go, and not blast them, and to put his men at other work, which he did. Wynn and his men, and the succeeding shift, the shift with which plaintiff worked, did not resume work in the shaft until the following day, the day on which plaintiff was injured. In the meantime these missed shots and pot holes were not blasted, and no report was made of them, either by Wynn or Quinn, to the shift that first resumed work in the shaft after Quinn's attention had been called to its dangerous condi-

tion by Wynn, or to the pusher under whom plaintiff worked. When plaintiff and the men with whom he was working returned to the shaft, they found that the preceding shift had drilled 11 holes, and the drilling machines were in position for drilling, and that there was nothing in the appearance of the bottom of the shaft that indicated to them that there were any missed shots or dangerous holes of any kind concealed and imbedded therein. While the plaintiff was attempting to start a hole with one of the power drills, the drill slipped into one containing powder—a missed or pot hole—that had been left and not reported, and caused an explosion, inflicting on him the injuries complained of.

It is claimed by defendant that Pusher Wynn called Foreman Quinn's attention to pot holes only, and that this class of holes contain no powder, hence are harmless, and therefore it was not notice to the defendant of the dangerous condition of the shaft. We think, however, that the evidence shows that pot holes are dangerous. Foreman Quinn, a witness for the defendant, testified on this point as follows: "Pushers ought to look out for holes when they are starting a hole. When they are drilling, it is the duty of the man in charge of the shift, and all the men for their own safety, to look out always where they are starting a hole, because you can't tell what is in the bottom of a shaft. * * * For his own safety a man has to look out for these pot holes,—from an old hole that was blasted before. * * * It is best for him to do that, and not put a drill into it without looking around." James Johnson, another of defendant's witnesses, testified as follows: "We generally try never to start a hole where there has been a prior shot, without picking down and examining it closely to see if there is any powder in it." Michael Malla, a pusher, and another of defendant's witnesses, testified: "I have seen that, when we have got the full number of shots, enough powder was left in a hole to be dangerous. * * * Never set a drill where an old shot has been, if I can help it. * * * The reason for trying to set the drill away from where an old shot was is that powder is known to explode and leave powder in the bottom. For that reason a man has to be careful, even if he gets all his reports."

The question as to whether or not Foreman Quinn had notice of the dangerous condition of the shaft, at and prior to the time of the explosion that injured plaintiff, is a question of fact, that was entirely within the province of the jury to decide; and, as there is evidence to support a finding by the jury that the condition of the shaft, as reported by Pusher Wynn to Foreman Quinn, was dangerous, and that the defendant had sufficient notice thereof, but neglected and failed to put the shaft in a reasonably safe condition, and to take reasonable precaution to avoid accidents to its laborers working therein, this court cannot consider this feature of the case, for the

purpose of determining whether the weight of the evidence on this point is in favor of or against the defendant. Quinn having taken Wynn and his men away from their work in the bottom of the shaft at the time his attention was called to its dangerous condition, and put them at other work without first permitting them to put it in a safe condition for the succeeding shifts, took upon himself all the duties that Wynn, as pusher, might otherwise have been under to report the dangerous condition of the shaft to the oncoming pusher and the pusher who resumed work therein, and, failing to make such report, he was guilty of negligence, and the defendant thereby became liable for any injury plaintiff received by reason of such failure.

Defendant further contends that plaintiff was guilty of contributory negligence in not making an examination of the rock and grounds before starting the hole where he was drilling at the time the explosion occurred that injured him. It is conceded that the work in the shaft was more dangerous and hazardous than ordinary mining, and because of this the men working therein were paid more per day than they received for working elsewhere in the mine. Plaintiff, at the time he was injured, was inexperienced in the labor required of him in the shaft. He had never worked in a shaft before going to work in the one referred to, and this was his second day with power drills. On this point he testified, in substance, that he did not know and was not informed of the necessity of examining the rock and ground in the bottom of the shaft for holes, before starting the drills, when no report was made of missed shots. This inexperience and lack of knowledge on the part of the plaintiff was known to Quinn, defendant's foreman, yet he (Quinn) failed to inform plaintiff of the precautions necessary for him to take in order to avoid accidents by the explosion of missed or hidden shots that might be imbedded and concealed in the bottom of the shaft. It is a duty a master owes to his servant to inform and point out to him the latent dangers, or those not exposed or discernible, incident to the work to be performed by the servant, when such dangers are known to the master, and of which the servant is ignorant, by reason of the inexperience on his part, and he could not know and understand unless pointed out to him. *Bailey, Mast. Liab. p. 111.* And where the master has knowledge of the risks and dangers not discernible that are incident to the work to be performed by a servant, and he is also aware of the servant's inexperience, and fails to inform him of the precautions and care necessary for him to take in order to avoid injury, and the servant is injured without any negligence on his part, the master will not be permitted to exonerate himself from liability by showing that the servant failed to exercise the same degree of skill to avoid injury as his more experienced fellow workmen; and especially is this true where the dangers and risks of the employment are

greatly augmented and increased by the negligence of the master, as they were in this case, as shown by the evidence. *Gates v. State*, 128 N. Y. 221, 28 N. E. 373; *Trihay v. Mining Co.*, 4 Utah, 468, 11 Pac. 612; *Timber Co. v. Mooney* (Ariz.) 33 Pac. 590; *Roth v. Lumbering Co.* (Or.) 22 Pac. 842. It further appears, from the evidence, that the shift with which plaintiff worked did not return to work in the bottom of the shaft, after Quinn's attention had been called to its dangerous condition, until the time of the explosion that injured plaintiff, and when he went to work on that day he found that the preceding shaft had drilled 11 holes, and left the drilling machine in position for drilling; hence he was justified in assuming that the bottom of the shaft was in a safe condition for running the drills, as is conceded was the custom of the men who were working in this shaft, when they found the drilling machines in position when going to work. The question of negligence on the part of the defendant and the question of contributory negligence on the part of the plaintiff were questions of fact for the jury to decide, and, these issues having been fairly submitted to the jury, and the jury having found in favor of the plaintiff, this court will not disturb the verdict, as the record shows there is evidence to support it. *Reddon v. Railway Co.*, 5 Utah, 344, 15 Pac. 262; *Seley v. Pacific Co.*, 6 Utah, 319, 23 Pac. 751; *Andreson v. Depot Co.*, 8 Utah, 128, 30 Pac. 305; *Woods v. Railway Co.*, 9 Utah, 146, 33 Pac. 628; *Smith v. Railway Co.*, 9 Utah, 144, 33 Pac. 626; *Chapman v. Pacific Co.*, 12 Utah, 30, 41 Pac. 551.

Appellant complains of and assigns as error the giving of certain instructions by the court to the jury, and of the court's refusal to give certain instructions asked by defendant. We have carefully examined the instructions given in the case, and we are of the opinion that they contain a correct statement of the law applicable to the facts in the case, and are as favorable to the defendant as the facts warrant.

There are several other assignments of error, but as counsel for the appellant did not refer to the questions raised by these assignments in their oral discussion of the case before this court, and have not referred to them in their brief, we deem it unnecessary to consider them. We find no reversible error in the record; therefore, the judgment is affirmed.

BARTCH and MINER, JJ., concur.

WELLS v. KREYENHAGEN et al. (Sac. 191.)

(Supreme Court of California. June 17, 1897.)
APPROPRIATION OF WATER—RECORD ON APPEAL.

1. Where defendant made a prior appropriation of water for purposes of irrigation, by posting a notice thereof, and constructing a ditch, the fact that defendant's ditch broke be-

fore the water reached the land intended to be irrigated, and thus enabled plaintiff to first apply the water on his land, did not affect defendant's prior appropriation.

2. Where an appeal is perfected by giving proper notice and undertaking, but the record fails to show that either the complaint, answer, findings, or judgment were ever filed in the court below, or that the judgment was ever entered, it does not constitute a record upon which a judgment could be based, and the judgment will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action brought by J. M. Wells against Emil Kreyenhagen and others to enforce a water right. Plaintiff appeals from the judgment of the lower court, and its order denying his motion for a new trial. Affirmed.

Sayle & Coldwell, for appellant. J. P. Meux and M. K. Harris, for respondents.

HAYNES, C. The defendants had judgment, and the plaintiff appeals therefrom, and from an order denying his motion for a new trial.

Respondents object to the consideration of this appeal upon the ground that the record does not show that any of the papers appearing therein have ever been filed or used in the court below, except the notice of intention to move for a new trial and the notice of appeal, and that, as to the notice of intention to move for a new trial, it is not embodied in the statement on motion for a new trial. The record fails to show that either the complaint, answer, findings, or judgment were ever filed in the court below, nor is there any evidence in the record that the judgment was ever entered, nor is there any certificate to the papers which would constitute the judgment roll. The statement on motion for a new trial makes no allusion to any notice of intention to move for a new trial, nor is there any evidence that the statement was filed. The transcript purports to contain an order denying the motion for a new trial, but does not show that that order was ever entered, nor does the certificate of the clerk, added to the transcript, show that any of these papers were filed. In *Mills v. Dearborn*, 82 Cal. 51, 22 Pac. 1114, it was held that, "until a settled statement on motion for new trial is filed, it is no part of the record, and cannot properly be considered by the court in ruling upon the motion, and the motion, if submitted without such filing, is properly denied;" and that the fact that a statement was settled is shown by the judge's certificate does not show that it was filed. In *Mix v. Railroad Co.*, 86 Cal. 235, 24 Pac. 1027, it was said: "A statement of the case is copied into the transcript, but it does not appear to have been filed in the court below after it was settled. This being so, it is no part of the record, and cannot be looked to in aid of this appeal." Section 659 of the Code of Civil Procedure explicitly requires the filing, not only of the notice of in-

tention to move for a new trial, but of the bill of exceptions or statement, and there is no authority for the court to pass upon a motion for a new trial until the bill of exceptions or statement shall have been filed.

Nor is the appeal from the judgment in any better situation, since an appeal from a judgment will not lie until the judgment has been entered. *McLaughlin v. Doherty*, 54 Cal. 519. Appellant has not seen proper to reply to this contention of respondents, or to take any steps to correct the record. Under these circumstances, any conclusion we might reach upon the merits of the appeal would be unauthorized, and, besides, we cannot refuse to give the respondents the benefit of a point well taken. We may say, however, that the case involves the question of the prior appropriation of water for the purposes of irrigation; that the testimony introduced by plaintiff shows that defendants' appropriation by posting a notice thereof, and the construction of their ditch, was prior to the construction of plaintiff's ditch; that the fact that defendants' ditch broke before the water reached the land intended to be irrigated, and thus enabled the plaintiff to first apply the water on his land, did not affect defendants' prior appropriation. The defendants' notice of appropriation was sufficient, and was properly received in evidence; nor did the court err in permitting defendants to show why their ditch broke, nor why it was not sooner repaired. Upon the case made by the plaintiff, we think the judgment for the defendants was right; and, for these reasons, we feel less hesitation in disposing of the case upon what may appear to be technical grounds. The appeal was perfected by giving the proper notice and undertaking, but, appellant having failed to bring a record upon which a reversal of the judgment could be based, we advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

130 Cal. 222

WHITE v. WARREN. (S. F. 232.)

(Supreme Court of California. June 15, 1897.)

GIFT BY WIFE TO HUSBAND—UNDUE INFLUENCE—BURDEN OF PROOF.

Civ. Code, § 158, provides that husband or wife may enter into any engagement with the other, subject to the general rules which control the actions of persons occupying confidential relations with each other. Section 2219 of the title on "Trusts" provides that every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee. Section 2235 provides that all transactions between a trustee and his beneficiary by which he obtains an advantage from his beneficiary are presumed to be entered into by the latter under undue influence. *Held*, that a gift by a wife to her husband is pre-

sumed to have been made under undue influence, and the burden is on him to rebut such presumption.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Jane Warren against John K. Warren. Pending the action, plaintiff died, and W. H. White, executor of her estate, was substituted as plaintiff. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

H. B. M. Miller and Sullivan & Sullivan, for appellant. Gordon & Young, for respondent.

SEARLS, C. This is an action to recover \$6,280.03, with interest, for money loaned to the defendant by Jane Warren, his wife. Plaintiff had judgment, and, having died pending a motion for a new trial, her executor was substituted as plaintiff. Defendant appeals from the judgment, and from an order denying his motion for a new trial. The question presented is confined to narrow limits. The cause was tried before a jury.

There was testimony on the part of plaintiff tending to show that the plaintiff and defendant intermarried September 8, 1890, at which time defendant was the owner of a lot of land on Valencia street, San Francisco; that plaintiff was possessed of separate property acquired by her before her marriage, consisting of money in bank. In 1891 plaintiff loaned to defendant \$6,280.03, with which to construct a building on his said lot, with which he did construct a three-story building, with a store on the lower floor and two flats above. According to her testimony, it was agreed that she was to receive payment in the rents to be derived from the building, which she expected to devote to the support of herself, her husband, and his three children. Plaintiff, after the completion of the building, received the rents for some two months (\$50), when difficulty arose between husband and wife, whereupon he collected the rents, and appropriated them to his own use, and this action was brought to recover the money loaned. The parties had been divorced prior to the trial of this cause. On the part of defendant, some four witnesses, three of whom were the children of defendant, testified to admissions of plaintiff to the effect that she had presented the money to her husband, the defendant, as a gift or to build the house, or that he might have an income, or, as one of them stated: "Well, she stated that she had given the money to my father, and that is about all. She had given the money to him, and the money was for him, and for his use." The defendant did not testify. Plaintiff denied the admissions. The court thereupon instructed the jury to find for the plaintiff, holding in substance that, as defendant and plaintiff were husband and wife, it devolved upon the former, who claimed to have received the gift, to prove, in addition, that such gift was made without any un-

due influence on his part, the presumption being that, in the absence of proof, there was such undue influence. The jury thereupon found for plaintiff as prayed for, less \$50, received by her from the rents. The propriety of this ruling is the only question involved on the appeal.

Section 158 of our Civil Code is as follows: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on 'Trusts.'" The relation between a husband and wife is confidential, and all transactions between them respecting property are subject to the same rules that control a trustee and cestui que trust. *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689. Turning to the title on "Trusts," and we find that section 2219 provides that "every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter." Under the relation of personal confidence existing between defendant and plaintiff, as husband and wife, the former is to be treated in the transaction under review as the trustee of the wife, and is subject to the provisions of section 2235, Civ. Code, which are as follows: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." The decisions of courts have been uniformly to the effect that the exercise of undue influence by one occupying a position of personal confidence to another, whereby he gains an advantage, will be unavailing to him. But the authorities are not entirely uniform as to the party upon whom the onus probandi rests to show the exercise of such undue influence. It would seem to have been the object of our Code to set this question at rest, by presuming that transactions between a trustee and his beneficiary are without consideration in cases where a consideration is required to support the contract, and under undue influence by the trustee who gains an advantage. In the case at bar, the defendant, who offered evidence of a gift from his wife, presented no testimony to disprove the rebuttable presumption of the law that such gift was obtained by the exercise of undue influence.

Defendant's case stands, then, in the eye of the law precisely as though he had come into court, and said: (1) I and the plaintiff are husband and wife. (2) As such, we are subject, in dealings between ourselves, to the rules which govern trustees and beneficiaries. (3) She, while my wife, made me a gift of the

money in question. (4) I procured such gift to be made to me by the exercise of undue influence over her. Upon such a statement, defendant would have had no standing in court; and, had a jury upheld the gift by finding in defendant's favor, it would have become the duty of the court to set aside the verdict. This being so, the instruction of the court to the effect that the defense was not made out was proper, and the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

GAROUTTE and VAN FLEET, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HARRISON, J. I concur in the judgment. At the trial the plaintiff testified that in 1891 she loaned to the defendant the money sued for, and that no portion of it had been paid. She also testified that the money loaned him was her separate property, and was used by him in building a house upon a lot of land which was his separate property. This testimony of the plaintiff that the money was loaned to the defendant authorized a judgment in her behalf, unless he should, by some affirmative evidence, overcome the liability thus created. The theory upon which the action is defended, although there is no averment of that nature in the answer, is that the money which the defendant received from the plaintiff was a gift. This was affirmative matter, of which the onus was upon him to establish by a preponderance of evidence. There was no evidence other than that of the plaintiff of the circumstances attending the transaction between her and the defendant, and it was not disputed that the defendant did in fact receive the money from her; and, while it was competent for him to show that he received it as a gift, there is no presumption that it was a gift; but, in the absence of any other evidence than that the plaintiff delivered the money to him at his request, the law would presume an obligation on his part to return it. The defendant did not testify at the trial, and the only evidence offered in support of his defense was the testimony of one witness, that in a conversation with the plaintiff, prior to the date of the loan, she had said to him that she proposed to "advance" to the defendant money enough to put up a house upon his lot, and of two other witnesses who testified that, some months after the loan, the plaintiff had said to them that she had "given" the money to the defendant. This testimony, in its most favorable view, was only an admission by the plaintiff to a stranger, remote from the time of the transaction itself, and disconnected therewith, as well as with the defendant, and in a conversation to which the defendant was not a party, and of which it does not appear that he had any knowledge; and, while the defendant would have been en-

titled to have it considered by the jury in aid or corroboration of any substantive evidence in support of his claim that the money had been received as a gift, it was insufficient of itself to establish such claim. Her statement that she had "given" him the money was not equivalent to a declaration that she had made him a "gift" of it, since the term is often used as the equivalent of a mere delivery. If the evidence relating to the transaction between the parties had been contradictory, or of an ambiguous nature, her subsequent statement that she had given him the money might have been explanatory of the transaction; but, in the absence of any testimony other than her own relative to the transaction itself, the court was justified in holding that this testimony of her subsequent statements was insufficient to establish the defense, or to authorize the submission of the issue to the jury. Upon the testimony before it, the court was authorized to hold that the defendant had not introduced any evidence in support of his defense which he was entitled to have considered by the jury, and it did not err in directing the jury to find a verdict in favor of the plaintiff.

It is undoubted law that when the determination of an issue depends upon the weight to be given to conflicting evidence, or upon the credibility of witnesses, or inferences of fact to be drawn from established facts, the court is not authorized to withdraw the question from the jury; but it is equally settled that, when the party upon whom the burden of establishing an issue rests has failed to introduce any evidence in support thereof, the court may direct the jury to find against him upon that issue. As was said by Mr. Justice Clifford in *Improvement Co. v. Munson*, 14 Wall. 448: "In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." And in *Pleasants v. Fant*, 22 Wall. 116, the rule was stated by Mr. Justice Miller as follows: "If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court may say so to the jury." In *Bulger v. Rosa*, 119 N. Y. 404, 24 N. E. 853, it was said: "The test of the right to direct a verdict is whether the court would be bound to set a verdict aside as against evidence, if rendered against the party in whose favor it was directed. If this would be the duty of the court, the judge need not await the verdict before acting, but, in advance, may rule the question as one of law. But, as verdicts cannot be found on mere conjecture, neither will a shadow or possibility, nor a mere scintilla, stand in the way of ruling the case in favor of the party who shows a substantial right of which there is no substantial contradiction." See, also, *Commissioners v. Clark*, 94 U. S.

284, and cases there cited; *Lacey v. Porter*, 103 Cal. 605, 37 Pac. 635. As the verdict was rendered under the direction of the judge, his remarks in giving this direction did not influence the jury in their verdict, and, consequently, was not the subject of an exception.

(117 Cal. 164)

RECLAMATION DIST. NO. 551 v. RUNYON et al. (Sac. 157.)¹

(Supreme Court of California. May 27, 1897.)

RECLAMATION DISTRICTS—CONSULAR PRIVILEGE—CONCLUSIVENESS OF ASSESSMENT.

1. Proceedings by a reclamation district under Pol. Code, § 3493½, to establish the validity of an assessment by it, wherein all objections are heard before the bringing of an action on the assessment, is in the nature of a proceeding in rem, and hence a plea of consular privilege is not available therein.

2. In a proceeding by a reclamation district to establish the validity of an assessment by it, defendant may show that the assessment of his property is excessive and unfair.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Proceeding by reclamation district No. 551 against Sol. Runyon and others to establish the validity of an assessment. There was judgment establishing the assessment, and defendant P. J. Van Loben Sels appeals. Reversed.

Warren Olney, for appellant. W. A. Gett, Jr., for respondent.

HENSHAW, J. Plaintiff instituted this proceeding as contemplated by section 3493½ of the Political Code, seeking a determination of the validity of an assessment which it had caused to be levied for purposes of reclamation. Summons was served upon all the property owners in the district. They suffered default, saving the defendant Van Loben Sels, who appeared and contested. From the judgment, which was adverse to his contention, and from the order denying a new trial, he prosecutes these appeals.

1. It is first insisted that plaintiff is not legally organized. The argument here is precisely that pressed upon our consideration in *People v. Reclamation Dist. No. 551* (Sac. 156, decided May 25, 1897) 48 Pac. 1016, adversely to appellant's views.

2. Defendant is consul of the republic of Paraguay, and has pleaded his consular privileges in bar of this proceeding. We need not stop to decide whether under the amendment of 1875 to the federal judicature act the courts of a state may take jurisdiction of actions in personam against consuls of a foreign country. That question is now under consideration by this court in bank, and its decision need not be anticipated, for this proceeding is not an action in personam; and, while it is not in strictness a proceeding in rem either, it partakes rather of the nature of the latter. It is designed as one of the processes to test the legal perfection of an assessment levied

by a reclamation district. The property owner is entitled to a hearing at one time or another upon the question of benefits. *Reclamation Dist. v. Evans*, 61 Cal. 104; *Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, and 41 Pac. 335; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663. Before the passage of section 3493½ of the Political Code he made his showing when action was brought to enforce the assessment. But to obviate difficulties and delays which thus arose, this peculiar proceeding was established. By it is provided a forum before which a property owner may go and make full proof of his objections to the assessment. The final determination of the court upon the matter may be used by or against him in any future action to collect the tax. Thus it gives the property owner the hearing to which he is entitled, but provides that such hearing may take place in advance of an action upon the assessment. It is, then, a process of law forming one of the steps by which the lien of the tax is fixed upon property. We entertain no doubt that a foreign consul may be bound by all legal processes and proceedings in state courts having this end in view. No more responsibility attaches to the person of the consul in such a proceeding than arises in an action to enforce the assessment, or than is occasioned by his appearance before a county board for the equalization of his assessment for purposes of state and county taxation. We conclude that the plea of consular privilege is not well taken.

3. The law contemplates the employment by the trustees of a reclamation district of a competent engineer to survey, plan, locate, and estimate the cost of the works necessary for reclamation. These plans and estimates, as approved by the trustees, are reported to the supervisors, and upon them the assessment follows. Appellant contends that in the plans and report of the engineer employed in this instance the ditches and pumping plant are not located, and that, therefore, the assessment is invalid. The engineer's report is quite elaborate, and contains not alone a general and comprehensive, but also a detailed, statement of the character and amount of ditch work to be done, with estimates of the cost thereof, and also of the cost of the proposed pumping plant. We think the report is sufficient in these respects to serve as a basis for the assessment.

4. The appellant made offer to prove, and asked of the witnesses questions tending to prove, that his land was wholly reclaimed, and had been provided at his own expense with a suitable pumping plant and drainage facilities; that a thousand acres of it were in fruit-bearing trees, and other large portions planted to potatoes and other vegetables. He sought further to show that all of his land had been assessed at nearly \$20 per acre, while other lands similarly situated, and of the same level, but unreclaimed, had been assessed for only \$11 per acre. He further at-

tempted to prove that portions of his lands used for roads and portions used for ditches had been assessed for about \$20 an acre, while the lands of other owners within the district subjected to like uses had been entirely relieved from assessment. To all of appellant's efforts in this direction objection was interposed and sustained by the court. The theory upon which the case was tried is sufficiently indicated by the objections of counsel at an early stage of the trial: "We might as well cut this short here as anywhere else. The object of this is apparent. It is to impeach the assessment made by these commissioners, and your honor knows it has been held repeatedly it cannot be done." And again: "The object of this is unquestionably to impeach the assessment. Here is the most extreme case that has ever been decided in the state of California, and it is the last, I think, on that proposition, and is to this effect,—the case of *People v. Hagar*, 66 Cal. 59, 4 Pac. 951. It has been held from that time up to the present time that parties are not permitted to show anything in the world that tends to impeach the judgment of the commissioners in the assessment." This view receives some countenance, it is true, from the case to which counsel directed the court's attention, but in the case of *Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, and 41 Pac. 335, the question was elaborately considered, the authorities extensively reviewed, and the conclusion expressed, with which the whole court was in accord, that a property owner was within his undoubted right in making any legal proof to show an unfair and illegal assessment whereby his lands were not benefited to the amount of the lien sought to be fixed upon them. For this reason the judgment and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

117 Cal. 232

WOOD v. LOWDEN et al. (Sac. 171.)

(Supreme Court of California. June 11, 1897.)

SHERIFFS—SECOND TERM—UNEXECUTED PROCESS—LIABILITY OF SURETIES.

1. Under County Government Act 1883, § 107, providing that on expiration of a sheriff's term all process wholly or partly unexecuted shall be executed by his successor, the sureties for the first term of a sheriff are not liable for his negligence in completing during a succeeding term the execution of process partly unexecuted at the beginning thereof.

2. The safe-keeping by the sheriff of property taken on attachment is part of the execution of the writ, and hence, while the property is in his custody, the writ is partly unexecuted.

Commissioners' decision. Department 1. Appeal from superior court, Shasta county; Edward Sweeny, Judge.

Action by Walter N. Wood against John R. Lowden and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Clay W. Taylor and J. Chadbourne, for appellant. Aaron Bell and N. P. Chipman, for respondents.

HAYNES, C. This appeal is by the plaintiff upon the judgment roll. The action was brought against the sureties upon the bond of William F. Hopping, sheriff of Shasta county, to recover the value of certain horses and cattle alleged to have died while held under attachment by the said sheriff, by reason of his failure to procure the necessary feed for them. The defendants had judgment. Hopping was elected and served two successive terms as sheriff of Shasta county, the first term ending and the second term beginning on the 5th day of January, 1891. Two days before the end of his first term said sheriff seized said horses and cattle under a writ of attachment issued out of the superior court of Lassen county, in an action wherein one G. W. Stratton was plaintiff and the plaintiff in this action was defendant, and thereafter held the same under said writ until the 28th day of August, 1891, when said writ of attachment was discharged, and the property released therefrom and returned to the plaintiff. The neglect of the sheriff which caused the loss and injury complained of occurred during the second term of said sheriff, and the only question in the case is whether the sureties upon the bond given by the sheriff under his first election are liable for the said neglect of the sheriff occurring during the succeeding term.

Appellant first contends that an officer, having commenced to execute a writ, must complete it, and cannot release himself from his duty by handing the writ over to his successors; that he must proceed with the execution of the writ notwithstanding the expiration of his term of office. This was undoubtedly true at common law, as abundantly shown by the authorities cited in appellant's brief, and was the law in this state prior to the enactment of the county government act in 1883. Prior to 1883 the statute provided that the outgoing shall turn over to the incoming sheriff "all executions, attachments and final process, except those which he has executed or has begun to execute by the collection of money or a levy on property." *Hitt. Gen. Laws*, § 6885. Section 107 of the county government act of 1883, among other things, provides as follows: "When any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office; and when the sheriff sells real estate under and by virtue of an execution or order of court he, or his successors in office, shall execute and deliver to the purchaser or purchasers all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made

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the sale." Said section was re-enacted in the county government act of 1891 (*St.* 1891, p. 391). To avoid the effect of this statute it is argued by appellant that it does not support the decision of the court below, for the reason that the writ was executed before the sheriff's first term expired. It is true the court found that the seizure was completed two days before the commencement of his second term of office as such sheriff, and the property was then in his possession. The question, therefore, to be determined, is whether the writ in this case was "unexecuted in whole or in part" when the sheriff's first term expired, or, in other words, what constitutes the execution of a writ of attachment within the meaning of this statute?

In the ordinary language used in making a return upon a writ of attachment, the officer certifies that he has "executed the within writ" by seizing the property and taking it into his custody. I think, however, that this statute does not intend so narrow a construction to be given to the word "executed." A writ of attachment requires the officer not only to attach, but to "safely keep" the property attached; and the only authority for keeping the property is the writ, which is operative continually for his protection. In *Sageley v. Livermore*, 45 Cal. 613, it was said: "This writ had come to the hand of the plaintiff here while he was yet holding the office of sheriff. He had partly executed it by seizing certain property, and had begun to execute that portion of its command which required him to safely keep the property. In this condition of things the plaintiff's term of office as sheriff expired, and the first question made is whether it was his duty to turn over the attached property to his successor in office." That case arose under the law in force prior to 1883; but it will be observed that the court in that case gave to the word "executed" a wider signification than that contended for by appellant in this case. There it was said the officer had partly executed the writ by seizing the property, and had begun to execute the other portion of the command of the writ, which required him to safely keep the attached property. The findings show that all the loss and injury the plaintiff sustained was from neglect occurring after the commencement of the new term of the sheriff, and we think the conclusion of law that the sureties on his bond for the preceding term were not liable was correctly drawn. A writ of attachment does not become functus when personal property is seized thereunder, but its requirement to "safely keep" the property attached continues the writ for the protection of the officer in the discharge of the duty to safely keep it. So far as the owner of the property is concerned, the writ is executed when the property is seized and taken into the possession of the officer; but, so far as the officer is concerned, it is not "wholly executed" so long as there remains unperformed any duty imposed by the writ, and in this

case that duty continued until the writ was discharged on August 28, 1891.

Appellant's first contention, and the common-law authorities he cites, would seem to be conclusive against him. That proposition is that an officer, having commenced to execute a writ, must complete it, and cannot release himself from that duty by handing the writ over to his successor; and it is upon this theory, viz. that the writ was not wholly executed by the seizure of the property, that the duty was imposed upon him as the old sheriff to complete the execution of the writ as ex-sheriff, instead of turning it over to his successor; and he thus brings the case precisely within the statute of 1883, of writs "unexecuted in whole or in part" which "shall be executed by his successor." The judgment appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

117 Cal. 229

PEOPLE v. TUCKER. (Cr. 277.)

(Supreme Court of California. June 11, 1897.)

CRIMINAL LAW—NEW TRIAL—FORMER JEOPARDY.

1. It is within the discretion of the trial court to refuse to hear oral evidence in support of a motion for a new trial in a criminal case.

2. There was no abuse of discretion in refusing to hear oral evidence of the intoxication of a juror during the trial of a criminal case, on a motion for a new trial, though it was claimed that the affidavits of the witnesses could not be obtained; the juror's condition being within the observation of the judge, and defendant's counsel not even presenting their own affidavits as to the facts claimed.

3. There is no error in instructing that on a former trial there was no evidence in support of a plea of former jeopardy urged on both trials; the state of the evidence at the former trial being immaterial.

4. A criminal trial whereon there was a conviction which was reversed for failure of the jury to find on a special plea of former jeopardy was neither an acquittal nor jeopardy.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

E. N. Tucker was convicted of extortion. A new trial was denied, and he appeals. Affirmed.

J. G. Swinnerton and Max Grimm, for appellant. W. F. Fitzgerald, Atty. Gen., and Chas. H. Jackson, Dep. Atty. Gen., for the People.

GAROUTTE, J. The defendant has been convicted of extortion, and appeals from the judgment and order denying his motion for a new trial. A demurrer was filed, attacking the sufficiency of the indictment. This demurrer was properly overruled.

Among the grounds relied upon for a new trial, it is claimed that one of the jurors was intoxicated during the progress of the trial.

Upon the showing made by the affidavits introduced at the hearing of the motion, the court was entirely justified in holding against defendant's contention upon this matter. Upon the hearing of the motion, defendant's counsel proposed to establish the fact of the juror's intoxication by oral evidence before the court, claiming that he was unable to procure the affidavits of witnesses. The court ruled that he should make this showing by affidavit, and not by oral evidence. It is not necessary for this court to pass upon the legality of a procedure allowing oral evidence to be presented upon the hearing of a motion similar to the one at bar. The usual and ordinary course is to proceed by affidavits, but, conceding such practice not legally exclusive, then the whole question becomes one of those matters resting in the discretion of the trial court, and a matter in which the trial court is allowed the widest latitude of decision. The judge who tried the case and heard the motion for a new trial was an eyewitness to the condition of the juror, his attention being directly called to him at the important period of time when it is claimed he was intoxicated. He had an opportunity of observing his condition at that time equally well with the bystanders. Again, defendant's attorneys did not even present their own affidavits to establish the facts claimed. For these reasons, we will not hold that an abuse of discretion was committed.

This is the second trial of the defendant upon the present indictment. At the first trial upon the indictment he entered a plea of once in jeopardy. The jury found him guilty of the crime charged, but failed to find upon his special plea of jeopardy. Upon appeal to this court the judgment was reversed and the cause remanded for a new trial, by reason of a failure to find upon that plea. 47 Pac. 111. At the present trial the defendant entered special pleas of once in jeopardy and a former acquittal. Upon these pleas the jury were instructed to find for the people. Defendant's counsel now make complaint of the action of the trial judge wherein the jury were instructed that upon the plea of once in jeopardy, entered at the former trial, there was no evidence offered at that time to support the plea. We fail to see the materiality of the contention to anything here involved. Here the material question is, was the court upon the present trial justified in instructing the jury to find for the people upon the special pleas entered? The presence or absence of evidence at the former trial upon the matter of the special plea seems to be foreign to anything involved upon this appeal. The facts disclosed by the record show the former conviction, a failure of the jury to find upon the plea of once in jeopardy, and a reversal of the judgment upon appeal for that reason. These facts did not constitute jeopardy or an acquittal of the defendant, and the judge at the present trial was authorized to so inform the jury.

There are various assignments of error per-

taining to the rulings of the court in the admission of evidence. They have all been considered, and we are not prepared to say that such rulings are to any extent erroneous. The evidence coming before the jury under these rulings in most instances is not of great importance, and we find no rulings in the record which we deem both prejudicial and erroneous. The evidence fully supports the indictment. The case of extortion was clearly made out, and defendant legally convicted. Judgment and order affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

117 Cal. 252

SUMMERTON v. HANSON et al. (S. F. 619.)
(Supreme Court of California. June 16, 1897.)

LIABILITY ON CONTRACTOR'S BOND.

The sureties on a contractor's bond guaranteeing the performance of a contract for the erection of a building, and the delivery of the building to the owner free from all liens that might be filed on account of claims against the contractor, are liable thereon for any sums paid by the owner, in excess of the sum remaining due on the contract, to release the building from such liens, though the contract was void because the plans and specifications, which were made part of it, were not filed in the office of the county recorder.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by George Summerton against R. H. Hanson and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

William H. Jordan, for appellants. Richard C. Harrison (W. S. Goodfellow, of counsel), for respondent.

HENSHAW, J. Plaintiff entered into a contract with one Charles Scranton for the erection of a building upon a lot of land owned by the former. The contract price exceeded \$1,000. The contract was in writing, and was accompanied by a bond with two sureties, who guaranteed the faithful performance by Scranton of his contract, and also guaranteed the delivery of the building to the plaintiff free from all liens that might be filed on account of any claim against the contractor. The building contract, together with the bond, was filed in the office of the county recorder, but the plans and specifications which were to accompany it, and which, by the terms of the contract, were made a part of it, were not filed, and the contract became void. Scranton, however, proceeded to construct the building, and after its completion, and within the time allowed by law, certain lien claims were filed against the property. These liens were afterwards foreclosed, and judgments for various amounts obtained. Plaintiff, to release his building from the liens of the judgments, was obliged to pay and did pay to the judgment

creditors the sum of \$1,052.40, or \$1,972.40 in excess of the sum remaining in his hands and due upon the contract. He prosecuted this action against the sureties upon the bond to recover this sum of \$1,972.40. Judgment was rendered in his favor, and from that judgment the defendants appeal.

The argument of appellants is this: The contract being void, the liability of the principal upon the contract was extinguished. Upon this follows the release of the sureties, for their obligation could in no event be greater than that of the principal. This argument, however, has been repeatedly answered by the decisions of this court. *Klessig v. Allspaugh*, 91 Cal. 234, 27 Pac. 662; *Klessig v. Allspaugh*, 99 Cal. 452, 34 Pac. 106; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

117 Cal. 242

PEOPLE v. WILSON. (Sac. 215.)

(Supreme Court of California. June 14, 1897.)

STATE INSURANCE COMMISSIONER—LIABILITY FOR MONEY DEPOSITED IN BANK.

Pen. Code, § 424, provides that each officer of the state charged with the receipt, safe-keeping, transfer, etc., of public moneys, who either loans the same, fails to keep the same in his possession until disbursed or paid out by authority of law, or unlawfully deposits the same in any bank, is punishable, etc. *Held*, that the insurance commissioner, who by Pol. Code, § 606, is required to "pay monthly into the state treasury whatever amounts may be received and collected by him," is not permitted by law to make an ordinary deposit of such funds in the bank during the time intervening between his monthly payments to the state treasurer.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by the people of the state of California against John N. E. Wilson to recover money collected by defendant as insurance commissioner, and not paid by him into the state treasury, as required by law. From a judgment for plaintiff, defendant appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Dep. Atty. Gen., for the People.

BRITT, C. The law of this state relating to the office of insurance commissioner provides, among other things, for the collection by the commissioner of certain fees and assessments from persons and corporations engaged in the business of insurance, and that he shall "pay monthly into the state treasury whatever amounts may be received and collected by him." Pol. Code, § 606. Appellant held said office from April 1, 1890, to April 1, 1894. It was his custom to make remittance of his official collections to the state treasurer once a

month, and at intermediate times he deposited the same in the Pacific Bank, an incorporated commercial bank in the city of San Francisco, then of good financial repute and standing. Towards the close of June, 1893, when appellant's receipts in virtue of his office during that month amounted to about \$2,300, which had been deposited as aforesaid from day to day, the bank failed, and ceased to do business, and refused repayment of such deposits. This action is prosecuted against the commissioner on the complaint of the state controller to recover the amount collected by the former in said month of June, with certain penalties for failure to pay over the same. Pol. Code, § 437. In his answer defendant alleged most of the facts above stated, with various other matters, and also "that he deposited said moneys in the Pacific Bank, as the agent of the state of California, and not upon his individual account; and that he is neither morally nor legally liable for, nor had he anything to do with, the failure of the said Pacific Bank to pay to its depositors the money deposited therein by them." The superior court gave judgment for plaintiff on the pleadings.

Counsel differ as to whether the answer shows that the deposits were placed to the credit of defendant individually or as a public officer; and the question is of importance in the case (*Estate of Arguello*, 97 Cal. 196, 31 Pac. 937), provided defendant was permitted by law to make an ordinary deposit of the funds in bank at all. But, in our opinion, he was not. If such deposits are allowed, the title to the money passes to the bank, and the transaction is nothing more or less than a loan, with a special provision implied that repayment shall be made as demanded by the checks of the depositor. *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100; *Yarnell v. City of Los Angeles*, 87 Cal. 603, 608, 25 Pac. 767; *Boone, Panking*, §§ 39-41. By the provisions of section 424, Pen. Code, each officer of this state charged with the receipt, safe-keeping, transfer, etc., of public moneys, "who either * * * (2) loans the same or any portion thereof, * * * or (3) fails to keep the same in his possession until disbursed or paid out by authority of law; or (4) unlawfully deposits the same, or any portion thereof, in any bank, or with any banker or other person; * * * is punishable by imprisonment," etc. The moneys deposited by defendant in this instance were undoubtedly public moneys (Pen. Code, § 426); and such deposits were in contravention of the spirit, if not the letter also, of each of the said subdivisions of section 424, and were thus unlawfully made (Civ. Code, § 1667). It may be said that subdivision 4 contains an implied recognition of deposits in a bank which may be lawful. So it does, but, for the purposes of a case like the present at least, that subdivision should be understood in connection with the preceding prohibition of loans generally. It is not probable that the legislature intended to allow loans by way of general deposit in banks, while forbidding all others. *Yarnell v. City*

of Los Angeles, 87 Cal. 603, 25 Pac. 767, tends strongly to confirm the views we entertain of the present case. The judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

WOOD et al. v. CHAPMAN et ux.

(Supreme Court of Colorado. May 17, 1897.)

EVIDENCE—ADMISSIBILITY—LIMITATIONS—INSTRUCTIONS—APPEAL—RECORD—RECOVERY OF REALTY—VERDICT AGAINST BOTH PARTIES.

1. An objection to the introduction of evidence on the ground that the issue on which it was offered had been eliminated from the case cannot be first raised on appeal.

2. Evidence admitted on a promise to follow it up with testimony without which it was inadmissible should be stricken out, on motion, where the other testimony has not been introduced.

3. In an action for the recovery of real property, it was misleading to instruct the jury that there was evidence which they were at liberty to consider in determining whether defendants had brought their case within the statute of limitations, where there was no evidence of the payment of taxes, which was essential under the statute.

4. An instruction in an action to recover realty, submitting the issue of the validity of a tax deed, and reciting that all "conditions precedent" must have been complied with, to render the deed valid, is erroneous, if it fails to set out what those conditions were.

5. Where there is no order showing that certain instructions requested by appellant were refused, and the transcript and the abstract recite that they were given, it must be held that they were given, though flatly contradicting the court's instructions.

6. In the ordinary action to recover real property, under the Code, the jury cannot find a verdict against both parties, as in suits under federal statutes in support of adverse claims to mining locations.

Appeal from district court, Pitkin county.

Action by H. N. Wood and G. S. Wood against Luke Chapman and wife. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

William Young, for appellants.

CAMPBELL, J. This action, brought in the district court of Pitkin county by H. N. and G. S. Wood, as plaintiffs, against Luke Chapman and wife, as defendants, was for the recovery of the possession of lots numbered 4, 5, 6, 7, 8, 10, 11, and 12 in block numbered 7 of Eames' addition to the city of Aspen. The verdict of the jury was that plaintiffs were not the owners of any of the lots, and that defendants were the owners and entitled to possession of lot 12. The judgment was in accordance with the verdict, and the plaintiffs appealed therefrom to this court. There is no appearance for the appellees. The record is voluminous, and somewhat ambiguous, and both the transcript and the abstract are so unsatisfactorily made up that, to determine the

errors assigned, has involved much labor that would have been avoided had appellants brought here a systematically arranged record. After a careful examination, we are satisfied that the judgment ought not to stand. Without discussing in detail the numerous objections raised by the appellants, we proceed to state some of the reasons for our conclusion, which the record discloses.

The answer contained a general denial, and an allegation of ownership in the defendants. Nineteen months after it was filed, the defendants, without leave of court, lodged with the clerk an amended answer, attempting therein to set up as additional matters a plea of the statute of limitations, based upon possession under claim and color of title made in good faith, and payment of taxes for five successive years prior to the commencement of the action. Upon the plaintiffs' motion, this amended answer was stricken out; and upon the subsequent application of the defendants, made to the court, for leave to refile the same, the request was denied. These rulings were right, as no showing was made why the same defense was not included in the original answer; nor was the defense itself well pleaded, as there was no allegation therein that the possession and payment of taxes relied upon were for five successive years. The rulings, also, might be upheld upon the ground that the amended answer contained a defense which is not usually permitted to be set up for the first time in an amended pleading. *Owers v. Mining Co.*, 6 Colo. App. 1, 39 Pac. 980. In one view, what we have just said is not pertinent to the assignments of errors; but, as will appear from a subsequent part of the opinion, this reference is appropriate to the discussion.

At the trial the plaintiffs deraigned title in themselves from the United States government to all the property except lot 12, and there they might with propriety and safety have stopped in the introduction of their testimony, except as concerned that lot. But it seems that the other lots, or some of them, had been sold at tax sales; and the plaintiffs introduced numerous exhibits showing that, by divers mesne conveyances from the purchasers at the tax sales, title to said other lots became again vested in them. They also introduced the treasurer's certificate that he had, at a tax sale, bid off for Pitkin county lot 12, and an assignment of the certificate to Edward Charlton, a subsequent tax deed from the treasurer to Charlton, as said assignee, and a deed from Charlton to the plaintiffs. At this stage, then, assuming the regularity and sufficiency of this latter tax deed for lot 12 to pass title thereto, the plaintiffs had made a prima facie case as to all the property in controversy, without considering the tax deeds conveying the seven other lots. The defendants, in their own behalf, sought by the records of Pitkin county to show such irregularities and lack of conformity with the statute relating to tax deeds as made all of

the tax deeds introduced by the plaintiffs absolutely void. As to all of these tax deeds (except the one to Charlton for lot 12), it is, as it seems to us, immaterial whether they are void or convey title; for the plaintiffs have, as we have seen, otherwise shown title in themselves from the United States government, and there is nothing to show, and no attempt to show, any divestiture of title as to these other lots except by these numerous tax deeds. If, however, these tax deeds are void, as the defendants claim, then no title ever passed from the plaintiffs. If, upon the other hand, these tax deeds were regular, and sufficient prima facie to transfer title, the mesne conveyances spoken of show that the plaintiffs have again acquired the property. As to the tax deed of Charlton, the court seems to have admitted it in evidence, and no objection, except as to the acknowledgment, appears to have been interposed by the defendants. From an examination of this deed, it would seem to be regular upon its face, and in substantial conformity with the requirements of the statute in that behalf. Whether, however, the trial court deemed the defendants' attack upon it successful, we are unable with certainty to determine; but as we find no order excluding it from the consideration of the jury, and no instruction specifically applicable to the evidence bearing upon it, we must presume, in view of certain instructions of the court,—to be hereafter referred to,—that the sufficiency of the deed, and its regularity, were not passed upon by the court, but left to the determination of the jury. The defendants also introduced evidence tending to show possession, with a promise to follow it up with testimony showing that they so held under claim and color of title made in good faith, and that they had paid taxes,—all under their plea of the statute of limitations, which, by a previous order of the court, had been eliminated from the case. While numerous specifications were made by the plaintiffs in objecting to the introduction of this class of evidence, they seem not to have relied upon the ground that the evidence was permissible only under the eliminated plea, and that that was no longer an issue in the case. The admission of the evidence, therefore, might not be assigned for error by the appellants upon the ground just indicated. *Stark v. Brown*, 101 Ill. 395. But the evidence itself entirely fails to sustain such a defense, as there was no pretense that color of title was shown, nor was there any proof that possession and the payment of taxes were for the requisite length of time. This evidence as to possession, therefore, should not have been admitted, or, if admitted, as it seems to have been, subject to subsequent proof of color of title and payment of taxes, ought to have been stricken out when the plaintiffs, as they did, made a motion to that effect, because defendants failed to produce that proof which, and which only, made it admissible. The defendants also introduced in

evidence a quitclaim deed from Eames, the patentee of lot 12, bearing date the 10th of January, 1886. The tax deed from the county treasurer conveying this lot to the grantor of the plaintiffs was for the nonpayment of taxes which became due and payable after the defendants obtained this conveyance. It is a little difficult to determine from the evidence whether the defendants rely for their title to lot 12 solely upon this quitclaim deed, or whether they count upon the quitclaim deed merely as color of title, followed by the statutory possession and payment of taxes. But as the court, in its instructions, apparently considered that the latter theory was held by the defendants, we shall indulge in the same presumption.

Coming now to the instructions of the court, we think it almost too apparent for argument that the case was improperly submitted. The court first stated to the jury the law of this state in relation to the statute of limitations, the plea of which had theretofore been eliminated from the case. The jury were then instructed specifically that there was no evidence of any right of the defendants to claim under this statute, except as to lot 12; and as to this lot, while not expressly so instructed, by inference, at least, they were told that there was evidence which they were at liberty to consider in determining whether the defendants had brought their case within its provisions. But an examination of the evidence discloses that, though the jury possibly might have found that there had been possession for the statutory length of time, there certainly was no sufficient proof of payment of taxes, or an excuse for not paying them; there being an unsuccessful attempt to prove that there was a tender of taxes by defendants to the county treasurer, which the latter refused to accept. This instruction was improperly given, if it was intended to apply to lot 12; for there was no evidence in the case to which it was applicable, and it must have misled and confused the minds of the jury. As bearing upon the Charlton tax deed, and apparently, also, upon the other tax deeds introduced by the plaintiffs, the court gave instructions numbered 6 and 8, as follows: "(6) The court instructs the jury that it is necessary that, in order to convey title under a treasurer's tax deed, that all the facts set forth in the deed should be true, and that if it is shown that the requirements of the law have not been complied with as to the time of sale, the proper record of sale made, and deposited with the clerk and recorder of the county, as required by law, which must contain, among other requirements, the date of sale of the respective tracts." "(8) That the deed is the last act in the execution of the statutory power, and all conditions precedent must be complied with before it can lawfully be given. The deed, in this state, presumes these matters to have been done; but if it has been shown that, by the evidence, that these requirements have not been complied with in any one of the require-

ments, then the deed must fail." Assuming, but not deciding, that these instructions do not submit for the determination of the jury mixed questions of law and fact, we remark, in the first place, that instruction numbered 6 is not complete in itself; for the court does not say to the jury what the legal consequences are if they should find there had not been a compliance with the things that are mentioned in the instruction. Both No. 6 and No. 8 refer to "requirements of the law" and "conditions precedent" which the jury are told are essential to the validity of a tax deed; and in instruction No. 8 the jury are further told that these requirements and conditions must appear in the proof, and unless they do the deed must fail. Neither in these instructions nor elsewhere are the jury informed what the "requirements" or "conditions" are, so that they may intelligently pass upon the evidence. It is clear that the giving of these instructions is reversible error.

We find both in the transcript and the abstract that the last two instructions given by the court are Nos. 11 and 12. Apparently, they were tendered by the plaintiffs, and because of the alleged refusal of the court to give them the plaintiffs complain, although there is no order showing that they were refused. Upon the contrary, they appear to have been given; and, if we are bound by the record (as we certainly are), we must conclude that both of these instructions were given to the jury, just as the transcript and the abstract recite. If so, certainly the verdict is contrary to the instructions of the court; for in No. 11 the jury are expressly instructed that the plaintiffs are the owners of all the property in controversy, and entitled to its possession; and while in No. 12 the form is somewhat varied, and excludes lot No. 12, yet as to the other lots the jury are directed to bring in a verdict for the plaintiffs. It would scarcely seem possible that these instructions were given by the court, for they are so inconsistent and contradictory of previous instructions; and it may be, and doubtless is, true that the transcript, in this respect, is incorrect. But it shows that they were given, and we mention this fact as one example of the unsatisfactory record which we have been compelled to examine.

The court also instructed the jury—probably confounding the practice with that obtaining in suits brought under the authority of the federal statutes in support of adverse claims to mining locations—that, if the evidence warranted it, they might find a verdict against both parties. We do not understand this instruction to be pertinent to an ordinary action under our Code for the recovery of real property, but only in an adverse suit under the act of congress.

Other errors have been assigned and argued, which, in a proper case, we might feel called upon to determine. But, as they probably may not occur in the event of another trial, no useful purpose would be subserved by con-

sidering them at this time. Because of the commission of the errors already alluded to, the judgment of the court must be reversed, and it is so ordered. Reversed.

HAGERMAN et al. v. BATES et al.

(Supreme Court of Colorado. April 5, 1897.)

CONTRACTS — AUTHORITY OF AGENT — LACHES — PLEADING — SUBSTITUTION OF PARTIES — OBJECTIONS — WAIVER — NEW TRIAL — RESTRICTED ISSUES.

1. Its owners applied for a patent to the B. mining claim, and the owners of the G. claim, which was overlapped by it, began an adverse suit and an action in ejectment for the disputed ground. Defendants M., B., and D. were the locators of the B. claim. Before trial a settlement was effected by contract. Plaintiffs dismissed the actions, and defendants, on issuance of a patent, were to convey to plaintiffs a part of the disputed ground in fee, and a part for surface purposes only. Previous to the making of the contract, D. was living in Texas. He knew that an application for a patent had been made by his co-locators, and was conversant with the different steps taken, and the opposition by the owners of the G. claim. He had written to M., authorizing him to act for him in securing the patent, to employ counsel in actions brought, and "to attend to my interests jointly with your own to protect the property," stating that "I will pay my part of the cost." M. had employed an attorney for D. and himself, and M. and the attorney were present, and participated in the settlement with plaintiffs. M. wrote D. that the obstacles to the securing of a patent had been removed by compromise, and asked him to remit his share of the costs. He also stated that defendants were required to convey to plaintiffs a part of the disputed ground, for surface purposes only, and that he had signed the contract for D. and himself. In reply, D. objected to the item of costs, but made no reference to the settlement. *Held*, that M. was authorized to make the contract of settlement for D., as his agent.

2. Though the contract required a conveyance in fee in part, and D.'s only knowledge of it before action thereon was that derived from M.'s letter, he was bound by it as made, in the absence of an offer to place the parties in statu quo.

3. Plaintiffs, having made the contract knowing that D. had clothed M. with apparent authority to represent him, and having given up valuable rights in consideration of the conveyance, had a better right to enforce the contract than D. had to avoid it.

4. Laches may consist, not only in negligently instituting a suit, but also in negligently prosecuting it.

5. While the defense of laches need not be specially pleaded, when not pleaded the court should not of its own motion rest its decision on that ground, unless it clearly appear from the evidence that there has been unreasonable delay in prosecuting the suit; and especially where, had the question been raised during trial, plaintiff might have offered evidence to explain the seeming laches.

6. A dispute as to a strip of ground common to two overlapping mining claims, designated as "B." and "G.," was settled by contract. The owners of the G. claim withdrew all opposition to issuance of a patent to the owners of the B. claim, in consideration of a conveyance of a part of the disputed ground. The contract was made in 1882, and the conveyance was to be made as soon as a patent issued. The patent was in fact issued soon afterwards, but was not recorded until 1884. The G. owners then first learned of its

issuance, and sued on the contract, which in the meantime had been lost. Both parties made diligent search for it, and several states were visited to get testimony. Various intermediate questions were disposed of, and continuances were had from time to time by mutual consent. The claims changed hands in 1885 and 1887, and there were substitutions of parties. In 1889 one of the original defendants was dismissed from the action, and plaintiffs' appeal from such dismissal was not decided till 1892. Thereafter there was no lack of diligence in reaching a trial. *Held*, that plaintiffs' rights under the contract were not barred by laches.

On Petition for Rehearing.

1. Where there is a substitution of parties, any error therein is waived by failure to object to the application, or except to the order, or assign any error in regard thereto on appeal.

2. Where a cause is remanded for a new trial on a single issue of fact, the parties are not precluded from raising any question of law that may fairly arise on the trial of that issue, except, of course, such questions as may have been expressly decided on the appeal.

Error to court of appeals.

Action by J. J. Hagerman and others against John C. Bates and others on a contract for a conveyance of land. A judgment in favor of defendants was affirmed by the court of appeals (38 Pac. 1100), and plaintiffs bring error. Reversed.

In 1880 there were located in what was then Gunnison county, Colo., two mining claims,—one, the Little Giant, in January; the other, the Bonnybel, in July. By an act of the legislature becoming operative May 23, 1881, that portion of Gunnison county in which these properties were situate became a part of Pitkin county. The two claims overlapped, so that there was common to both a triangular strip of ground of about three acres. The owners of the Bonnybel made the first application for a patent, and subsequently such proceedings were taken by the owners of the Little Giant under the statutes of the United States providing for settling conflicting interests in mining claims that adverse suits were brought and pending,—one, an adverse suit proper, in the district court of Lake county; the other, an action in the nature of ejectment, in the form of an adverse suit, in the district court of Pitkin county; each having for its object the recovery of the possession of the conflicting ground. An attempt to file an adverse suit in the district court of Gunnison county within the statutory period failed, probably owing to a miscarriage of the mails. After the suit in Lake county was brought, and before that in Pitkin county was begun, a receiver's receipt was issued to the owners of the Bonnybel, in May, 1881, possibly upon the production of a certificate from the clerk of the district court of Gunnison county that no suit was there pending in support of the adverse claim filed in the land office. There were three defendants in both of these actions,—Charles J. Moore, Thomas Bracken, and J. M. Daniel, who were the original locators of the Bonnybel claim. In July, 1881, judgment was rendered in the cause pending in the district

court of Pitkin county against all three defendants for the possession of the tract in dispute, which was thereafter, in November of the same year, vacated as to the defendants Moore and Daniel upon the ground that the attorney representing them had no authority to enter their appearance, but the judgment against the defendant Bracken still stood. Thereafter Moore and Daniel filed their joint answer, and issues were made up. While the case was in this condition, and at the July, 1882, term, the parties to the litigation were present in court, with their witnesses, ready to proceed to a trial. Before the case was set, however, a settlement of the litigation was effected, and the plaintiffs dismissed, not only this action, but also the one pending in the district court of Lake county, in accordance with the terms of the agreement of settlement, and four days thereafter a patent for the Bonnybel was issued. The parties disagreeing as to the terms of the contract, on August 5, 1884, in the district court of Pitkin county, the present action was instituted by the then owners of the Little Giant to compel the defendants, as owners of the Bonnybel claim, to perform their obligations under the agreement. In this action there were many steps taken and interlocutory orders made, not important to the present discussion, even the bare recital of which would unduly extend the statement and the opinion, and tend to obscure, rather than elucidate, the vital questions in the case. It may be said, however, that before the trial of this action, which was had in June, 1891, and the argument heard in September of that year, and decree rendered in March, 1892, the cause, in March, 1890, was transferred, by stipulation, to the district court of Arapahoe county. Before the time of trial the ownership of both claims had entirely changed, and there was a substitution of parties plaintiff and defendant; the plaintiffs at the time of the trial being the then owners of the Little Giant, and the defendants the owners of the Bonnybel. Upon the part of the plaintiffs it was alleged and contended that the contract, which was the principal point in controversy, was that after the patent for the Bonnybel was issued the owners of the latter claim were to convey absolutely and unconditionally to the owners of the Little Giant a portion of the conflicting ground described in the pleadings, and an additional strip adjoining the same, for dumping purposes, in consideration that the owners of the Little Giant would first consent to have the judgment against Bracken vacated, and then dismiss both actions against all of the defendants, and pay to the owners of the Bonnybel \$100, being costs and expenses incurred by them in the litigation. The plaintiffs aver performance by their grantors of their covenants, and the refusal upon the part of the defendants' grantors to perform. Upon the other hand, the defendants assert that the contract was that their grantors were to convey a small strip of ground in dispute to the Little Giant owners for dumping purposes

only, and that plaintiffs and their grantors, by their noncompliance with their part of the contract, had lost even the right to the conveyance of this easement. The plaintiffs alleged, and their proof was to the effect, that the contract, as finally agreed upon, was drawn by Charles R. Bell, an attorney, and signed in behalf of the owners of the Little Giant by Taylor & Ashton, their attorneys, and by Bracken himself, one of the defendants, and by Henry Moody as the attorney for the other two defendants, Moore and Daniel. The defendants claimed, and their testimony so tended, that the contract as made was drawn by Moody, and executed by the individual owners of the rival lodes, except by Daniel, and the contract, as signed by all of the parties except Daniel, was then delivered to Moody, to be sent to Texas for Daniel's signature. The principal question in the case was therefore as to the nature and terms of this contract, and the largest part of the voluminous testimony was directed to this issue. The trial court, though not so finding, assumed, for the purposes of its decision, that the evidence was sufficient to establish the contract as alleged by the plaintiffs, but refused them specific performance, and dismissed their complaint, upon the ground that no sufficient authority was shown from Daniel to Moore, or to Moody for them, or either of them, to make the settlement alleged, or to sign the agreement declared upon, and that no ratification by Daniel of the acts of Moody or Moore was shown. Plaintiffs then appealed the case to the court of appeals, and in an elaborate opinion (5 Colo. App. 391, 38 Pac. 1100) that learned court affirmed the judgment, largely, if not wholly, upon another and different ground, viz. that the plaintiffs' laches in the prosecution of the suit defeated their rights to the equitable relief sought. It should be added that the court stated further that its decision might also be justified upon the other ground that no sufficient authority from Daniel to Moore was shown for the making of the contract. From this judgment of the court of appeals the plaintiffs have appealed to this court, assigning numerous errors. Such additional facts as are material are found in the opinion.

Rogers, Cuthbert & Ellis, Hugh Butler, and Charles S. Wilson, for plaintiffs in error. Thomas, Hartzell, Bryant & Lee and Wolcott & Valle, for defendants in error.

CAMPBELL, J. (after stating the facts). From the foregoing statement it will at once be seen that the main issue in the case (the nature and scope of the contract of settlement) was determined neither by the district court nor by the court of appeals, and this is one of the grievances which the plaintiffs urge here. The general rule undoubtedly is, as appellees assert, that the reasons given by a court for its decision are not material, so long as its conclusion is right. As

otherwise expressed, very poor reasons are sometimes given for a correct decision. But, where the facts upon which the decision is based are insufficient to support the conclusion, then not faulty reasoning, but the unvarnished effect given to the facts, constitutes the prejudice. After a most diligent examination of the entire record in this case, including all the evidence, we are satisfied that the judgment against the plaintiffs ought not to stand, and that the grounds given by both courts are not tenable. The learned judge of the district court held that the employment of Moody by the owners of the Bonnybel as their attorney in the ejectment action did not, as an incident, carry with it the power to compromise the suit, or to agree to a conveyance of real estate. Upon this, as a legal proposition, the authorities are conflicting, and possibly the ruling is right. However that may be, we do not find it necessary to express our views upon it. Previous to the making of the contract which is the subject of the controversy here, Daniel was living in the state of Texas. He knew that an application for a patent had been made by his co-locators in their own and in his behalf; was conversant with the different steps in relation thereto, and cognizant of the obstacles thrown in their way by the owners of the Little Giant claim. The three locators were desirous of securing a patent at the earliest date possible, and, as is manifest from the correspondence passing between them, thought that it might be facilitated by applying for a patent during the inclement season of the year, when the deep snows and the stormy weather would probably render opposition less effective. Daniel had written to Moore,—and the correspondence is in the record,—and had authorized him, as his co-owner, to act for him in securing the patent, to employ counsel to represent them in actions that might be brought, and (to quote the exact language) wrote, "I request you to attend to my interests, jointly with your own, to protect the property, and I will pay my part of the cost." Moore unquestionably construed this as giving him full authority, so acted, and, among other things, employed Moody as attorney for him and Daniel, while Bracken had separate counsel for himself. Moody and Moore were both present at Aspen, and participated in the negotiations that led up to the settlement, whatever it was. Bracken was present in person, while Daniel was absent. In the negotiations the owners of the Little Giant certainly supposed that Moore was representing, not only himself, but Daniel also; and it is not reasonable to suppose that the owners of the Little Giant would make any agreement of compromise, and dismiss the suits, unless they supposed, and Moore had so represented, that he had authority to act for Daniel, and that Moody, as their attorney, acted for them both. After the settlement was made and the actions dismissed, on July 28, 1882, Moore wrote from Leadville to Daniel, in Texas, in the follow-

ing August, stating that the differences between the owners of the two claims were adjusted, that the various actions were dismissed, and all obstacles to the securing of a patent removed, and asking Daniel to remit his share of the costs and expenses incurred in the litigation. He stated that, as one result of the compromise, the owners of the Bonnybel, after receiving a patent, were required to convey, for surface purposes only, to the owners of the Little Giant, a certain described parcel of the conflicting ground. In the letter Moore also stated that he had signed the agreement of settlement for Daniel as well as for himself. In reply to this letter, Daniel objected to the item of costs, but did not refer to the settlement, either by way of objection or approval, though advised by Moore that an agreement in his behalf had been made, whereby an easement in the property was to be conveyed after the patent was issued.

Now, we think that the facts just mentioned, especially when taken in connection with the circumstances of this case which our examination of the record has revealed, are sufficient, unexplained and uncontroverted by Daniel, to constitute Moore his agent, with power to make the contract, if any such was made, which plaintiffs set up in their complaint. It is true, Moore denies that such power was conferred, and, while at first denying any previous authority from Daniel to represent him, when confronted with this correspondence he admitted the receipt of Daniel's letters, and writing to him, as above set forth, and these admissions overcome his naked denial. There is not a word in Daniel's letters questioning such authority. His testimony is not in the record; and when his son, George M. Daniel (who throughout this litigation, in our judgment, is to be considered the same as J. M. Daniel, his father, and who seems to have had an equitable interest in the original location of the Bonnybel, and to whom the father transferred his entire record title before this action was begun), filed his answer, there was no plea or averment therein of the lack of authority in Moore to make the contract, but only that no such contract as alleged was in fact made. But, if we should be mistaken in our conclusion as to Moore having originally been given such authority, we are of opinion that Daniel ratified the agreement, or at least subsequently recognized that Moore had authority to make such an agreement as is declared upon. But, say appellees, and so said the trial court, Daniel could not ratify a contract of which he never heard until this action was instituted, and there is no evidence that previously he ever knew of plaintiffs' claim. It is true that in his letter of August, 1882, Moore informed Daniel that the contract contemplated a conveyance for surface purposes only. He was advised that a contract had been made in his behalf that called for a conveyance of an easement. By his silence and acquiescence

he acknowledged that authority existed therefor. In accepting the fruits which the contract of settlement gave, which secured the dismissal of two actions, and enabled the owners to get a patent for the Bonnybel without further opposition from their antagonists, it would be inequitable to permit Daniel to retain its benefits and repudiate its burdens, in whole or in part. So long as he retains the advantages, he should be held also to those provisions of the contract favorable to his opponents which secured for him the corresponding benefits. The other alternative would be for him to restore, or offer to restore, the status quo, and put the owners of the Little Giant, with respect to the litigation, in the same position they were in before the settlement was made. But, as the record discloses, this cannot now be done, and no such offer has been made, and it is in accordance with good conscience to hold Daniel to the contract as made. There is still another reason for so holding: Unquestionably, Daniel clothed Moore with apparent authority to represent him in this litigation and in this settlement. Previous to the application for a patent, and in the doing of assessment work, and in the various steps preliminary to making application for a patent of the Bonnybel, Moore seems to have acted for Daniel with the latter's full authority and acquiescence, and to the knowledge of the owners of the Little Giant. When, therefore, Moore was acting within the scope of his apparent authority as Daniel's agent, and made a contract for his principal, relying upon which others gave up valuable rights, and Moore thereafter misinformed Daniel as to the true nature of the contract, Daniel, rather than innocent third parties, should suffer. Especially is this principle applicable in this case, where Daniel retains the fruits of the contract, and, when suit is brought, and he is directly acquainted with plaintiffs' claim, makes no offer to restore them to the condition they were in before the contract was made. *Mechem, Ag. §§ 153 et seq., 298, 311; Story, Ag. c. 6.*

Coming now to the decision of the court of appeals, we find it predicated upon the plaintiffs' laches in the prosecution of the suit. As a matter of law and practice, we think the court was right in holding that laches may consist, not only in negligently instituting a suit, but also in negligently prosecuting it after it has been begun. The authorities referred to by the court of appeals sustaining this proposition are *Sullivan v. Railroad Co.*, 94 U. S. 806; *Johnston v. Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585. It seems to be in accordance with the better practice, also, that laches need not be specially pleaded as a defense, but may be raised by counsel at the trial, or taken cognizance of by the court, of its own motion, at any stage. In this case no defense of the kind was pleaded, and it seems not to have been suggested or considered as in issue by the trial court or

by counsel until after the case reached the court of appeals, and then for the first time in the brief of counsel for defendants. When the defendants were putting in their testimony, an objection to a question was interposed by counsel for plaintiffs upon the ground, *inter alia*, that the particular testimony sought to be elicited was not proper, because it related to the question of laches. The learned district judge remarked that no question of that kind was in the case, whereupon one of the counsel for defendants replied that no question of that kind arises. While, as we have stated, the defense of laches need not be specially pleaded by the defendant, still, when not pleaded, unless it clearly and satisfactorily appears to the court from the evidence that there has been an unreasonable delay in prosecuting the suit, the court, of its own motion, should not rest its decision upon that ground. Applying this principle to the case at bar, especially in the light of what occurred upon the trial in the district court concerning laches, to which we have just referred, we think that defense was not satisfactorily made out. We must not be understood as intimating that counsel for defendants purposely misled the plaintiffs, but what we do say is that the statement made in the trial court was calculated to mislead—and probably, in accordance with the contention of plaintiffs' counsel, did mislead—they into supposing that no such defense was to be relied upon. While this declaration of defendants' counsel might not preclude the court from resting its decision upon the ground of laches, still it would naturally be interpreted by plaintiffs as relieving them of the necessity of introducing evidence to explain any apparent laches; and the decisions are to the effect that this may be explained, and certainly the party against whom any such defense is suggested ought to have full and ample opportunity to make the necessary explanation. In the opinion of the court of appeals is found a marshaling of the facts as plausible, and an argument as strong, to sustain this defense, as can possibly be presented. There are certain other facts, however, apparent in this record, which, though they may not have been overlooked by the learned court, were probably not deemed of sufficient consequence to merit notice; but which, to our minds, place plaintiffs' conduct of the suit in a light quite different from that in which the opinion views it. Laches is not dependent upon the statute of limitations. Mere lapse of time and staleness of the claim are material questions that enter into the definition of the term, but of themselves are not conclusive. This suit was begun in 1884, and notice of *lis pendens* duly filed in the recorder's office. Not much progress was made therein until 1889. It should be said, as appears from the testimony of plaintiffs' witnesses, that the so-called "Bell Contract," if made, has either been lost or mislaid. Taylor, the attorney, states that

the day after it was executed he took it into court, and, after dismissing the action, left it with the clerk to be filed in the records of the case; and, so far as the testimony in this case is concerned, the contract has not from that time been seen by any witness who has testified. During the early history of the case, it seems that both parties made more or less diligent efforts to ascertain the whereabouts of this contract, and whether or not it was made. A number of states of the Union were visited by representatives of these parties with a view to securing testimony in the case, and more or less ample preparations were made for the trial. Various intermediate questions were disposed of, continuances had from term to term, some by agreement of the parties, and apparently no continuances were granted against the opposition of either side, and all evidently by mutual consent. While it may be true that negligence of the defendants does not excuse lack of diligence upon the part of plaintiffs, yet it is a circumstance proper to be taken into consideration that in this case the defendants themselves took no active steps to bring the case to trial. They were in default in the filing of their answers,—at least, would have been without an extension of time secured from the plaintiffs, or by order of the court. The present plaintiffs bought into the Little Giant in 1885; the present defendants, into the Bonnybel in 1887, charged with notice of plaintiffs' equities. Defendants' purchase was made after it was ascertained that the property in conflict was of value. That fact was ascertained, and ore discovered, not by expenditures of the defendants upon the Bonnybel claim, but by certain development work done upon other property under order of the court in litigation pending between what is known as the "Apex and Side Line" interests in the somewhat famous litigation of that character in this state before and during the pendency of this action. Hagerman, one of the plaintiffs herein, acted with the defendants and others of the side-line parties to that litigation; and his money, in proportion to the interest he had, was employed in the development work which led to the discovery of the value of the Bonnybel property. The defendant Moore in August, 1880, was dismissed from this action, and, so far as appears, the plaintiffs, in entire good faith, appealed from that order of dismissal to the court of appeals, where, at the April, 1892, term of the court, the appeal was dismissed upon the ground that the order was not in the nature of a final judgment. 2 Colo. App. 83, 29 Pac. 1014. This accounts for more than two years of delay. After that appeal was dismissed, there seems to have been no lack of diligence shown by the plaintiffs in prosecuting the suit. A part of the delay is to be accounted for, also, in the fact that the plaintiffs at one time sent their attorney to Aspen, who conferred with one of the attorneys for the defendants, and, after

such conference, reported to his clients his opinion as to their inability to prove the contract relied upon, and one of the plaintiffs then wrote to the defendants' attorneys that he had concluded to take no further steps in the litigation. Afterwards, however, the plaintiffs, as they state, becoming satisfied that their attorney had been deceived, determined, and so informed the defendants, that thereafter they would push the case, and this was done. There are other facts and circumstances apparent in the record, which might be noted, tending to explain the apparent laches of the plaintiffs, but we do not think it necessary further to notice them.

If the contract, as plaintiffs set it up, was made, it was the duty of the defendants to make conveyance after the patent was issued. While it is true that the patent was issued four days after the settlement, it was delivered to Moore by the register of the land office some time in September, 1882, and was not put upon the records of Pitkin county by Moore until April, 1884; and the plaintiffs' testimony is to the effect (and there is no proof to the contrary) that information of the issuance of the patent was not acquired by the owners of the Little Giant until a very short time before this suit was begun, in August, 1884. There was no negligence, therefore, in instituting this action; for it would be inequitable to impute to plaintiffs negligence in not sooner learning of the issuance of patent, when defendants themselves for nearly two years withheld the same from the record,—the recording being the usual means of imparting notice of title. Considering the facts to which we have adverted as tending to explain the alleged lack of diligence in prosecuting the suit after it was begun, and considering what was the natural effect of the statement of defendants' counsel that laches was not considered in the case, which obviated the necessity for introducing testimony explaining any negligence of this character that might be imputed to them, we are satisfied that the decision should not be placed upon that ground. If, as matter of fact, the contract as set up by plaintiffs was made, they are entitled to recover, and their equities should not be defeated either upon the ground of alleged lack of authority from Daniel, or that plaintiffs themselves have been guilty of laches in prosecuting the suit. In other words, there should be a decision of this case upon its merits, which up to the present time has not been had, and the plaintiffs have a right to a determination as to the main issue in the case. Upon this record, we are clearly of the opinion that Moore had authority to bind Daniel by a contract such as is set up by plaintiffs, and are further of the opinion that plaintiffs are not chargeable with laches in beginning or prosecuting the action.

The testimony upon the only other issue left to be determined is so irreconcilable, and, in the nature of things, must necessarily so largely depend upon the credibility to be given

to the witnesses who gave oral testimony, that we do not feel called upon to determine it from the record before us. It is peculiarly a case where such a decision should be made by a judge or jury who sees the witnesses as they testify, and observes their manner and appearance upon the witness stand.

The rulings of the trial court upon Moore's application for a dismissal of the action as to him were somewhat unstable. At first it was denied, and finally granted. After he sold his interest in the Bonnybel claim, his grantees in some way, and for some reason, not disclosed by the record, were made parties defendant,—whether because of the conveyance of Moore, and as substituted for him, it is impossible to determine, for the same persons were grantees, also, of Bracken and Daniel. A review of this ruling is not pressed upon us, and possibly no exception was taken to it. If it should be considered that Moore's grantees had been substituted for him, possibly the question is no longer material. We mention it now merely to suggest that in case of another trial, if the parties so desire, and it is considered important, they may get a ruling of the trial court to determine whether the present defendants are in court as purchasers of, and as substitutes in the suit for, Moore, Bracken, and Daniel, or only one or more of them. The judgment of the court of appeals is therefore reversed, and the cause remanded, with instructions to direct the district court, if any further steps are taken in the action, to proceed in accordance with the views expressed in this opinion, and to grant a new trial upon the following issue of fact only: What was the contract of settlement made between the owners of these two claims, or their agents and representatives, when the action in the district court of Pitkin county was dismissed? Reversed.

On Petition for Rehearing.

PER CURIAM. Counsel for appellees have filed an elaborate brief in support of their petition for rehearing, comprising numerous specifications of errors of law and fact which it is said the original opinion contains. No essentially new legal propositions are advanced, but merely an amplification in some particulars of those heretofore argued. With the conclusions both of law and fact reached and expressed by us in the former opinion, we are still content; but considering the importance of the interests here involved, and with a view of correcting mistakes of fact, if any, into which we were led, we have, with care, examined each of the points made, and again considered the record. In no respect do we find that the opinion misstates any material fact, but there is one matter to which we desire to advert. Counsel say that there is error in the statement that before the trial there was a substitution of parties plaintiff and defendant,—at least, so far as the defendants are concerned. We are told

that this statement is an important one, and, if true, properly weighs against the defendants. It is said that no application was made by the plaintiffs for leave to substitute new defendants, and in fact that no order therefor was obtained. After this petition for rehearing, and argument in its support, were filed, counsel for appellants applied to this court for leave to file a supplemental transcript of the record of the district court, showing that such leave was applied for and such order obtained, but we denied the application upon the ground that it was not material. The facts are, as the present record itself shows, that such a substitution was made, whether with or without proper authority; and the appellees appear not to have objected to the application, or excepted to the order, if made, or assigned any error thereto. For this, if for no other, reason, they are not in a position now to object.

There ought not to be any misapprehension of just what was decided upon the original hearing; but the appellees not only complain that, if a new trial be had, it should not be restricted to the one question of fact touching the nature of the contract of settlement, but they further insist that they should not be prevented from raising any legal objections that may properly arise upon the trial of that issue, from which, they say, appellants may insist our former opinion has cut them off. That there may be no further controversy as to this point, we say that after it was held by us that, if a contract such as the plaintiffs set up was entered into, the plaintiffs' right to recover could not be defeated because of the alleged lack of authority from Daniel to make it (which formed the basis of the decision of the district court), or of plaintiffs' laches in prosecuting the action (upon which the court of appeals rested its judgment), it was in accordance with good practice to limit plaintiffs, in the event of another trial, to the only remaining question of fact in the case. There was no longer any reason for requiring the district court to hear further evidence, and again pass upon the questions of fact, after this court, from the record before it, had resolved these two issues in favor of the plaintiffs. But, in limiting the new trial to the single issue of fact, the defendants are not, as they profess to fear, precluded from raising any questions of law that fairly arise upon the trial of that issue, except, indeed, such questions as may have been expressly passed upon and declared in the former opinion. To comply with the suggestion of the appellees, and at this time settle the legal propositions (other than those that have been determined by us, incidentally or otherwise, in the former opinion which may or may not arise at another trial, would be altogether improper, for the sufficient reason, if none other existed, that it is impossible now to anticipate what they may be. The former opinion is adhered to, and the rehearing denied. Rehearing denied.

PINCUS v. REYNOLDS.

(Supreme Court of Montana. May 31, 1897.)

FRAUDULENT CONVEYANCES — EXECUTION SALE —
RIGHT TO ATTACK — EVIDENCE — DECLARATIONS — WITNESSES — CROSS-EXAMINATION.

1. A plaintiff suing for conversion of property, where his title is alleged to be fraudulent as against creditors, may be subjected to a rigid cross-examination as to the bona fides of his ownership.

2. Where plaintiff, in conversion, claimed title under a sale attacked as in fraud of creditors, declarations by one of the parties to the sale, showing that he was afraid the sale would not stand, and that he desired that a mortgage be given to cover emergencies, were admissible against plaintiff, though made when he was not present, since parties to a fraudulent sale are co-conspirators.

3. A creditor may attach property that his debtor has fraudulently sold, as soon as he hears of the fraudulent character of the sale, even where the indebtedness accrued subsequent to the sale, and he knew his debtor had claimed to have parted with his title to said property when credit was given.

4. One purchasing property on sale under a judgment void as to creditors acquires no title, as against them, whether or not he obtains actual possession.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Adolph Pincus against Samuel J. Reynolds for conversion. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

This is an action to recover the value of certain personal property, described in the complaint, and which the plaintiff claims to be the owner of, and which he alleges the defendant wrongfully took and converted to his own use. All the material allegations of the complaint are denied by the answer, except as to the value of the property, which the defendant concedes is of the value of \$300 only, instead of \$3,500 as alleged in the complaint. The defendant, at the time of the taking of the property, was the sheriff of Silver Bow county. He alleges that he took possession of the property under a writ of attachment issued in a suit in the district court of Silver Bow county, in a case wherein P. J. Brophy & Co. were plaintiffs, and James Dunstan and Sol. Lachman were defendants, and justifies his taking of the property under said writ. The defendant further alleges in his answer that whatever claim or right to the property in question this plaintiff (Pincus) has he acquired under and by virtue of his purchase of the property at a sheriff's sale thereof, which sale was had in Silver Bow county under an execution issued on a judgment rendered in the district court of said county in favor of this plaintiff and against Lachman & Dunstan. The answer alleges that said sheriff's sale, at which this plaintiff purchased the goods in controversy, was illegal and void, for the reason that it was made and intended by said Pincus, the plaintiff in the execution and judgment under which said property was sold, and said Lachman & Dunstan, the defendants in said case,

for the purpose of hindering and delaying the creditors of said Lachman & Dunstan, and particularly said Brophy & Co., in the collection of their just debts, and was intended to cover up the property, and protect the said Lachman & Dunstan in the possession and use thereof against their said creditors, and that said sale was fraudulent and void as against the said creditors of Lachman & Dunstan for the reason that said sale was not accompanied by any delivery or followed by any change of possession of the property. The answer further alleges that the property so pretended to be sold at said sale, before and after said sale, was and remained in the exclusive possession of said Lachman & Dunstan. The replication denies the allegations of the new matter contained in the answer, and alleges that Brophy & Co. had actual notice of the sale which the answer alleges to be fraudulent and void. The case was tried with a jury, and a verdict rendered in favor of defendant, and a judgment in accordance therewith. This appeal is from the judgment and an order overruling plaintiff's motion for a new trial.

O. M. Hall and Geo. Haldorn, for appellant.
F. T. McBride, for respondent.

PEMBERTON, C. J. (after stating the facts). The pivotal question to be determined on this appeal is as to whether the execution sale of the goods in controversy, under and by virtue of which the appellant claims ownership thereof, was illegal, fraudulent, and void for the reasons alleged in the answer. The execution under which this sale took place was issued on the judgment rendered in the case of Pincus against Lachman & Dunstan, as set out in the statement of the case, and which judgment is attacked for fraud by the answer of respondent. The complaint in the case of Pincus against Lachman & Dunstan, mentioned above, and in which the alleged fraudulent judgment was rendered, alleges as causes of action four promissory notes executed by Lachman & Dunstan,—the first for \$1,000, dated December 7, 1891, payable to Pincus; the second, payable to Pincus, in the sum of \$500, dated January 1, 1892; the third for \$1,600, dated October 1, 1891; and the fourth for \$1,250, dated February 1, 1892; the last two notes being payable to one S. D. Martin, who transferred them to Pincus before suit. The evidence of Martin and Dunstan is positive that there was no consideration for the two Martin notes above mentioned. Concerning the execution of these notes Martin testified as follows: "I agreed to take these notes to help them [Lachman & Dunstan] out; that is, to ostensibly have them in my debt when they were not actually in my debt. These notes were given a few days before the time that Pincus brought suit against Lachman & Dunstan. If this \$1,600 note is dated October, 1891, that date is incorrect, for the note was given to me about

the time that Pincus brought suit, and, if his complaint was filed February 9, 1892, this note and the other note were given to me within two or three days of that date. * * * Pincus made the suggestion to me. * * * Pincus told me he was willing to 'help the boys out,' as he called it. * * * They were not to beat anybody. They just wanted an extension of time, and it was to give them an extension of time that this arrangement was made. They mentioned several creditors, Mr. Brophy in particular. Pincus said he would take these notes, and bring suit, and get judgment, and forestall their other creditors. Prior to the Pincus attachment, Lachman & Dunstan did not owe me a cent. Pincus and Lachman and I had a talk one time about the matter, walking across Main street towards the restaurant; and we had another conversation about it up in the Mint. I saw Lachman at the premises that evening after the sale. He was getting ready, and making calculations of opening up as soon as possible. The arrangement was that Pincus was to let them have the place, and go on and run it as we had agreed to do in the first place." Dunstan's testimony as to these two notes is as follows: "That Lachman and he were partners in the restaurant business in 1892; that he knew Mr. Pincus; that at the date of the Martin notes Lachman & Dunstan did not owe Martin a dollar; that Lachman had told him that he would have to sign the Martin and Pincus notes; that the notes were just to confess judgment in favor of Pincus and Martin, so as to give us time, and keep other people from attaching us. On the 9th of February, 1892, we did not owe Sam Martin a dollar." This testimony is not disproved. While it is not literally admitted by Pincus and Lachman, it is not successfully contradicted, and, we think, is substantially admitted by them, except that Pincus claims that Lachman & Dunstan did actually owe him \$750, due by three promissory notes, of \$250 each, and some other sums, making in all, as he claims, about \$1,100. But the evidence conclusively shows that this \$750 claim was not sued on by Pincus in the case we are discussing. After the execution sale in question, Pincus went to Lachman & Dunstan with the three \$250 notes and required of them the execution of a \$750 note in lieu of them; and this \$750 note was placed in bank, and Lachman & Dunstan paid the interest thereon to the bank for a long time after the suit, judgment, and sale we are discussing. From this evidence we do not see how the jury could have done otherwise than find that the judgment in favor of Pincus against Lachman & Dunstan, under which the sale took place at which Pincus bought the property in controversy, was fraudulent and void. It is generally difficult to prove fraud. The party alleging it must generally rely largely upon circumstantial evidence. But in this case we have the positive evidence of two of the conspirators and the substantial admission of the other two. The records of the

courts rarely disclose such ample and positive proof of actual fraud as is found in this case. Here we are not compelled to grope through many labyrinths, and ways that are doubtful and dark, to find the slimy trail of the serpent. Here we have a bolder snake, who holds his head up, and disdains to hide or deny.

Counsel for appellant contends that the court erred by permitting Pincus, when on the stand as a witness, to be cross-examined as to the entire transactions between himself and Lachman & Dunstan and Martin, in relation to the giving of the notes sued on and the recovery of the judgment alleged to be fraudulent in defendant's answer. He says the court erroneously permitted the defendant to prove his case by Pincus by an improper cross-examination. But counsel overlooks the fact that Pincus claims in this case to be the owner of the property in controversy. His title is based upon his purchase of the property at an execution sale, which is alleged to be invalid because had under a judgment obtained by fraud. So that the bona fides of Pincus' title became a material matter, which defendant had a right to inquire into by cross-examination. Pincus, being the party in interest, whose title was alleged to be fraudulent, was properly subjected to a rigid cross-examination for the purpose of ascertaining whether his claim of ownership was bona fide. In such cases the extent to which a cross-examination may go is largely discretionary with the trial court. We see no abuse of a sound judicial discretion here.

During the trial Dunstan was permitted, over appellant's objection, to testify that Lachman, long after the execution sale in controversy, asked him (Dunstan) to go to a lawyer's office to sign a mortgage to Pincus for the same goods purchased by Pincus at the execution sale, and now in controversy. It seems that Lachman had some fear that the execution sale would not stand, and the mortgage was needed to cover possible emergencies. The objection to this evidence is that Pincus was not present. But this was part of the scheme of fraud. That scheme had not, in the opinion of the conspirators, been successfully carried out and completed. In such cases the declarations of any of the conspirators may be given in evidence, whether made in the presence of all or not. We see no error in this action of the court.

Counsel for appellant says Brophy & Co. cannot attack the sale of the property in question for fraud, because they knew of the sale and gave credit to Lachman & Dunstan after such sale. Brophy & Co. had judgment against Lachman & Dunstan before this sale. They attached for an indebtedness accruing after the sale. But there is no proof that Brophy & Co. knew that the judgment obtained by Pincus against Lachman & Dunstan was fraudulent. As soon as they learned this, they had a right to attack it, whether their demand accrued before or after the execution sale.

The sale to Pincus of the goods in contro-

versy having been under an execution issued upon a judgment absolutely void on account of the actual fraud of Pincus and all the parties to such judgment, it becomes unnecessary for us to discuss the question of the necessity of an actual delivery and change of possession of personal property sold at a judicial sale. The judgment obtained by Pincus against Lachman & Dunstan was void. He acquired no title to the property by virtue of the execution sale as against the creditors of Lachman & Dunstan, whether he got actual possession at the sheriff's sale or not. The judgment and order appealed from are affirmed.

HUNT and BUCK, JJ., concur.

STATE ex rel. JOHNSON et al. v. BOARD
OF COM'RS OF DEER LODGE
COUNTY.

(Supreme Court of Montana. June 7, 1897.)
HIGHWAYS—VACATION OF PUBLIC ROAD—RIGHT
OF LANDOWNER TO DAMAGES.

1. The owners of land along and through which a public road runs are not entitled to damages on vacation of the road by the proper authorities.

2. By the vacation of a public road there is no taking of private property for public use, within the meaning of Const. art. 8, § 14.

Appeal from district court, Deer Lodge county; Theodore Brantley, Judge.

Application by the state of Montana, on the relation of Herman Johnson and others, for a writ of certiorari to review the proceedings of the board of county commissioners of Deer Lodge county, Mont., in vacating a public road. From a judgment quashing the writ, relators appeal. Affirmed.

This is an application for a writ of certiorari to review the action of the board of county commissioners of Deer Lodge county in vacating a certain public road, described in the complaint. It is conceded that the proper steps and proceedings were had, in accordance with the statute, to procure an order of the board of county commissioners vacating the road in controversy. The chief complaint of the petitioners seems to be that the board of county commissioners, when the matter of vacating the road was properly before them, made the order vacating the road, but declined to appoint viewers to pass upon the propriety or necessity of vacating the same, and acted seemingly as viewers themselves, and declined to allow any compensation to the petitioners on account of vacating the road. It seems that the petitioners own land along and through which said public road runs, and have improved their said lands during the time said road ran through them, before the order vacating the same was made. The district court issued the writ as prayed for, and on the return day thereof the board of county commissioners, through the county attorney, filed a motion to quash the same on the grounds: "(1) Because the affidavit and application up-

on which said writ is asked do not state facts sufficient to entitle said plaintiffs to said writ. (2) Because said defendant board did not exceed its jurisdiction, as shown by said affidavit and application. (3) Because said application for said writ was not made within thirty days after said order was made closing said road. (4) Because said plaintiffs were guilty of laches in applying for said writ, in this: that they did not file their application until four months after the order closing said road had been made, and after said road had been closed in pursuance of said order." The district court sustained the motion, and quashed the writ. The plaintiffs appeal.

Ed. Scharnikow and W. W. Goodman, for appellants. C. B. Nolan, Atty. Gen., for respondent.

PEMBERTON, C.J. (after stating the facts). The motion of the respondent to quash the writ, which was sustained by the court, and from which action this appeal is prosecuted, is in effect a demurrer to the application or petition of plaintiffs. The question, then, is this: Does the application or petition of the plaintiffs for the writ show in them any such right, or that they have sustained any such injury, as will entitle them to damages on account of the vacating of the road in controversy by order of the defendant board? The law under which this case was instituted gave the board power to vacate public roads when proper proceedings had been taken before the board for that purpose. There is no express statute allowing damages to anybody on account of the vacating of a public road by the board of county commissioners. The question here involved has been decided by the supreme court of Iowa. The Iowa statutes are not unlike ours. In *Brady v. Shinkle*, 40 Iowa, 578, the supreme court of that state says: "That a landowner may sustain 'damage,' according to the common acceptance of the word, on account of the vacation of a highway, as stated in the question, cannot be doubted. It is equally true that inconvenience and damage may result to him by closing a road which is miles away from his land. A farmer may suffer serious loss and inconvenience by the vacation of a highway over which he is accustomed to travel and haul the productions of his farm to market, though his land abuts upon no part of it. All who use the road suffer in the same manner. While one may be more largely injured than others, he yet sustains damages of the same character and nature which all who use the road—the public generally—suffer. While the road exists, he has a right to the easement. But this right is not different from that enjoyed by the public generally. His right, then, is such as is enjoyed by the public. His damages are those shared by the public, and no other. It is well settled that in such a case recovery cannot be had by a citizen. It cannot be claimed that plaintiff's

property, by the vacation of the road, is taken from him, either for public or private use. The right to the continuation of the highway, held in common with the public, if it exists, cannot be claimed to be property of the character which the citizen holds free of governmental interference, except upon receiving therefor due compensation. We hold many rights subject to the control of the state for the public good. The law places the control of highways, with the power to vacate them, out of the reach of the citizen. They are to be exercised for the public good. Inconvenience and damage resulting therefrom are not to be compensated. Each citizen must bear such burdens. They are imposed as a condition for the enjoyment of the benefits resulting from government. It will be readily seen that different rights of the citizen are invaded when a road is established than when one is vacated. In the establishment of a highway real property must be taken for public use, and the law provides in such cases for compensation of the landowner. In the vacation of a road the land so taken is restored to the owner, and the right of the public to its use is cut off. The citizen has no right to the continuation of the road, except such as he holds in common with the public. The distinctions between the right of a citizen to the use of an existing highway and his right to its continuation are also plainly discernible. While he may not be deprived of the first right, the second he holds subject to the exercise of lawful authority." To the same effect, see *Ellsworth v. Chickasaw Co.*, 40 Iowa, 571. There is nothing in the application or petition of the plaintiffs that shows that they have sustained any inconvenience or damage different from that which the public generally has suffered by the vacation of the road in question. If this suit can be maintained for damages, why may not anybody and everybody who may be inconvenienced or damaged by the vacation of a public road by the proper authority have a cause of action against the county, or the persons causing such road to be vacated, for damages? There is, in our opinion, no such taking of private property for public use shown in this case as is contemplated and prohibited by section 14, art. 3, of our constitution. The Iowa decisions, quoted at length above, so forcibly and conclusively express the views we entertain of this question that we deem any further discussion of the matter unnecessary. See, also, *Clarke v. City of Providence* (R. I.) 15 Atl. 763; *Insurance Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395.

The appellants contend that the defendant board exceeded its jurisdiction in its action relating to the vacation of the road in controversy. Respondent also contends that the appellants had the right of appeal from the action of the board complained of to the district court, or could have brought a suit by

injunction to restrain the action of the board, if illegal or if appellants had any right of action for damages, and that consequently they have no right to institute this proceeding for a writ of certiorari. Having disposed of the appeal on the ground that plaintiffs have no right of action for damages by reason of any fact stated in their application or petition, it is useless to discuss any minor question presented by the record. We may say, however, that the statutes in force when the order was made vacating the road in question did not require the board to appoint viewers to determine any question of propriety, necessity, or damage before making the vacating order, as in case of laying out new roads, nor has any necessity for such action by the board been shown in this case. The order and judgment appealed from are affirmed.

HUNT and BUCK, JJ., concur.

BARRY v. WESTERN ASSUR. CO.

(Supreme Court of Montana. June 1, 1897.)

HOMESTEAD EXEMPTION—HEAD OF FAMILY.

A married woman lived in a building with her family, including four minor children, which was built from her own earnings. The wife supported herself and children. For eight years the husband had slept in a cabin back of the house. He was indolent, but worked a little at intervals. He testified that it was his fault that he had not been steady at work. He often left the home after quarrels with his wife. *Held*, she was not the head of the family, entitled to the exemption of a homestead.

Appeal from district court, Silver Bow county; W. O. Speer, Judge.

Suit by Elizabeth Barry against the Western Assurance Company on an insurance policy. From judgment for plaintiff, defendant appeals. Reversed.

The plaintiff (respondent) sued the defendant and appellant to recover \$1,000 alleged to be due and owing on account of an insurance policy issued by the defendant company to plaintiff upon certain property in Menderville, which said property plaintiff claimed as a dwelling house and homestead. It is conceded that the house was destroyed by fire about September 20, 1893. The defense raised by the answer was to the effect that about September 25, 1893, certain creditors sued the plaintiff, and issued writs of attachment, and attached all moneys in the possession of this defendant and its agents (in the manner provided by law) belonging to plaintiff, and thereafter recovered judgments against the said Elizabeth Barry, and issued executions, and that thereafter the defendant company paid over to the sheriff under the executions all moneys which might be due under the policy. In her replication plaintiff alleges that she is now, and has been for many years, a married woman, a sole trader, and the head of a family; that she built and constructed the house which was destroyed

by fire, and upon which she procured the insurance, out of her own earnings; and that she claimed the premises as a homestead. There was a trial and judgment in favor of plaintiff. The defendant moved for a new trial, which motion was overruled. From the judgment and order overruling the motion for a new trial, defendant appeals.

Chas. R. Leonard and J. W. Cotter, for appellant. W. S. Shaw, for respondent.

HUNT, J. (after stating the facts). The plaintiff's principal contention is that the money due to her under the insurance policy was exempt from levy by attachment in the hands of the company because the house destroyed was her homestead, and because she was the owner thereof and was the head of a family. The appellant, on the other hand, argues that plaintiff was not the head of a family, and was not, therefore, entitled to claim a homestead exemption. If, therefore, the privilege of claiming exemption of the property destroyed as a homestead is available to plaintiff at all, it is because the evidence has established her headship of the family. We are thus obliged to look into the facts to ascertain whether her relation as the head of the family was established. In doing this we shall only regard the plaintiff's testimony. It appears that Mrs. Barry and her husband had been married for 32 years before this suit was tried, and lived and cohabited together until the last 8 years before the fire destroyed the property involved in this suit. They had a large family, including four minor children. Mrs. Barry appears to have been an industrious woman, and in the later years of her married life to have been the main support of the children. The husband, Barry, was evidently a lazy man, content to allow his wife to do most of the work whereby a support was obtained for his wife and children. To use his own language on this point: "She managed to support them. I thought it was all right anyhow." At times he was away mining, but returned at intervals, and lived with his family, although during the past eight years he did not sleep in the same house with his wife, but had a bed in a little cabin in the end of the yard, back of the main house. He admitted the knowledge of his obligation to support his family, and that it was his own fault to a great extent that he had not been steadily at work, and said that he often had "little spats" with his wife, and would leave because his presence was not wanted. The house which was burned seems to have been kept for a time as a boarding house by Mrs. Barry, and the debts for the payment of which the insurance money was attached were contracted by her. She was a sole trader, and doing business on her own account. The insurance was originally written in the name of her husband, James F. Barry, but it was afterwards transferred to the plaintiff in this suit. Un-

der this evidence we do not think Mrs. Barry can be held to be the "head" of the Barry family, as the term is used in the statute exempting homesteads. Ordinarily the husband is the head of the family. He is the parent, if living, whom the law first recognizes as having a right to have a home for his family protected and secured. From the natural relation existing between the husband and his wife and children, there arises a duty upon him, both moral and legal, to support his family; but his legal headship of the family cannot be destroyed because of a mere dereliction of duty on his part. It is clear to us that, if the property had been seized for a debt of Mr. Barry, he could have claimed its exemption as a homestead. It was the residence of his wife and children, and his home. There was no such change in his relations with his family as would impair his homestead rights. *Carrington v. Herrin*, 4 Bush, 624. The circumstance that Barry was not on the best terms with his wife, and occupied a different bed, even when considered with his general indisposition to support his family, cannot change the law. It was an unhappy family; that is all; but the husband was none the less the head of it. The order denying a new trial, and the judgment, are reversed, and the cause is remanded. Reversed and remanded.

PEMBERTON, C. J., and BUCK, J., concur.

MONTANA NAT. BANK v. MERCHANTS' NAT. BANK et al.

(Supreme Court of Montana. June 7, 1897.)

GARNISHMENT—EFFECT—LIEN—EXTENT—EQUITY—JURISDICTION—PLEADING—OBJECTIONS WAIVED.

1. A garnishee's property having been sold on execution in favor of one of his creditors, the garnishment plaintiff sued his debtor, the garnishee, plaintiff in execution, and the sheriff, to have the proceeds of the execution sale applied in payment of his claim. It was stipulated that no claim was made except on account of the attachment of the alleged debt of the garnishee to plaintiff's debtor, and the main issue of fact was as to whether such debt existed. *Held*, that defendants could not, on appeal, take advantage of a defect in the complaint in not averring that an attachment was levied on an indebtedness due from the garnishee to plaintiff's debtor.

2. By garnishment of a debt due defendant, plaintiff acquires an inchoate right to a lien as to the garnishee's property.

3. But where the other creditors of the garnishee subsequently levy upon such property, the right of the garnisher to a lien is limited to the pro rata interest it would be entitled to receive had the garnishee made a general assignment for benefit of creditors.

4. A court of equity will interfere to protect an attachment lien.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action by the Montana National Bank against the Merchants' National Bank, the Daily Journal Company, the Journal Publishing Company, and Charles M. Jeffris. From a

judgment in favor of plaintiff, and an order denying a new trial, defendants appeal. Modified.

The facts in this case are substantially as follows: On November 9, 1892, the Montana National Bank instituted an action in the district court of Lewis and Clarke county against the Journal Publishing Company for a debt of \$26,424.15. On the same day a writ of attachment was issued in the suit, and pursuant to it the sheriff served notice upon the Daily Journal Company for the purpose of attaching the sum of \$8,939.89, a debt due from said Daily Journal Company to said Journal Publishing Company. The Montana National Bank obtained judgment against the Journal Publishing Company for the amount it sued for on November 29, 1892. Subsequent to the service of the writ of attachment aforesaid, and with notice thereof, the Merchants' National Bank sued said Daily Journal Company for the sum of \$25,307.43, and on the same day procured a writ of attachment, and caused the sheriff of Lewis and Clarke county to seize all the property of said Daily Journal Company. On November 22d the Merchants' National Bank recovered judgment against said Daily Journal Company for the said sum alleged to be due it, and on the same day caused a writ of execution to be issued and placed in the hands of the sheriff. The sheriff levied an execution on all the property of the Daily Journal Company, and sold the same on December 1, 1892, realizing the sum of \$21,000. On December 1, 1892, the Montana National Bank brought a suit against the Merchants' National Bank, the Daily Journal Company, The Journal Publishing Company, and the sheriff of Lewis and Clarke county, for the purpose of having applied on its judgment against the Journal Publishing Company the amount of the indebtedness from the Daily Journal Company to the Journal Publishing Company which it had attached. An answer was filed. The case was tried to the court without a jury. From a judgment in favor of the Montana National Bank, and an order denying a motion for a new trial, the defendants appeal.

McConnell, Clayberg & Gunn, for appellants. H. G. McIntire, for respondent.

BUCK, J. (after stating the facts). It is claimed by appellants that the complaint of respondent does not state a cause of action, by reason of its failure to allege that any attachment had ever been levied on any indebtedness due from the Daily Journal Company to the Journal Publishing Company. Appellants contend that the complaint shows that only property and credits were attached by respondent, and not debts. The complaint is somewhat defective in the allegations as to the attachment of an indebtedness, but upon the trial it was stipulated between appellants and respondent that no claim was made in the action except on account of the attachment of

the alleged indebtedness of the Daily Journal Company to the Journal Publishing Company. The main issue of fact on the trial was as to whether there was any such indebtedness or not. Having entered into this stipulation, and the issue aforesaid having been tried, we are satisfied that appellants are in no position to take advantage of the alleged defect in the complaint. It would not be fair to allow them to raise this point. Moreover, the complaint alleges "that at the time of the service upon it of the writ of attachment and notice, the Daily Journal Company owed the Journal Publishing Company the sum of \$9,039.89, and that said sum, so owing from said Daily Journal Company to said Journal Publishing Company, and so as aforesaid by said plaintiff attached and garnished, is still owing and wholly unpaid."

We proceed at once to the main issue of law involved. Appellants state their position as follows: "Under our statutes, no lien is created, by virtue of an attachment, either upon the property of the garnishee or upon the property of the defendant in the garnishee's possession." Neither the words "garnish," "garnishment," "garnisher," or "garnishee" appear in the Montana attachment statutes. The sheriff is commanded by the writ of attachment to attach the property of the defendant, whatsoever its character,—whether capable of actual possession or of constructive seizure only. But we will use the terms aforesaid for convenience in this opinion. As to a chattel capable of manual delivery in the possession of a garnishee, we cannot agree with appellants that no lien results from garnishment. An inchoate lien or right is acquired by garnishment as to such chattel. See *Reed v. Fletcher* (Neb.) 39 N. W. 437, and *Knife Co. v. Sharpleigh*, Id. 788; also *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770, and *Smith v. Bridge Co.*, 13 Ill. App. 572. In this case, however, a debt was garnished, and just what right in connection with the property of the garnishee was acquired by virtue of the garnishment is a question of difficulty. Is the garnisher of a debt substituted only to the right of the creditor of the garnishee, or does he acquire, by virtue of the garnishment, a right different in the power of enforcement from such creditor's right? To hold that he does not would be almost to declare the statute permitting a garnishment of a debt a nullity. If there is a mere substitution, the garnishee, particularly if insolvent, can ignore the garnishment by disposing of all his property, and thereby absolutely defeat any practical gain from the process. On the other hand, it would not do to hold that, by the mere service of the notice of attachment, a specific lien is created upon any property of the garnishee. The garnishee's right to deal lawfully with his own property cannot be disregarded, and must be carefully preserved. It was manifestly the intention of the legislature, in framing the attachment laws of Montana, however, to give some practical advantage by virtue of legal

process to the diligent creditor who garnishes a debtor of his debtor, as well as to a creditor who actually attaches tangible property or garnishes a chattel capable of manual delivery. In *O'Brien v. Insurance Co.*, 56 N. Y. 52, an insurance company was garnished for a debt due a debtor of the plaintiff, and the court said (the statutes of New York being substantially the same as those of Montana) that the effect of the garnishment was to impound the debt,—that is to say, to take it into the custody of the court,—as effectually as a seizure of chattels capable of manual delivery. In *Shoe Co. v. Ladd* (Minn.) 20 N. W. 334, an insurance company owing the defendant was garnished, and the court said: "The garnishment is in effect an attachment of the 'indebtedness' of the garnishee to the defendant. Though, technically speaking, it may not give a specific lien upon such indebtedness, its effect in conferring upon the plaintiff a specific right, over and above that of a mere general creditor, to the indebtedness for the payment of his claim, is substantially analogous to that acquired by an attachment of tangible property."

Between the impounding of the debt itself, however, and the acquiring of a specific lien upon the property of the garnishee, there is a marked difference; at least, in so far as the garnishee's right to deal in good faith with his own property is concerned. Yet, if a debt is impounded,—taken into the custody of the court,—is it not the duty of the court to preserve, so far as lies in its power, any right of the garnisher as against a subsequent attaching creditor who invokes its process in hostility to any such right? The *Daily Journal Company* had assets worth \$21,000. It owed the *Merchants' National Bank* \$26,424.15 and the *Journal Publishing Company* \$8,939.89. These assets constituted its sole and only means of payment—or, rather, part payment—of said debts. The object of the attachment statutes is to reward diligent creditors. Respondent served notice of its garnishment before the *Merchants' National Bank* levied its attachment, and used the utmost diligence, apparently, to obtain an actual benefit from this garnishment. Under the statutes of the state respondent was in no position to obtain a judgment against the garnishee until after it had obtained a judgment against its direct debtor. But the judgment was not obtained until November 29th, and at that time all the assets of the garnishee, the *Daily Journal Company*, had been seized and advertised for sale by the sheriff under the execution issued on the judgment of the *Merchants' National Bank* against its debtor, obtained on November 22d. The property was sold on December 1st, and on that day the respondent commenced this action in equity against appellants, thereby availing itself of the only practical remedy left to it. Proceedings supplemental to execution would have been idle and inadequate under the circumstances.

No direct question arises here, as between

the garnishee or any person dealing with it without notice and the garnisher, with reference to any specific lien on the former's property while actually engaged in business. The *Daily Journal Company* is a lifeless and hopelessly insolvent corporation. The contest is strictly between the two creditors as to its assets, each claiming by virtue of its attachment. Even on the theory that the only right acquired by respondent through its garnishment was a substitution to the rights of the *Journal Publishing Company* as against the *Daily Journal Company* alone, was there any complete substitution? If there had been a full and complete substitution, at the very moment the notice of garnishment was served on the *Daily Journal Company*, respondent might have sued for the debt due the *Journal Publishing Company* and taken the tangible property of the *Daily Journal Company* into legal custody by direct attachment. As stated, however, respondent was in no position to sue the *Daily Journal Company* until November 29th, when it obtained its judgment, and at that time all the assets had been advertised for sale, and were actually sold by the sheriff two days later. If the service of the notice of garnishment by respondent through the court was not the commencement of a proceeding to reach assets of its debtor, then the law permitting the garnishment of a debt is a nullity, at least so far as this case is concerned. We are of the opinion that, as to the *Merchants' National Bank*, respondent acquired an inchoate right to a lien as to the property of the *Daily Journal Company* by virtue of this garnishment. By service of the garnishment respondent took the first legal step necessary to the possible perfection of a lien, and the judgment finally obtained as to the *Daily Journal Company* perfected the lien, and the right initiated thereto by the service.

When the *Daily Journal Company* was garnished by respondent, it was notified by the court to hold its debt to the *Journal Publishing Company* for the benefit of respondent. It became in a sense the agent of the court for that purpose. Hence the *Daily Journal Company* could not have assigned all its assets for the benefit of its one creditor, the *Merchants' National Bank*, to the exclusion of respondent's right, after the notice of garnishment was served. The law could have been invoked to prevent any such assignment. And yet of the same court which would have restrained any such assignment the *Merchants' National Bank* demands identically what would have been the result of such an assignment. Unquestionably, however, had the *Daily Journal Company*, after it had been garnished, seen fit to make an assignment for the benefit of both its creditors, it could have done so. And from this it follows that the right to a lien initiated by respondent by virtue of its garnishment, so far as the *Merchants' National Bank* is concerned, was only what pro rata interest respondent would have been entitled to receive had a general assignment been made by the *Daily*

Journal Company for the common benefit of both its creditors. To this extent alone is respondent entitled to a portion of the \$21,000 realized from the sale of the assets of the Daily Journal Company,—of course, with interest thereon from the time appellants withheld it. It is held in the decisions of some of the states that a court of equity will not interfere to protect an attachment lien. For such a doctrine we are unable to find any sound reason. The case is remanded, with directions to the lower court to enter a decree in accordance with the views herein expressed. It is also ordered that each side in this appeal pay its own costs.

PEMPERTON, C. J., concurs. HUNT, J., disqualified.

(5 Kan.App. 813)

ATCHISON, T. & S. F. R. CO. v. LAMOREUX.

(Court of Appeals of Kansas, Southern Department, W. D. June 18, 1897.)

CARRIERS OF PASSENGERS—WRONGFUL EJECTION—GROSS NEGLIGENCE—DAMAGES.

1. Where a person gets upon a railroad train at a station eight or nine miles distant from his home, and is unlawfully evicted from such train about a mile and a half from said station, and about seven miles from his home, at about 10 o'clock on a dark, stormy night, with but three cents in his pocket, it is not error for the court to refuse to instruct the jury that said passenger should have returned to the station at which he boarded the train, instead of continuing his journey home.

2. Where a person whose duty it is to sell railway tickets is temporarily absent from the ticket office, and such office is not open in the manner required by the statutes so as to permit the charge of excess fare under the statutes then in force, and where the passenger, by reason thereof, has failed to procure a ticket, and is evicted from the train by the conductor upon his refusal to pay the excess fare, which eviction is done in a gentlemanly manner, and without any acts of abuse or violence, and in the absence of any wanton mistake or malicious motive, *held*, that there is no such showing of gross negligence, or of wanton disregard of the rights of the passenger, as will entitle him to recover exemplary damages.

3. It is the province of a jury to decide upon what facts have been proven, but not to decide upon what an admitted fact tends to prove.

4. Where a person is entitled to recover for physical pain, and for such mental pain and suffering as grow immediately out of, or result directly from, the physical pain he endured, there is no good reason for requiring these elements of damage to be divided into minor subdivisions; but, where they have been so divided in answer to questions propounded by the plaintiff in error, the court commits no error in refusing to eliminate from the judgment the award made for mental suffering, the result of physical pain.

(Syllabus by the Court.)

Error from district court, Stafford county; J. H. Bailey, Judge.

Action by A. J. Lamoreux against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Modified.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. F. M. Cowgill and Moseley & Dixon, for defendant in error.

DENNISON, P. J. This is an action brought in the district court of Stafford county, Kan., by A. J. Lamoreux, as plaintiff, against the Atchison, Topeka & Santa Fé Railroad company, as defendant, to recover damages alleged to have been sustained by him in being on the 26th day of September, 1891, unlawfully ejected from a train operated by said company. Lamoreux claims that he went to the depot of the railroad company at Stafford a short time prior to the departure of the train which ran from there to St. John, and went to the ticket window in time to purchase a ticket and safely board the train, but that there was no person in the ticket office to sell him a ticket, and that no one returned so that he could purchase a ticket before the departure of the train, and that just prior to its departure he got in said train for the purpose of riding to St. John, which was about eight or nine miles distant. When the conductor came to Mr. Lamoreux and asked for his ticket, he handed to him 26 cents, 25 of which the conductor took and put into his pocket. The conductor then looked at his rate book, and told Lamoreux that the train fare was 36 cents, and that he must pay that amount or walk. Lamoreux then offered the conductor two or three cents more, and said to him, "I could not get a ticket, but here is enough to make 28 cents, and that is three cents per mile, and that is all the money I have." The conductor stopped the train about 1½ or 2 miles from Stafford, and about 7 miles from St. John, and Lamoreux got off the train without any physical force being used by the conductor. The conductor retained the 25 cents given to him by Lamoreux. The night was very dark and stormy. Lamoreux continued his journey on foot, following the railroad to St. John. He was evicted from the train shortly after 10 o'clock p. m., and arrived home after 2 o'clock the next morning. Lamoreux lived in St. John, and was returning home. He was a cripple, and told the conductor so when he was being evicted.

The first error argued by the plaintiff in error is that the court erred in refusing to instruct the jury, in effect, that Lamoreux should have returned to Stafford instead of continuing his journey to St. John; that as he was about 62 years old and a cripple, and as the night was very dark and stormy and threatened rain, it was his duty to seek the most convenient shelter. Lamoreux lived in St. John, and was going home. He had been left on the prairie a mile and a half from Stafford, and seven miles from St. John, with but three cents in his pocket. His business called him to St. John, his home was there, and he took passage on the train in an endeavor to go to his home. Having been put off the train, and being without means to pro-

cure a conveyance to take him, he was compelled to walk, which he did. The court did not err in not giving these instructions.

The second error argued is that the court erred in refusing to instruct the jury that if the removal of the plaintiff from the train was without unnecessary force, abusive language, malice, or insulting language, no exemplary damages can be allowed. Other assignments of error are predicated upon the instructions of the court relative to exemplary or punitive damages, and the refusal of the court to reduce the amount of the verdict so as to exclude the exemplary damages. These questions may all be considered together. No such gross negligence or disregard of the rights of Lamoreux exist in this case as will entitle him to exemplary damages. The person whose duty it was to sell tickets at that time was temporarily absent, and the ticket office was not open in the manner required by the statutes to permit the charge of excess. Lamoreux tendered the conductor 28 cents, which is all that could be legally charged for his passage to St. John. He was therefore not a trespasser upon the train, and the employees of the company had no right to evict him. However, the act of the ticket seller is not shown to be malicious or wanton. The action of the conductor in evicting him from the train was not the result of a wanton mistake, nor was it accompanied by any acts of violence. It is contended that the conductor acted maliciously in keeping the 25 cents and then evicting Lamoreux from the train. The jury, in the twenty-fourth special finding, say they do not know whether the conductor kept the 25 cents intentionally or inadvertently. In their twenty-fifth special finding they say that they find that it tends to prove malice. If the jury do not know that the conductor kept the money intentionally, they certainly cannot say that he did it maliciously. Then, again, it is the province of the jury to decide upon what has been proven; to decide upon what are the facts, and not upon what a fact admitted tends to prove. The judgment should have been so modified as to eliminate therefrom the \$85 awarded as exemplary damages. The jury awarded the plaintiff below \$115 for pain and suffering, and \$110 for mental suffering, the result of pain. The counsel for plaintiff in error contends that the court erred in not modifying the judgment by eliminating therefrom the \$110 for mental suffering, the result of pain. The special questions were submitted at the request of plaintiff in error, and the division of these elements of damage into different parts was done by its counsel. The defendant in error is entitled to recover for physical pain, and for such mental pain and suffering as grows immediately out of, or results directly from, the physical pain he endured. In *Railroad Co. v. Dickerson*, 4 Kan. App. 345, 45 Pac. 975, the counsel for the company contended that the trial court erred in not compelling the jury to divide these two elements of damage. In

that case we held that there was no good reason for requiring these elements of damage to be divided into minor subdivisions. In this case they have been divided into minor subdivisions, in answer to the questions propounded by the plaintiff in error. Although not necessary, it is not error, and the defendant in error is entitled to recover upon each of these elements of damage. The passenger in this case, being an old man and a cripple, and being evicted from the train, 7 miles from his destination, on a dark, stormy night, caught cold, and suffered for a considerable time from his lame leg, which was made much worse by the exposure, and he was still suffering from it in some degree at the time of the trial in the court below. Under this state of facts, the amounts found for such suffering are not excessive. The case will be remanded, with instructions to the district court to modify the judgment by deducting therefrom the sum of \$85, which was allowed as exemplary damages. The costs in this court will be divided equally between the parties hereto. All the judges concurring.

(5 Kan.App. 818)

MITCHELL et al. v. RIPLEY et al.

(Court of Appeals of Kansas, Southern Department, W. D. June 18, 1897.)

LIMITATIONS—PLEADING—AMENDMENTS—INCONSISTENT ALLEGATIONS.

1. The question of statutory bars is a matter of defense, and, unless the pleadings show upon their face that the cause of action cannot be maintained, they must be specially pleaded.

2. Where allegations in the answer are inconsistent with each other, the defendant is bound by those against him. *Bierer v. Fretz*, 4 Pac. 284, 32 Kan. 329.

3. Permission to file an amended answer is a matter largely in the discretion of the trial court, and there is no abuse of discretion in this case.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by Ripley & Bronson against Douglass Mitchell and others. From a judgment for plaintiffs, defendants bring error. Affirmed.

Sutton & McGarry, for plaintiffs in error. W. H. Robb and Ed. H. Madlson, for defendants in error.

DENNISON, P. J. This is an action upon a statutory bond, brought in the district court of Ford county, Kan., by Ripley & Bronson, as plaintiffs, against Douglass Mitchell et al., as defendants, to recover the sum of \$280.72 and interest. The petition alleges that Douglass Mitchell, W. G. Sherlock, and James Langton were partners doing business under the firm name of Douglass Mitchell & Co.; that as such firm they entered into a contract with the officers of the city of Kinsley to erect and construct a system of waterworks for said city, consisting, among other things, of what is known as a standpipe, water mains,

etc.; that they filed in the office of the clerk of the district court of Edwards county, Kan., the bond provided for in paragraph 1747 of the General Statutes of 1889, and the remaining defendants were sureties upon said bond; that the plaintiffs, Ripley & Bronson, contracted to and did furnish to the firm of Douglass Mitchell & Co. certain materials for the erection of said waterworks; that on May 23, 1888, the plaintiffs and Douglass Mitchell & Co. had an adjustment of their accounts, and agreed among themselves that the amount remaining due to Ripley & Bronson from Douglass Mitchell & Co. was the sum of \$280.72, for which the said Douglass Mitchell & Co. gave to Ripley & Bronson an order upon the treasurer of the city of Kinsley; that said order was presented by plaintiffs to said city treasurer, and payment was refused. The bond and order are both attached to the petition as exhibits, and made a part thereof. The defendants, in their answer, admit the execution of the contract with the city, and also the bond, and allege that the materials furnished by the plaintiffs were furnished by them directly to the city of Kinsley upon a written contract entered into by the plaintiffs with said city. They also allege that it was further agreed that the amount paid to said plaintiffs by said city should be deducted from the contract price agreed upon by the said Douglass Mitchell & Co. and said city, but that the amounts so paid should be evidenced by an order from said company to said city, and in favor of Ripley & Bronson. The case had twice before resulted in a mistrial by reason of the jury failing to agree. Upon this trial the plaintiffs introduced their testimony and rested. When the defendants offered to introduce their testimony, the plaintiffs objected to the introduction of any testimony by the defendants for the reason that the answer filed by them did not state facts sufficient to constitute a defense to the petition and allegations therein contained. The court sustained said objection. The defendants made application to amend their answer so as to show "that after the contract was made between said company and said city as alleged in plaintiff's petition, and after the execution of the bond sued on in this action, that said contract which is mentioned in said bond was so modified by agreement of the parties thereto that the city was to furnish the materials for constructing said waterworks, and said company were only to furnish the labor therefor, which said contract so modified was duly executed," which amendment the court refused to allow. Thereupon the court instructed the jury to return a verdict for the plaintiffs, which was accordingly done. Judgment was rendered against the defendants for \$352.20, and they bring the case here for review.

The errors complained of and argued by the plaintiffs in error are upon the refusal of the court to permit the introduction of evidence to sustain the allegations of the answer, and upon the refusal of the court to permit the

amendment to the answer to be filed. The plaintiffs in error contend that the petition alleges: First, that the action was commenced within six months from the completion of the waterworks; second, that plaintiffs sold materials to defendants to be used in the construction of the waterworks; third, that the contract price exceeds \$100; fourth, that plaintiffs and defendants adjusted their accounts, and agreed that defendants owed plaintiffs \$280.72; fifth, that the defendants gave plaintiffs an order on the city of Kinsley for \$280.72; sixth, that the amount due is \$280.72, and that these allegations are each denied in the answer, and that the six issues should have been submitted to the jury. We do not so understand the issues raised. The execution of the bond and order stand admitted. The bond recites the fact that said company entered into a contract with said city to construct and furnish the materials for a system of waterworks for said city according to the plans and specifications for the same adopted by said city, and the conditions recited in the bond are that the obligators shall pay all indebtedness incurred for labor and material furnished in the construction of said waterworks. The order reads as follows: "City Treasurer, Kinsley, Kansas: Please pay to Ripley & Bronson, or order, \$280.72, account pipes, hydrants, etc. D. Mitchell & Co." So far as the first and third allegations above mentioned are concerned, they relate to matters of defense, and must be specially pleaded, unless the pleadings show upon their face that the cause of action cannot be maintained. "A defendant generally has no right to rely upon any defense except such as he has set up in his answer." *Bell v. Wright*, 31 Kan. 237, 1 Pac. 601. A general denial will not raise the question of a statutory bar. See *Parker v. Berry*, 12 Kan. 351. Where the pleadings do not, on their face, show that the cause or the relief sought is barred by the statutes of limitation, said statutes must be specially pleaded. *Cheells v. Coble*, 37 Kan. 558, 15 Pac. 505. The second allegation is inconsistent with the recitals in the bond; and the fourth, fifth, and sixth allegations are inconsistent with the order. "Where the allegations in an answer are inconsistent with each other, the defendant is bound by those against him." *Pierer v. Fretz*, 32 Kan. 329, 4 Pac. 284. The answer does not state facts, well pleaded, sufficient to constitute a defense to the allegations of the petition, and the court correctly refused to permit the introduction of evidence to sustain it.

The only other question to be considered is as to whether the court erred in refusing to permit the filing of the amendment to the answer. This is a matter largely within the discretion of the trial court. In this case there was no such an abuse of discretion as calls for a reversal by this court. The trial judge was in a much better position to pass upon the merits of the application to amend than we are.

For the reasons above stated, we must hold that the court committed no error in instructing the jury to return a verdict for the plaintiffs, nor in overruling the motion for a new trial. The judgment of the district court is affirmed.

SCHOONOVER, J., concurs. MILTON, J., having been of counsel, not participating.

(3 Kan. App. 810)

ATCHISON, T. & S. F. R. CO. v. CHENOWETH et al.

(Court of Appeals of Kansas, Southern Department, W. D. June 18, 1897.)

DEMURRER TO EVIDENCE—ASSIGNMENT OF CAUSE OF ACTION.

1. Where there is some evidence introduced tending to sustain each material allegation of the petition, a demurrer to the evidence should be overruled, and such evidence is properly submitted to the jury.

2. A cause of action arising in tort is not assignable, and the fact that the attempted assignment is made to one who is already interested in the loss does not take it out of the rule.

(Syllabus by the Court.)

Error from district court, Comanche county; Francis C. Price, Judge.

Action by David M. Chenoweth and George Maxted against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiffs, and defendant brings error. Modified.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. T. G. Chambers, for defendants in error.

DENNISON, P. J. This action was brought in the district court of Comanche county, Kan., by David M. Chenoweth and George Maxted, as plaintiffs, against the Atchison, Topeka & Santa Fé Railroad Company, as defendant, to recover the damages alleged to have been sustained by them by reason of the alleged destruction of 80 tons of prairie hay belonging to the plaintiffs, caused by a fire set out in the operation of the railroad belonging to this plaintiff in error. The petition alleges and the evidence discloses that these defendants in error and one Thomas Burnett owned jointly the hay destroyed, and that Thomas Burnett attempted to sell and assign to said Chenoweth all his rights and claims against the railroad. The plaintiff in error contends that the court erred in admitting some of the evidence of J. A. Wright and A. M. Meeley. We have carefully examined the testimony of these two witnesses, and find that no material error prejudicial to the substantial rights of the plaintiff in error was committed by the court in its rulings upon the introduction thereof. The next contention is that the court erred in overruling the demurrer to the evidence. It is claimed that there was no evidence that the fire which caused the damage occurred in the operation of the road, or that the company, by its agents or servants, set out the fire. A. M. Meeley testified that he lived about a mile and

a half east of Coldwater, and that he first saw the fire from his house in the morning, between 8 and 10 o'clock; that it started on the right of way of the Santa Fé Railroad; that he saw a man over there, and afterwards went over, and discovered that it was Mr. Patterson, the section foreman; that he (Meeley) went east of where the fire started about a mile, to fight the fire; and that during the day, while he was on the way back from fighting the fire, Mr. Patterson told him he set it out, and it got away from him. Meeley further testifies that the fire started on the right of way where Patterson was burning fire guards. He further testifies that, the day before the fire, Mr. Patterson came to him, and asked him to help him burn fire guards. The testimony discloses that the hay burned was some 10 miles from where the fire was started, and that it did not reach it until 3 or 4 o'clock in the afternoon. There was certainly some evidence tending to show that the admissions of the section foreman were made while the fire was burning, and before the hay was consumed, and that the fire escaped from the section foreman while he was engaged in burning fire guards upon the right of way of the railroad. This was properly submitted to the jury.

It is also claimed that the demurrer to the evidence should have been sustained, because Burnett attempted to assign a cause of action arising in tort to Chenoweth. It is argued by the defendant in error that the assignment to Chenoweth was proper, because he was already interested in the loss. It is admitted that, but for this fact, the cause of action is not assignable. The fact that the assignment is attempted to be made to one interested in the loss does not take it out of the rule. This, however, will not necessitate the granting of a new trial in this case. Chenoweth and Maxted may maintain the action to recover for their share of the loss, and, if the defendant had objected to their maintaining the suit, the objection should have been raised upon the question of a defect of parties plaintiff. The jury assessed the amount of damages at \$421.40. The interest of Burnett was for one-third of this amount, and should not have been included in the judgment. The judgment of the district court will be modified, and the cause remanded, with instructions to deduct one-third of \$421.40 from the judgment. The costs in this court will be divided equally between the parties hereto. All the judges concurring.

(58 Kan. 815)

BANK OF TOPEKA v. NELSON et al.

(Supreme Court of Kansas. June 5, 1897.)

ACTION ON NOTE—BURDEN OF PROOF—BONA FIDE PURCHASER.

1. In an action by the indorsee of negotiable notes against the makers, the burden was on defendants to prove the alleged failure of consideration, and the alleged fact that indorsee was not a bona fide purchaser and holder of such notes.

2. A condition, as between maker and payee,

that certain negotiable notes should not take effect until certain other persons had signed the same, is of no validity as against a bona fide purchaser of such notes.

Error from district court, Pawnee county; S. W. Vandivert, Judge.

Action by the Bank of Topeka against J. A. Nelson and others. From a judgment in favor of defendants, plaintiff brings error. Reversed.

Wm. Osmond and Quinton & Quinton, for plaintiff in error. Fred Dumont Smith, for defendants in error.

PER CURIAM. Suit was brought upon negotiable promissory notes executed by the defendants in error to the firm of E. Bennett & Son, to evidence and secure the purchase price of a breeding horse. The notes were indorsed and delivered by the payees to the plaintiff in error. The defenses were that the indorsee was not a bona fide purchaser and holder of such notes, and that the indorsement of such notes was merely colorable, to avoid the defenses to the same. Such defenses were a breach of warranty in the sale of the horse, and also that the notes were not to take effect until certain other persons had signed the same, and that such others had not affixed their signature thereto. Trial to the court. Judgment for plaintiff for \$65, as against all defendants except Mr. Clark, and, as to him, judgment in his favor.

The burden of proof rested upon the defendants, and the evidence shows a total failure in all particulars to discharge the same. The only testimony in the case upon the subject of purchase and ownership of the notes was that they had been sold, indorsed, and delivered for a valuable consideration, before maturity; and the only evidence upon the subject of warranty was that a written guaranty was given with the horse, but the witnesses had never read the same, and did not know its terms. No delivery of a negotiable promissory note can be made to the payee upon conditions which will prevent its taking effect by indorsement to a bona fide purchaser of the same. Upon what possible theory this case could have been adjudged in favor of defendants we are at a loss to understand. We have been favored by neither brief nor oral argument in behalf of defendants in error, and we can conceive of nothing that could be said in support of the judgment of the court below, and such judgment will be reversed, and a new trial ordered.

(58 Kan. 815)

DAGENETT et al. v. BANK OF LOUISBURG.

(Supreme Court of Kansas. June 5, 1897.)

DIVORCE—DECREE—ALIMONY.

Where, by a decree in divorce, certain lands are given to the wife "to have and to hold" for her separate use, "together with all the hereditaments and appurtenances thereunto belonging,

and all the farm and other implements and utensils thereon," and defendant is enjoined from interfering with plaintiff's ownership or possession, full title in the land is vested in plaintiff.

Error from district court, Miami county; John T. Burris, Judge.

Action by the Bank of Louisburg against Sarah J. Dagenett and others. Judgment for plaintiff. Defendants bring error. Affirmed.

John W. Deford and W. A. Deford, for plaintiffs in error. W. T. Johnston, for defendant in error.

PER CURIAM. Our construction of the language of the decree of divorce is adverse to the contention of the plaintiffs in error. The language used is: "That the said plaintiff have and hold for her separate use and control, as and for allimony herein, all of the following lands: * * *, together with all the hereditaments and appurtenances thereunto belonging, and all the farm and other implements and utensils thereon, * * * and that the said defendant be enjoined from interfering with or disturbing the said plaintiff in the ownership or possession of said described real estate or personal property." We think the terms of the decree are such as to vest full title to the land in Sarah J. Dagenett. The court evidently intended that she should have and hold the land itself for her separate use and control, not merely that she should have the use of it. The same language refers also to the personal property. It could hardly be contended that it was the purpose of the court to merely give her the use of farming implements, household goods, cattle, horses, and hogs, or that it was intended merely to give a life estate in them. This view is strengthened by the words following, which enjoin the defendant from disturbing the plaintiff in the ownership or possession of said real and personal property. The judgment is affirmed.

(58 Kan. 814)

PERRIGO v. ALEXANDER.

(Supreme Court of Kansas. June 5, 1897.)

APPEAL—PARTIES.

S. is a necessary party to an appeal by L. from a judgment for plaintiff, in an action by one against his partner, S., and L., to whom S. had executed a note and mortgage in the firm name, to have them canceled as fraudulent.

Error from district court, Chase county; Lucien Earle, Judge.

Action by Isaac Alexander against S. F. Perrigo and another. Judgment for plaintiff. Defendant L. E. Perrigo appeals. Dismissed.

Madden Bros., for plaintiff in error. John V. Sanders, for defendant in error.

PER CURIAM. Isaac Alexander, who was a partner of S. F. Perrigo in the mercantile business, brought an action against Perrigo and his mother, alleging that his partner, without consideration, executed a note to his mother in the name of the firm for \$2,670, and

at the same time executed and delivered to his mother a mortgage on the entire stock of merchandise, in the name of the firm, purporting to secure the payment of the note; that the note and mortgage were executed in pursuance of a conspiracy between S. F. Perrigo and his mother, L. E. Perrigo, to defraud Alexander, and cheat him out of his share of the assets of the firm, leaving him all the debts of the firm to pay; and that, in pursuance of this conspiracy, and after the execution of the mortgage, S. F. Perrigo placed his mother in possession of all the goods and chattels of the firm under the mortgage. The plaintiff, Alexander, asked to have the transfer of the note and mortgage enjoined, that they be decreed fraudulent and void, and be delivered up for cancellation. He further asked to have the partnership dissolved, and an accounting had between the partners. L. E. Perrigo answered, alleging that the firm was actually indebted to her in the amount stated in the note and mortgage, and she asked judgment against the firm upon the note and for foreclosure of the chattel mortgage. S. F. Perrigo answered alleging that the note and mortgage were executed in good faith to secure the indebtedness of the firm. When the case came up for trial, the matter of accounting was sent to a referee, and the remaining issues between the parties were submitted to the court and a jury for trial. It was found that the firm was not indebted to L. E. Perrigo when the note and chattel mortgage were given, and that they were without consideration and void. Judgment was given in favor of the plaintiff, and L. E. Perrigo brings the case here for review, but fails to make S. F. Perrigo a party. As he was a partner in the firm against which L. E. Perrigo sought to establish a liability, and a party to the note and mortgage declared to be fraudulent and void, and decreed to be canceled, he is a necessary party to this proceeding. His absence prevents a review of the rulings upon the trial, and hence the proceeding must be dismissed.

OSTER, C. J., not sitting, having been of counsel.

(58 Kan. 814)

AH-TWINE GOOSLIN et al. v. LETSON et al.

(Supreme Court of Kansas. June 5, 1897.)

APPEAL—REVIEW.

Instructions cannot be reviewed where the record does not contain all the evidence.

Error from district court, Brown county; J. F. Thompson, Judge.

Action between W. W. Letson and others and Ah-Twine Gooslin and others. From the judgment, Gooslin and others appeal. Affirmed.

D. C. Tillotson, for plaintiffs in error. James Falloon, for defendants in error.

PER CURIAM. This case comes to us upon claims of error in the rejection of evidence,

the giving of certain instructions, and the refusal of requests to give certain instructions asked by plaintiff in error. No evidence whatever is brought along with the record, and we cannot, as repeatedly ruled by this court, review the case upon claims of error in instructions or otherwise, which involve a consideration of the facts as they may have been disclosed by the evidence. As to the rejection of the offered testimony, the witness was clearly incompetent, under the statute. The judgment will be affirmed.

(58 Kan. 814)

MISSOURI, K. & T. RY. CO. v. WILLIAMSON.

(Supreme Court of Kansas. June 5, 1897.)

APPEAL—INSUFFICIENT RECORD.

Where the only questions for decision arise on the evidence, and the records show that it does not contain all of it, the judgment will be affirmed.

Error from district court, Miami county; John T. Burris, Judge.

Action by Marlon Williamson against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

T. N. Sedgwick and Sperry Baker, for plaintiff in error. John C. Sheridan, for defendant in error.

PER CURIAM. The only material questions presented for decision arise upon the evidence, and, to determine them, all the evidence is required. There is a statement in the record that it contains all the evidence offered on the trial, but it also appears that a blueprint map of the railroad track and depot grounds where the injury was inflicted was received in evidence, and is not included in the record. It was frequently referred to by the parties and their witnesses, and cannot be regarded as unimportant. In the absence of all the evidence, the questions based upon its sufficiency cannot be considered, and none of the other questions are deemed to be material. The judgment of the district court will be affirmed.

(58 Kan. 815)

LEEPER v. POMEROY et al.

(Supreme Court of Kansas. June 5, 1897.)

APPEAL—PARTIES.

Where a complaint alleged a joint liability of defendants on a contract, and judgment was entered in favor of all the defendants, it cannot be reviewed where certain defendants who appeared and took part in the trial are not made parties in error.

Error from district court, Jackson county; Louis A. Meyers, Judge.

Action by C. D. Leeper against J. P. Pomeroy and others. Judgment for defendants, and plaintiff brings error. Dismissed.

W. F. Guthrie, for plaintiff in error. David Martin, Hayden & Hayden, H. M. Baldwin, and Jackson & Jackson, for defendants in error.

PER CURIAM. We are of the opinion that J. T. Dobell and J. A. G. Sample are necessary parties to a review of the judgment of the district court. The plaintiff's claim was against all the defendants named in the petition, as partners. It was an action alleging a liability on contract, not in any sense an action for a tort. The liability, if existing, arose because the defendants had engaged in a common enterprise, and had contracted with the plaintiff to perform services in its prosecution, and because the charter under which they attempted to act was insufficient in law to shield them from liability, as partners, for the full amount of the indebtedness contracted. All the defendants, including Dobell and Sample, were charged in the petition with equal and joint liability. At the beginning of the case-made, it recites that the "cause came on for trial with personal service upon, and appearance by, all of said named defendants." After conclusion of the trial, the record recites: "Thereupon the defendant J. P. Pomeroy separately asked the court to instruct the jury to return a verdict in his favor, and the defendants other than Pomeroy, for themselves, made like requests; and thereupon the court instructed the jury, in writing, to bring in a verdict for the defendants generally; * * * and thereupon said jury, under said instructions of the court, brought in a verdict generally for the defendants, and against the plaintiff."

The judgment entered was in favor of all the appearing defendants against the plaintiff. Taken altogether, it must be held that the case-made shows that Sample and Dobell appeared, and took part in the trial, and asked the court to direct a verdict in their favor, with the other defendants, and that the court so instructed, and the jury so found. Their presence in this court is necessary to a review of the case; not because their interests could be affected by any order this court might make reversing the judgment, but because the defendants in error who have been duly brought into this court are entitled to have them here. The verdict in the district court entitled Sample and Dobell to a judgment, whether we construe the one actually rendered as a judgment in their favor or not. The rights of the parties here may be seriously prejudiced by a reversal of the judgment as to them, with Sample and Dobell released from all liability either to the plaintiff, or to contribution to such defendants as might be compelled to pay a partnership debt. The case in this court should be the same case that was tried in the district court. The suggestion that Sample and Dobell are insolvent is not entitled to consideration. It is not shown by the record, and, of course, is not to be presumed. *Hyde Park Inv. Co. v. First*

Nat. Bank, 56 Kan. 49, 42 Pac. 321; *Eaton v. Mendenhall* (Kan. Sup.) 44 Pac. 683. The petition in error is dismissed.

(58 Kan. 815)

In re TERRILL.

(Supreme Court of Kansas. June 5, 1897.)

HABEAS CORPUS—REVIEW.

1. Error in overruling plea of former jeopardy, or in the matter of change of venue, cannot be considered on habeas corpus.

2. To permit of petitioner's release on habeas corpus on the ground that the crime for which he was convicted was committed at a place which did not permit of the trial court's having jurisdiction, such fact must clearly appear.

Original proceedings in habeas corpus by Ira N. Terrill. Writ denied.

Buckner & Sons, for petitioner. C. A. Galbraith, for respondent.

PER CURIAM. Ira N. Terrill was prosecuted in the territorial court of Oklahoma, found guilty of murder, and imprisoned in the Kansas state penitentiary. By a proceeding in habeas corpus, he was released upon the ground that he was tried and convicted when the court was without authority to sit, and that the judgment was therefore absolutely void. In re Terrill, 52 Kan. 29, 34 Pac. 457. He was then remanded to the authorities of Oklahoma for further proceedings, and on another trial he was convicted of manslaughter, and sentenced to imprisonment in the Kansas state penitentiary for a term of 12 years. No appeal from that judgment was taken, but he again asks to be released on a writ of habeas corpus, upon the ground that the offense for which he was convicted was committed on a reservation, and that he could not be prosecuted therefor in any other than a court of the United States. The place of the commission of the crime was a matter for the consideration of the court trying him. It was not clearly shown by the evidence in this proceeding that the offense was committed on a reservation. An attempt was made to show that the offense was committed upon the "government acre," which was reserved from settlement and sale by executive order when the lands in Oklahoma were opened for settlement. It seems that the government retained the ownership of this acre, and erected a land office thereon; but our attention is not called to any act of congress, or to anything reserving exclusive jurisdiction to the courts of the United States, or excepting this reservation from the operation of the territorial laws and the jurisdiction of the territorial courts. Another ground asserted is that by the former proceeding he had been placed in jeopardy, and could not again be prosecuted; but this question, as well as that relating to the change of venue of which he complains, cannot be considered on habeas corpus. If errors were committed in these respects, they must be corrected upon appeal, and, as no appeal was taken, the judgment of the court became final. The petitioner will be remanded.

(58 Kan. 315)

McMILLAN v. LEEDS.

(Supreme Court of Kansas. June 5, 1897.)

LIMITATIONS—PAYMENT OF INTEREST—PLEADING.

1. Payment of interest by the principal maker on the note of himself and a surety does not suspend the operation of the statute of limitations in favor of such surety.

2. An answer acknowledging the execution and delivery of a certain note, without more, does not acknowledge that such note was then a subsisting obligation.

Error from district court, Franklin county; A. W. Benson, Judge.

Action by George W. McMillan against A. Leeds and another. From a judgment in favor of defendant A. Leeds, plaintiff brings error. Affirmed.

John W. Deford and W. A. Deford, for plaintiff in error. C. A. Smart and W. S. Jenks, for defendant in error.

PER CURIAM. This was an action upon a promissory note executed by the son of defendant in error as principal, and the defendant in error himself as surety. A number of interest payments were made by the son without the knowledge or by the direction of the surety. About seven years after the maturity of the note, suit was instituted upon it, to which the defendant pleaded the statute of limitations. There is nothing whatever in the case to distinguish it from *Steele v. Souder*, 20 Kan. 39, and it must therefore be affirmed, so far as the point in question is concerned, upon the authority of that decision. It was insisted, however, that by the very terms of the answer the defendant acknowledged the indebtedness. By no reasonable construction of the answer can this claim be maintained. Such answer did nothing more than acknowledge the execution and delivery of the note, not that it was then a subsisting obligation. The judgment of the court below will be affirmed.

(58 Kan. 315)

NATIONAL BANK OF ST. MARY'S v. GILLE HARDWARE & IRON CO.
et al.

(Supreme Court of Kansas. June 5, 1897.)

APPEAL—PARTIES.

Where judgment was rendered in favor of beneficiaries in a trust estate that was the subject of litigation, they are necessary parties to a review of the rulings.

Error from district court, Pottawatomie county; William Thompson, Judge.

Action by the National Bank of St. Mary's against the Gille Hardware & Iron Company and others. Judgment for defendants, and plaintiff brings error. Dismissed.

R. S. Hick, for plaintiff in error. Guthrie & Williams, A. Bergen, Overmyer & Mulvane, George & Lowe, and J. W. Fitzgerald & Son, for defendants in error.

PER CURIAM. In this case a number of defendants in whose favor judgment was rendered by the trial court, and who were beneficiaries in a trust estate that was the subject of litigation, have not been properly brought before the court. They are necessary parties to a review of the rulings of which complaint is made, but neither the case-made nor a copy thereof was served upon them. This omission defeats the jurisdiction of the court, and prevents a review of the rulings and judgment. *Hughes v. Miller*, 56 Kan. 183, 42 Pac. 696.

(58 Kan. 315)

BROWN v. EDGERTON.

(Supreme Court of Kansas. June 5, 1897.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff approached defendant's double track at a street crossing, looked south, and saw no train, and crossed the first track. She then stepped back on such track without again looking for trains thereon, to avoid a train from the north on the other track, and was struck by a train from the south, which was moving rapidly, and gave no signal. The view towards the south was somewhat obstructed. *Held*, that contributory negligence was a question for the jury.

Error from court of common pleas, Wyandotte county; Almerin Gilett, Judge pro tem.

Action by Sarah A. Brown against J. M. Edgerton, receiver of the Interstate Consolidated Rapid-Transit Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Edward A. Burnett, E. A. Enright, and L. F. Bird, for plaintiff in error. Miller & Morris and Pratt, Dana & Black, for defendant in error.

PER CURIAM. Action by Sarah A. Brown against the receiver of the defendant railway company to recover for injuries suffered in a collision at a crossing in Kansas City. When the plaintiff had presented her testimony, the court held that she had failed to show a right of recovery, and took the case from the jury. At the point where the injury occurred the railway runs north and south on Sixth street, and is operated with locomotives over double tracks. The plaintiff was traveling west on State street, and when she came to Sixth street she says she looked to the south, but did not see a coming train, and, having looked and listened without detecting the approach of a train, she started to cross the tracks. When she had crossed the east track, and was about to cross the west one, a train going south over the west track came up suddenly, and she stepped back on the east track to allow the train to pass. About the time that train passed her the north-bound train over the east track approached very rapidly, as she states, without signal or warning. She states that she was frightened by the sudden approach of the south-bound train, and, after stepping back, did not look again for a north-bound train, and was not aware of its approach until

about the moment she was struck and injured. There is a station about 300 feet south of Sixth street, under Minnesota avenue, in what is called the "tunnel." At that point the road runs under Minnesota avenue, and on each side of the track there are high retaining walls. Although the sun was shining, the covered tracks, high walls, and high buildings in the immediate vicinity tended to obscure the north-bound train. There is testimony tending to show negligence on the part of the railway company in failing to give proper warning of the approach of the train, and some testimony from which the jury might infer that the company could, by the exercise of ordinary care, have discovered her peril in time to have avoided inflicting the injury. It seems that the coming of the south-bound train diverted her attention, and confused her. While the testimony strongly tends to show contributory negligence on her part, the peculiar situation and the surrounding circumstances are such that we think the question one of fact for the determination of a jury, and that the court erred in holding as a matter of law that the testimony showed her to be guilty of contributory negligence. The judgment will be reversed, and the cause remanded for a new trial.

(58 Kan. 358)

In re DAVIS.

(Supreme Court of Kansas. June 5, 1897.)

LEGISLATIVE COMMITTEES—POWERS—WITNESSES—IMPRISONMENT.

1. The committee appointed under senate concurrent resolution No. 26, providing for a committee composed of two senators and three members of the house of representatives to investigate charges of bribery, etc., has power to sit after the adjournment of the legislature and carry on the investigation.

2. Chapter 132 of the Laws of 1891 does not confer valid power on investigating committees appointed by the senate and house of representatives to imprison witnesses who refuse to appear or testify before such committees.

Doster, C. J., dissenting from second proposition of syllabus.

(Syllabus by the Court.)

Application by Thomas C. Davis for habeas corpus. Writ granted, and petitioner discharged.

At the last session of the legislature the following concurrent resolution was passed by both houses, as senate concurrent resolution No. 26: "Whereas, certain charges of bribery and the use of improper influence having been made from time to time for the purpose of influencing the members of the house of representatives and senators to vote for or against certain measures, bills, and resolutions pending in the legislature for passage at the present session; and whereas, charges of this nature have been made by reputable citizens of the state of Kansas, and by senators on the floor of the senate, and the said charges involve the moral standing and reputation of all members of the present legislature: Therefore be it resolved by the senate, the house

concurring therein, that a committee of five, to consist of three members of the house of representatives and two members of the senate, to be appointed by the speaker of the house and president of the senate, respectively; that said committee have power to appoint a sergeant at arms, clerk, and stenographer, to send for persons and papers, and to fully investigate all charges of bribery, attempted bribery, or other improper conduct in connection with the business of the present legislature, or any of the members thereof, by any person, firms, or corporations whatsoever." The resolution was passed by the senate on March 2d, and by the house on March 3d. In pursuance of said resolution the president of the senate appointed senators M. A. Householder and A. S. Cooke as members of the committee on the part of the senate, and the speaker of the house appointed representatives O. O. Outcalt, Lot Ravenscraft, and F. E. Grimes as members on the part of the house. On the 5th of March the committee met, and organized by electing O. O. Outcalt chairman, and F. E. Grimes secretary, and appointed Frank R. Forrest sergeant at arms. At a meeting of the committee held on March 19th, it was decided to again meet on April 6th to begin taking testimony in accordance with the resolution. The legislature adjourned sine die on March 20th. The committee again met on the 6th of April, and proceeded to take testimony, adjourning from time to time until the 27th of April, when the petitioner, Thomas C. Davis, who had been duly subpoenaed to testify as a witness, and who had testified at some length, refused to answer certain questions pertaining to the subject of the investigation. A warrant was thereupon issued, signed by four of the members of the committee, directed to Frank Forrest as sergeant at arms, commanding him to take the petitioner into his custody, and imprison him until he should consent to answer the question propounded. On the application of Davis a writ of habeas corpus was issued, and he was brought before the court for inquiry into the legality of his detention.

David Overmyer and D. R. Hite, for petitioner. L. C. Boyle, Atty. Gen., for the State.

ALLEN, J. (after stating the facts). Two principal questions are presented for determination. The first is whether the committee appointed under senate concurrent resolution No. 26 has authority to act after the adjournment of the legislature. The second is whether it has power to imprison a witness for refusal to testify. The general rule undoubtedly is that the powers of committees of legislative bodies cease on the final adjournment of the body, unless express provision is made for their continuance. But that the houses of the legislature have power to confer authority on a committee to continue its labors after adjournment is not questioned. The concurrent resolution under which

the committee claims the right to act contains no direction on the subject, and, if the question were to be determined solely on the resolution itself, it would follow that the committee is without power to proceed. But, in the act making appropriations for miscellaneous purposes, the ninety-fifth paragraph reads as follows: "There is hereby appropriated \$3,000 to pay expenses of committee officers, clerks, stenographers, witnesses and other necessary expenses incurred in an investigation for bribery as recited in senate resolution No. 26, or so much thereof as may be necessary: provided, that said sum shall not be available if criminal prosecution shall be instituted in the district court of Shawnee county on or before May 15, 1897; and provided further, that said investigation shall terminate when said sum of \$3,000 shall be expended under penalty of forfeiture to the state treasury of the whole sum herein appropriated, and no part of this sum shall be available until the investigation shall be terminated and the aggregate expense submitted to the auditor of state under oath of the committee of investigation; no mileage shall be paid in excess of five cents per mile, and the auditor of state is hereby authorized to draw his warrants upon the treasurer of state upon properly authenticated and detailed vouchers for the purposes above named in accordance with the conditions hereinbefore stated and when approved by the chairman of said committee." This act was approved March 15th, and appears as chapter 11 of the Laws of 1897. The clause quoted lacks much of being clear or explicit, but it seems to contemplate a session of the committee after the 15th of May, rather than before, and evidences an intent on the part of the two houses that the committee should sit after final adjournment.

The right of the committee to proceed with the investigation being upheld, the second question, namely, as to the power of the committee to punish a witness as for a contempt in refusing to answer, remains to be decided. It is not contended on behalf of the respondent that the committee is a court, nor that it would be competent for the legislature to confer on any other officials that kind of judicial power which the constitution says shall be conferred on courts. But the contention is that some judicial power resides in the legislature, and that some judicial power other than that properly appertaining to courts may be conferred wherever the legislature, in its wisdom, sees fit. It is not asserted that the constitution does not make a valid and effectual division of the powers of government, into executive, legislative, and judicial departments, nor is the wisdom of such a division of powers questioned, nor has there been any suggestion in the brief or on oral argument that such a division is unreasonable or illogical. It has been generally, if not universally, accepted as the best and safest division of powers yet devised by man, and

is recognized as firmly established by all writers on the constitution. Story, Const. c. 7; Cooley, Const. Lim. 46. The essential features of the arrangement are comprehended and approved by all classes of citizens. The legislature enacts general rules for the guidance of all departments of the government. It levies taxes and directs the expenditures of the money raised thereby, but it executes no law. The judiciary declares the law, and directs as to its application to controversies that arise. It expounds and makes plain that which is obscure and ambiguous, so far as it is able to do so. The fundamental law embodied in the constitution binds all departments of the government, and fixes the limits of their powers. To its mandates all must yield obedience, for it is superior to any and all agencies created under it. It is the warrant of authority from the people to all those placed in official position, and exercising the powers it delegates. When called on to declare what the law is in a case pending, it would seem to need no argument in support of the proposition that the constitution has force and authority superior to any legislative enactment, for the legislature itself must look to the constitution for its authority to act. Wherever there is a clear attempt on the part of the legislature to transcend the powers intrusted to it by the constitution, the courts must of necessity determine and declare that the fundamental law must be obeyed, rather than the unwarranted act of the legislature. This is well settled. The executive department of the government is the active force that gives effect to the laws enacted by the legislature, and to the decisions of the courts. It, like the other departments, must obey first of all the fundamental law. It alone is authorized to employ force, and, when duly authorized so to do, to seize the person or the property of the citizen. It is against the abuse of executive power that the citizen most needs protection, and it is here that the courts become most valuable, and stand as guardians of the people's rights, requiring every official who deprives a citizen of his liberty to show his authority under the law for so doing. The power of the courts is not exercised by the judicial officers in person, but must always require the aid of an executive officer. Its efficient exercise rests solely on the authority and binding force given to the decisions of the courts by the constitution and the general consensus of public opinion.

The petitioner is restrained of his liberty. He asks that he may be discharged from that restraint. He is entitled to that discharge unless the respondent can show lawful authority for his restraint. Bill of Rights, §§ 1, 18. It will not be contended for a moment that the legislature has general power to imprison citizens, or that any one may impose a sentence of imprisonment except in accordance with due process of law. "Due process of law," ordinarily, if not universally, means a trial

and conviction in a court of justice in accordance with established forms. Executive officers may not seize and imprison a citizen except in the prescribed manner, and in connection with the due administration of justice in the courts. The only exceptions to this rule arise from the exercise by the houses of the legislature of certain limited functions, judicial in their nature, and expressly confided to them by the constitution, and a single implied power to protect itself in the discharge of its legislative functions by punishment as for a contempt. It is not claimed, however, that the petitioner has ever been brought before the bar of either the senate or house of representatives, and declared guilty of a contempt of the body, but the warrant of commitment is signed by four of the five members of the legislative committee appointed under the concurrent resolution above copied. The commitment is therefore not for a contempt of a legislative body, declared to be so by the body itself, but for a contempt of a legislative committee, declared to be so by that committee. Is this an attempted exercise of judicial power, or of legislative power? Counsel for respondent concedes that it is judicial power, but insists that it is not that kind of judicial power mentioned in section 1 of article 3 of the constitution, which reads: "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law, and all courts of record shall have a seal to be used in the authentication of all process." It is not claimed, and could not with reason be urged, that the committee which issued this warrant is a court; for, under the provision of the constitution just quoted, courts must be created by law. This committee was not created by a law passed by both houses of the legislature in accordance with the forms prescribed in the constitution, and submitted to the governor for his signature, but by a mere concurrent resolution, containing no enacting clause, not read on separate days, as a law must be, not entitled as the constitution requires a law to be, and never presented to the governor for his approval. The act relied on as conferring authority on the committee to punish as for a contempt is chapter 132 of the Laws of 1891, section 1 of which reads as follows: "Any committee appointed by the senate and house of representatives of this state to investigate the conduct of any officer, board, committee, or department of state, or any other matter, shall have the power to issue subpoenas in the name of the state, to compel the attendance of witnesses from any part of this state, the production of any book or papers, and generally shall have the same power with reference to procuring testimony bearing upon the subject-matter under investigation as the district court would have in any case on trial in such court." This act does not purport to create tribunals of any kind, but to confer powers on all committees thereafter

appointed, and by the fourth section it is made to apply to a committee appointed by the house of representatives at the session of the legislature at which the act was passed. The case of *People v. Learned*, 5 Hun, 626, much relied on by counsel for respondent, is very different in its facts. There the governor had appointed commissioners, with the advice and consent of the senate, to investigate the affairs of the canal of the state, under a joint resolution. After the appointment of the commissioners, none of whom were members of the legislature, an act of the legislature was passed, in due form, which appears as chapter 91 of the Session Laws of 1875, which, in express terms, confers on that identical commission, then in existence, the power to issue subpoenas, and, in case of the failure of a witness to obey a subpoena, to issue an attachment to the sheriff, requiring him to attach the body of the witness and bring him before the commission, and providing for like proceeding thereupon as if such commission were a court of record, and such witness had been duly subpoenaed to attend before it. Although the commission in that case was appointed by the governor under a concurrent resolution, which the court held was customary in that state, its powers were conferred by a special law, regularly enacted in the constitutional manner. In this case there is merely a committee of the legislature, and there could be no direct reference to this particular committee in the law, for it was not called into existence until six years after the passage of the act under which the power to commit is claimed. The powers exercised by the New York commission were directly conferred on the existing commission by a law duly enacted. We see no reason why judicial powers might not be conferred on a commission already in existence, by direct legislative enactment. This case is wholly different. The legislative committee comes into existence by force of a mere concurrent resolution. It then seeks to convert itself into a court by virtue of an antecedent law, which did not, and in the nature of things could not, attempt to create this committee for any purpose. The section of the constitution above quoted requires that the courts themselves be provided by law. Other sections of the constitution give the legislature the power to confer jurisdiction on the courts which are created in accordance with the provision of the constitution. It is no more competent for the legislature to delegate the power to make courts to one or both houses of the legislature than it is to so delegate the power to fix their jurisdiction and authority. In each case the legislature itself must act. It may create the court and define its powers by a single act, or it may create the court by one act, and define its powers by another act or acts.

Something is said with reference to the supremacy of the legislature unless restricted by express constitutional provision. If this supremacy be conceded, it is supremacy in making laws, supremacy in the exercise of leg-

islative functions. Certainly it has no supreme executive or judicial power. In the case of *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, it was not doubted by counsel for either party, or by any member of the court, that the court had power to inquire into the legality of Gunn's restraint. The divergence of opinion in that case was as to the scope of the inquiry. The commitment was by the house of representatives itself, not by a committee, and it was treated on all hands as settled law that the house might punish for a contempt of its authority. In recent cases the question as to the power of the legislature to authorize officers other than courts to punish as for contempts, where directly conferred in explicit terms, has been considered and denied. In the case of *In re Sims*, 54 Kan. 1, 37 Pac. 135, it was held, that "paragraph 2543 of the General Statutes of 1889, so far as it attempts to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or testify, as provided in this section, is unconstitutional and void." In the recent case of *In re Huron*, 48 Pac. 574, decided by this court, as at present constituted, on April 10, 1897, it was held (Mr. Justice Johnston dissenting) that "a notary public has no power to commit a witness for contempt, who, having been duly subpoenaed before him for that purpose, refuses to be sworn or to give his deposition, and the statute purporting to confer such power upon him is invalid." In each of these cases the statutes, in express terms, conferred the power which was attempted to be exercised. This court held the statutes void, and the legislature powerless to confer on persons other than courts judicial power to imprison as for a contempt of their authority. In the case before us, although there is a strong implication of a purpose to confer authority on legislative committees to punish as for contempt, no explicit authority is given. The language used is that they shall have power to issue subpoenas to compel the attendance of witnesses, the production of books and papers, and generally have the same power with reference to procuring testimony as the district court would have in a case on trial in such court. It may well be held that witnesses are bound to obey subpoenas issued by the committee, and to testify, equally as if they were required to attend and testify before a district court, yet it does not necessarily follow that the legislature has conferred authority on the committee to punish. Extension of the power to punish is not to be inferred, but must be clearly expressed. It is held that the sole power of the federal courts to punish for contempt is derived from the statute. Works, Jur. 499, and cases cited. That a proceeding to punish as for a contempt is essentially criminal in character is not only settled by a long line of decisions in this state (*In re Sims*, supra, and cases there cited), but is almost, if not quite, universally recognized (4 Enc. Pl. & Prac. 766, and cases cited). Under the cases cited,

it is clear that the committee which issued the warrant in this case was never invested by act of the legislature with the powers of a court, and that an attempt to repose judicial power in a committee of the legislature, as such, must be ineffectual. The claim that a judgment of imprisonment as for a contempt is not an exercise of judicial power is sufficiently answered by the proposition that it is essentially a punishment for an offense against the public. That legislative bodies have the power to enforce obedience to their rules of order, and to compel witnesses to give testimony upon matters calling for legislative action, though sometimes questioned, is well established, and should be regarded as the settled law. Story, Const. § 846 et seq.; Cooley, Const. Lim. (6th Ed.) 158 et seq.; Anderson v. Dunn, 6 Wheat. 204; *In re Falvey*, 7 Wis. 630; *Ex parte McCarthy*, 29 Cal. 395; Cush. Law & Prac. Leg. Assem. § 655; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948. The power to punish as for a contempt resides in the houses separately, and while a refusal to testify before a committee duly appointed is a contempt of the house appointing such committee, and may be by it punished as such, the committee has no implied power to punish, and can only report the conduct of the offending party to the house for its action. Cooley, Const. Lim. 161. The power to punish as for a contempt is not expressly given to the houses of the legislature by the constitution, but is taken by implication, because necessary to the independence and integrity of these bodies. The limits of the power so implied are not clearly marked. They arise from necessity, and cannot extend beyond the limits of necessity. 2 Bish. Cr. Law, § 250. The extent of the punishment to be inflicted, while resting in the legislative body imposing it, has never been held to extend beyond fine and imprisonment; and, where imprisonment is imposed, it has always been held to terminate with the session of the legislature. *Anderson v. Dunn*, supra; Story, Const. § 849. The power to imprison the citizen is not to be lightly implied. Generally speaking, authority for its exercise must be conferred in clear terms. That the legislature may confer on courts the power to imprison for an offense against the law is undoubted. It is also clear that the refusal of a witness to testify before a legislative committee may be made an offense punishable by fine and imprisonment. *Chapman v. U. S.*, 5 D. C. App. 122; *In re Chapman*, 17 Sup. Ct. 677. It cannot be said that the act of 1891 creates, or attempts to create, courts of any kind. Nor does it attempt to confer powers on courts to be thereafter established. Its terms clearly contemplate that the powers mentioned are intended to be conferred on committees of the houses of the legislature as arms of the legislative department of the government, and not as parts of the judicial system. May the legislature confer on a committee the power to punish recalcitrant witnesses, not judicially, but as a branch of the legisla-

tive department of the government? The claim that it might do so would be indeed a novel one. The houses of the legislature are vested with the lawmaking power of the state. The constitution expressly authorizes the legislature to confer on tribunals transacting the county business of the several counties powers of local legislation, and also to make provision by general law for the organization of cities, towns, and villages, and to restrict their powers. Aside from the special cases in which legislative powers are expressly allowed to be delegated, the legislature itself must exercise the legislative functions. Its power to punish for contempt of its authority comes as an incident to its powers of legislation. Neither the senate nor the house can delegate to a committee any legislative power. It may use committees to collect information, and aid it in many ways, but the power of final action and decision rests with the house. The limits of the power of a legislative body to punish for contempts are not to be determined absolutely by it. It was held by the supreme court of the United States in the case of *Kilbourn v. Thompson*, 103 U. S. 168, that the power of the house of representatives to force witnesses to testify with reference to a particular matter, and to commit for disobedience of its orders, was subject to review by the court, and that, where an attempt was made to investigate a matter merely of private concern, the house had no power to compel a witness to testify. It is said in the syllabus of the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, that: "The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

To hold that a committee of the legislature may be given unrestricted power to punish for contempts is equivalent to saying that the committee, which is a mere branch and arm of the lawmaking body, may exercise greater power than the house itself possessed. After the adjournment of the legislature the senate and house of representatives became dormant. Their powers have utterly ceased for the time being, and those of the house of representatives are completely at an end, unless the governor sees fit to convene them in extra session. The members of the house, of their own volition, cannot again convene. The house can neither take further legislative action, nor exercise any function whatever. While the terms of senators extend past another regular session of the legislature, the senate has no more power, until again regularly convened, than the

house. But the committee, if authorized to sit in vacation, may adjourn from time to time. The resolution under which this committee was appointed contains no limitation on the time during which the committee is authorized to act, nor does it, in terms, provide for any report or final action of any kind on the part of the committee. It would seem that such a committee, if authorized to commit to prison, would have power to continue the imprisonment for an indefinite period, until it might finally dissolve, or the terms of office of its members expire. The active powers of the house of representatives ceased on the 20th of March. It cannot be that the house, the authority of which to imprison ceased on the 20th of March, might, merely by the appointment of a committee, perpetuate in that committee power to imprison until another legislature should be chosen. This would be a delegation by the house to a committee of powers which the house does not possess. As an incident to its legislative functions, the power to punish for contempt ceased with the cessation of the legislative powers of the house, and a mere arm extended for the purpose of gathering information certainly cannot hold that power after it has ceased to exist in the body itself. The conclusions reached are that while the committee may lawfully sit and take testimony, and while it is a contempt of the houses of the legislature for a witness to refuse to answer proper questions propounded by the committee, which might be punished by the senate or house of representatives in case the legislature should be convened in special session, the act of 1891 is insufficient to confer on the committee the power to imprison a witness for refusal to answer questions. The petitioner will be discharged.

JOHNSTON, J., concurring in the second proposition of the syllabus, and in the order discharging the petitioner.

DOSTER, C. J. I dissent from the order discharging the petitioner, and dissent from all that has been said by Mr. Justice ALLEN, in his opinion, denying the power of the legislative committee to vindicate itself by an order of commitment. The prisoner's contention in this case constitutes a striking instance of the latter-day tendency to minimize the power of the legislative branch of the government, and extend and magnify that of the judiciary. It has become the fashion, as it were, for persons unwilling to subject themselves to the wholesome provisions of legislative authority to rush to the courts with a plea of persecution, and, in the name of some theory of popular right, demand immunity from the restraint imposed. So frequently have the judges yielded to the importunities of this class, that the fact of this being a government of delegated legislative power is becoming obscured in the

popular mind, and its place usurped by a fancy—nebulous and indistinct, but fast outlining and shaping itself—that the judiciary is the final and supreme authority, sitting in censorship and correction over the other branches of government. "Government by injunction," and "government by habeas corpus," and "government by the courts" are really losing those contemptuous and protesting significations with which the terms were first used, and are rapidly passing into accepted theories of municipal sovereignty. Like an infection, which, through lack of preventive measures, may develop into a type of permanent, constitutional disease, the virus of this heresy has so inoculated the body politic as to endanger the very life of the organic political system. Even in this state, only four years ago, a majority of the judges of this court gravely assumed the right to compose a legislative dispute as to who were qualified to sit as members of one of the houses; and this not upon any theory of constitutional interpretation, but by the might of forces drawn out of that vast and cavernous reservoir of authority called "judicial power." Later, a probate judge of one of the counties of the state swelled out the inconsequence of his office to a point of contact with the supreme executive head of the state, and actually had the temerity to issue an order restraining the governor, as commander in chief, from mustering a militia company out of the service; and this court, instead of resting its denial of his right to do so upon the clear ground of distinction between the co-ordinate branches of government and their independence one of another, as it should have done, degraded the question into one of mere statutory construction and official practice. Instances of which the above are characteristic are constantly occurring in both state and federal courts, and in my judgment an imperative duty rests upon the judiciary to disavow in emphatic terms the extravagant measure of authority so frequently ascribed to it.

It is now too late, for any effective purpose, to deny the right of the courts to sit in judgment upon acts of the legislature. Accumulated precedent has established such right beyond the question of one, or even many, judges. If, however, it were an open inquiry, I should have no hesitation in denying the existence of the jurisdiction assumed. No close student of the structure, history, and philosophy of the government but will agree that the exercise of such power was not within the design of the framers of either state or federal constitutions. The question whether such power should be conferred by express provision was debated in the constitutional convention of 1787. Propositions to confer it were repeatedly brought forward, and as often put aside without decision. Finally the one introduced by Mr. Madison was put to a vote, and received the approval of Delaware, Maryland, and Virginia, only;

Mr. Dickinson, during the course of the debate, epitomizing the objection to the scheme in the pithy observation that "the justiciary of Aragon became by degrees the lawgiver." It never thereafter, during the sessions of the convention, became a subject of discussion. 2 Bancroft, Hist. Const. c. 10. In the early days of the republic an assumption by the courts of the right to invalidate acts of the legislature was bitterly resented. The judges of Rhode Island and Ohio were impeached for so doing, and those of Virginia resigned under a storm of censure on account of like conduct. Not until the decision of the supreme court of the United States in *Marbury v. Madison*, 1 Cranch, 137, did the controversy over the disputed question begin to abate; but Chief Justice Marshall who in that case affirmed the existence of the power, had some years previously, as counsel in the case of *Ware v. Hylton*, 3 Dall. 211, declared: "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society. And the judicial authority can have no right to question the validity of a law unless such a jurisdiction is expressly given by the constitution." That such jurisdiction is expressly given by the federal constitution, or by the constitutions of the states generally, will hardly be asserted. Jurisdiction, however, like "appetite, grows by what it feeds upon." One assumption of power by the courts has but given courage and capacity for another, until, from a hesitating, apologetic refusal to effectuate legislative acts clearly violative of constitutional right, we have grown to arrogate the prerogative of controlling executive acts, settling questions of legislative membership, condemning forms of legislative procedure, enjoining the enforcement of legislative provisions, marking out the scope and policy of legislative inquiries, and generally of directing the plan and supervising the machinery of political government. So far as I am concerned, I shall refuse to join in any assumption of constitutional jurisdiction beyond those boundaries which are already defined and defended by impregnable walls of precedent, and yielded over as undisputed ground.

The first and principal act of municipal control is the making of laws. Leaving out of view for the moment the people in their primary capacity as the fountain of authority, and looking only at the source from which it directly and proximately proceeds, it is inevitably perceived that power resides alone in the legislative body, and, furthermore, that in a natural sense it is the only tribunal to which primary power has been or can be confided. As a depository of delegated authority, the legislature is the only logical and necessary provision of nature in its bearing upon the government of men. All other powers are of secondary delegation from it. Governors and judges are but creatures of legislative fashioning, and executioners of legis-

lative will. In a social economy, determined upon principles of natural law, there is no provision for executive or judicial office. It is only because municipal law cannot be made self-executing, only because the subjects of municipal law do not always yield that ready obedience necessary to an orderly social state, that the legislative will must needs create an agency for its vindication; and this is all it does create, and these are all the powers that do exist,—legislative and executive. Among the divisions of government, analytically considered, there is no such thing as judicial power. What we call by that name is a function of executive power merely. It has been customary to consider government under three distinct general heads,—the legislative, the executive, and the judicial. But, if we permit our judgment to act unincumbered by the habit of multiplied terms, we can perceive no more than two divisions of power of which civil government is composed, namely, that of legislating or enacting laws, and that of executing or administering them. Everything, therefore, appertaining to civil government, classes itself under one or other of these two divisions. So far as regards the execution of laws, that which is called the "judicial power" is strictly and properly the executive power of every country. It is that power to which every individual has an appeal, and which causes the laws to be executed. Paine's *Rights of Man*, pt. 2, c. 4. Courts are but instrumentalities of the executive power. Except as arbitrarily created, they constitute no separate department of the political state; and the work of defining the law, in the process and to the end of its execution, is as much the exercise of executive power as the delivery of the blow with the fashioned and completed instrument by the executive arm, and in vindication of the executive right. In the domain of municipal law, as in everything else, we may subdivide and classify and invent names for things, we may enlarge or restrict powers, but we can no more change the essential attributes of the parts of government than we can make over or give new direction to the elements of physical nature. Let it be understood that the binding force of the divisions of power made by the constitution is recognized. Attention is only called to the essential nature of the power, as it existed before and lies back of the artificial classification made, for the purpose of aiding to a construction of its terms. I do not believe it was the intention of the masters of political science who framed and set in motion the machinery of this government to disregard the fundamental character of legislative and executive powers, and of judicial power, so called, and invert the order of nature by elevating the agent above the principal, the creature above the creator, and magnify a mere function of one of the parts of the system into the life and dominance of the system itself.

We are not left, however, to the necessity of

reasoning upon questions of fundamental principle to determine the case in hand. What was above said is only to indicate the base out of which grows the deep-seated aversion I have to attempts by the courts at the nullification of the popular will as expressed by the representative assembly. It is no justification of such attempts that much of legislative action is awkward, stupid, extravagant, useless, or positively corrupt and vicious. We are invested with no power of correction of the education, manners, or morals of the legislative branch. The people, in their sovereign capacity, have conferred upon that branch legislative power, and whatever that is it may freely exercise. What is legislative power? Primarily and principally, it is the power to declare rules of action for the government of the constituency, and incidentally to acquire information necessary to the discharge of its duties, and to adopt and enforce rules of procedure in the conduct of its business. How and when may this power be exercised? Marshall, in *Ware v. Hylton*, *supra*, said: "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society." Multiplied decisions of courts and sayings of jurists might be quoted to the same import. All of them affirm that legislative power is supreme, except as limited by the organic law. How may it be thus limited by such law? There is not a claim in American jurisprudence that it can be otherwise limited than by express prohibition, grants to other co-ordinate branches, reservations to the people themselves, and necessary implications flowing from such prohibition, grants, and reservations. Has the exercise of the acts of which the petitioner complains been expressly prohibited by the constitution? Such is not claimed to be the case. Has it been granted to another department? Neither is such claimed to be the case. Has it been reserved to the people themselves? Nor is such claimed to be the case. What, then, is the prohibition, grant, or reservation from which the implication of lack of power is derived?

In the writing of the majority of the court there is an emphasis of assertion that the power to imprison is judicial in its nature; that it is not to be lightly implied, but must exist in concrete and defined expression. No attempt, however, is made to point out the specific constitutional provision which, through its implications, limits the general grant of legislative power from authorizing imprisonment in this or any other like class of cases. It may well be conceded that the statutory enactment under which a power to imprison is derived should be expressed in positive and unambiguous terms. We are concerned, however, with no question of statutory construction, but with one of existence of constitutional power. From the general grant of legislative power proceeds the right to enact statutes for the imprisonment of all classes of offend-

ers. The very authority which courts have to imprison for contempt proceeds from it in most cases, and can be traced to no other source. What, I ask again, is that constitutional provision which, through its necessary implications, restricts this legislative power from authorizing imprisonment in one case while conferring it in another? The gravamen of Mr. Justice ALLEN'S decision is that the witness cannot be punished as for a contempt of legislative authority, because the legislature is not in session, and therefore does not exist as an object of contempt, and that the statute of 1891, which assumes to vest legislative committees sitting beyond the legislative session with power to punish for contempt, is ineffectual, as being an attempted delegation of legislative power. This view is predicated on the assumption that upon the close of a legislative session the power to perform all acts legislative in character ceases; that no power which the legislature, sitting as a joint body, or which either house, sitting separately, is qualified to perform, can thereafter be exercised in its or their behalf; that is, to quote the language of the opinion, which to me is quite indefinite, "no power of final action and decision" can be so performed. I understand the right of a legislative body to order an investigation, through an appropriate committee, into matters legislative in character, at a time beyond the legislative session, to be conceded, but understand the power of the legislature to put any effective means in the hands of such committee to attain the desired end to be denied; that is, a legislature may investigate at such time, and by such committee, if the subjects of investigation shall be pleased to allow the inquisition. In other words, the tribunal may be duly ordered and organized; it may sit, if riotous disturbers will tolerate its sessions; it may subpoena witnesses, if its officers choose to serve its process; and it may hear testimony, if such witnesses choose to attend; but it can command obedience from no one in its efforts to discharge its trust, and is entitled to no respect in its character as an official body. The illustrations thus given of the claimed impotence of such committee are not borrowed from the field of extremes. They state the exact view of the majority of the court. This novel doctrine, we are told, is extracted out of the principle that legislative power cannot be delegated; that, while either house may punish for contempt, it cannot authorize its committees intrusted with the performance of its business to do so. The inability of a legislative body to abdicate the duty imposed upon it, of making laws (that is, general rules of action for the government of the constituency), and to impose such duty upon another body or tribunal, or to relegate it back to the people, is conceded, so far as the refusal of judicial authority to sanction such action is concerned, and it is not necessary here to discuss the fundamental soundness of such doctrine. I know, however, of no authorities which have

gone further, or stated the doctrine in broader terms than to simply say that the legislature cannot delegate its power to make laws. The legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have. Locke, Civ. Gov. § 142. One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Cooley, Const. Lim. (6th Ed.) 137. It is a general principle of constitutional law that the power conferred upon the legislature by the constitution to make laws cannot be delegated by that body to any other person or authority. Black, Const. Law, § 105. The doctrine that legislative power cannot be delegated has never been invoked to nullify acts in abdication of legislative sovereignty, save in the case of attempts to transfer to another the right to enact laws. To the majority of this court, however, belongs the bold distinction of applying it to the defeat of the legislative will in its endeavor to procure information concerning matters vital to the integrity of the legislative branch, and to the interests and honor of the state. It is not necessary for me to assert that the incidental legislative authority to punish for contempt may be delegated to another tribunal, and exercised by it as legislative power. It is sufficient for my purpose to point out the fact that the rule invoked in this case is the rule that the power to make laws cannot be delegated, and that heretofore no court has applied it further than as thus stated.

But I assert that the power conferred by the concurrent resolution in question, in connection with the statute of 1891, is judicial in its nature, and may be rightfully exercised because of such fact. The recent decisions in *Re Huron*, supra, and in *Re Sims*, 54 Kan. 1, 37 Pac. 135, are not in point against such view. In the *Huron* Case it is held that a notary public could not receive a grant of power to punish for contempt, but such decision was rested upon the ground that a notary's office was not judicial in its nature, and that a notary public was not a "court," in the sense in which that term is used in the constitution, which allows the creation of "courts inferior to the supreme court"; that, except when a tribunal is created which rises to the dignity and is invested with the character of a court, the high judicial prerogative of imprisoning for contempt cannot be exercised; that the judicial power to punish for contempt cannot be vested as a mere incident to duties purely executive or ministerial. The same view influenced the decision in *Re Sims*, supra, with the added consideration that the power there sought to be conferred was interblended with the incompatible functions of an executive office. The case before us now is entirely different. Here a court is created, in the fullest sense of the term. There is not an element lacking in it, so far as organiza-

tion and subject-matter of jurisdiction are concerned. A tribunal is designated, to be composed of five persons; authority is given to appoint an officer to serve process, with a stenographer to note and transcribe testimony, and a clerk to make and preserve a record of proceedings. A subject-matter of inquiry is likewise stated and defined. That subject-matter is of vital public concern. The very organization and object of this tribunal implies a power to proceed in its labors according to formal and deliberative rules; to hear evidence; to determine the competency of witnesses, the admissibility of testimony, together with its weight and credibility; and to report its findings and judgment. True, there is no special direction to the committee to make a report, but that is necessarily implied from the purpose of its appointment and its power to sit. The power to "investigate" carries with it the power to publish the result of the investigation. Nor is the failure to designate some one to whom the report is to be made fatal to the power to proceed under the resolution and law. A claim of such character was argued at brief length upon the hearing, and is faintly shadowed forth in the opinion of the majority of the court, but I do not understand it to be made even in part a determining feature of the case. However, without troubling myself to find a specific depository for such report, I apprehend one can be found among the many legal custodians of public documents and records. But, if it were otherwise, I deny the right of this court to invalidate the resolution in question because no officer or tribunal is designated as the depository of the committee's report. That the legislature ought to have manifested a specific and sensible design, by, in terms, directing the making and filing of a report, may be conceded, but to rest a claim of constitutional invalidity of its action upon its failure to give such direction would be a most unwarranted extension of judicial prerogative. I assert it to be entirely competent for the legislature to direct an investigation into a matter of public concern, solely for public information, and with no other object in view than the dissemination of such information through the public prints.

Without elaborating further, I only care to say that the precise question here involved, as I view it, was determined by the supreme court of New York in the case of *People v. Learned*, 5 Hun, 626. The syllabus to that case read as follows:

"In March, 1875, a commission was created, by concurrent resolution of senate and assembly, to investigate the affairs of the canals of this state. Upon the hearing of an application for the discharge of a person committed by the commission for contempt in refusing to produce before it certain books and papers, it was insisted that such a commission could only be created by bill enacted by both branches of the legislature, and signed by the governor. Held, that there was no

clause in the constitution expressly prohibiting the creation of a commission by concurrent resolution; and that, when not expressly prohibited, the legislative power was unrestricted and unlimited.

"The act (Laws 1875, c. 91) provided that, in case of the refusal of a witness to obey the subpoena, he should be brought before the commission by attachment, and that 'the like proceeding shall hereupon be had as if such commission was a court of record, and such witness had been duly subpoenaed to attend before it.' Held: (1) That the act was not in conflict with the constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law; (2) that the act was not in conflict with section 17 of article 3 of amended constitution, providing that no act shall be passed which shall enact that any existing law shall be deemed a part of, or applicable to, the said act, except by inserting it therein; (3) that the said commission was empowered to issue subpoenas to enforce the attendance of witnesses, and to compel the production of books and papers, and to adjudge any person willfully refusing to produce such books and papers guilty of contempt, and commit him therefor."

The statements of law thus made are satisfactory to me, and, I think, should control the decision in this case. But it is said that the case cited differs in a material respect from the one under consideration. That difference, we are told, consists in the fact that while in both cases the committee was appointed under legislative resolution, and not by statute, yet in New York the power to commit for contempt was conferred by special act passed at the same session, and applying to such committee alone, while with us the power is conferred by a general law passed some years ago, and applying to all committees then or thereafter to be appointed. In other words, the exercise of the power is made to depend upon whether the act in question is special or general. The legislature may empower one committee, but not more than one. It may empower such committee as may be appointed at the same session, but none to be thereafter appointed. I do not unfairly state the reasoning of the majority of the court in its effort to distinguish the two cases. I have but reduced it to its final analysis. If the essential soundness of the decision in *People v. Learned* be not denied,—and I do not understand that it is,—it applies to this case. There is absolutely no difference between it and the present case, either in point of fact or principle.

But it is urged against the view taken of the judicial nature of the powers conferred upon the committee that it cannot be regarded as a court, because, under the constitution, "courts" can only be "provided by law" (that is, by bill, with title, enacting clause, formal enactment, and executive approval), whereas this committee was authorized by resolution

only. The attempt to draw this distinction is a shifting of the real ground of contention. The question is not how the members of the committee may be designated, nor how the subject-matter of their inquiry may be pointed out to them, but in what manner the judicial power to issue compulsory process, and to compel the giving of testimony, may be conferred. That the legislature is powerless to confer upon one of its committees, by formal statutory enactment, the judicial authority to summon witnesses and punish for contempt, simply because it had not, by another formal statutory enactment, authorized the appointment of such committee, is refining upon the constitutional powers of that body to a high degree indeed. But this committee or court was "provided by law"; that is, its powers were provided by law, and that is what the constitution means. That the appointment of committees such as the one in question, and the designation of a subject-matter of inquiry, by concurrent resolution, is an appropriate and constitutional exercise of power, is not denied; in fact, is conceded, as I understand. So far so good. The "court," then, was "provided by law," as to composition and subject-matter of jurisdiction. Nothing, therefore, remained to be done but to confer upon it the high judicial prerogative of compelling obedience to its orders. That was done in the very way required by the majority of this court. It was done by "law," using the term in its narrow and most technical sense. It was done by the statute of 1891,—an enactment possessing all the requisites of constitutional formality. But in a broader sense than this the "court" in question was "provided by law." The legislature by the act of 1891 declared that such legislative investigating committees as might thereafter be appointed should possess the judicial power to issue compulsory process and punish for contempt. It declared that, when such committees were appointed, they should be courts. It validated their existence in advance of their creation. It in fact authorized their appointment, and made ready to their hands the machinery of judicial power when they should be called into being. It therefore provided them by law. There is, in my judgment, no merit in the petitioner's contention; and he ought to be remanded into custody, and be dealt with for his contempt of the committee's order.

SWEENEY v. HJUL. (No. 1,493.)

(Supreme Court of Nevada. June 22, 1897.)

ELECTIONS—BALLOTS.

A ballot marked with a cross opposite the names of candidates for officers of a township other than that in which the ballot is cast is invalid.

On petition for rehearing. Denied.

For former report, see 48 Pac. 1036.

MASSEY, J. The appellant urges that a rehearing be granted in this action for the reason that this court has assumed that there are only two civil townships in Eureka county, when in fact there are four, and that, in the count made by this court, ballots were counted for respondent upon which crosses were made opposite the names of wrong township officers, other than those indicated in the opinion. The record in the case fails to disclose other townships than Eureka and Palsade. The ballots in all the precincts have printed thereon the names of the township officers for Eureka and Palsade townships only. If it is, then, a fact that there are two other townships, to wit, Ruby Hill township and Beowawe township, then the count made by this court of the contested ballots should be slightly changed. This court counted for the appellant ballots cast in Ruby Hill precinct, marked Exhibits VN, NN, TT, RR, and PP, each of which ballots was marked with a cross opposite the names of the candidates for township officers of either Eureka or Palsade township. These ballots, under the showing made by the petition, should have been rejected by this court. In the same precinct we counted one vote, marked Exhibit 45, for the respondent, which, for the reason indicated, should also have been rejected. Only two ballots were brought up to this court under the stipulation which were cast at Mineral Hill precinct No. 7, and neither of said ballots was cast for any township officer. Of the two ballots before the court, cast in Keystone precinct No. 11, both of which were voted and counted for Hjul, the one marked Exhibit PPP was also voted for the township officers of Eureka township, and the one marked Exhibit OOO was not voted for any township officer. Ballots marked Exhibits LLL and MMM, cast in Diamond precinct No. 10, were counted by the court for appellant, and each of said ballots was cast for the township officers of Eureka township. The ballot marked Exhibit NNN, cast in said precinct, and counted in this court for the appellant, was voted for the township officers of both Eureka and Palsade townships, and should, for the reason above given, be rejected. Ballot marked Exhibit 70, and voted in said precinct for the respondent, was also voted for the township officers of Eureka township. Ballots marked Exhibits 71, 72, 73, and 74 of said precinct were voted and counted for the respondent and for the township officers of both Eureka and Palsade townships. These ballots should have been rejected. Only one ballot from precinct No. 9 is before this court. It was cast and counted for the appellant. The elector voting the same made the proper cross opposite the names of the township officers for Eureka township. Only two ballots have been brought before the court having been cast in precinct No. 8. The one marked Exhibit JJJ was counted by the court for the appellant. This ballot was marked with a cross oppo-

site the names of the candidates for township officers of Eureka township. Ballot marked Exhibit No. 69, and cast at said precinct for the respondent, was rejected by this court. Of the ballots counted in Beowawe precinct No. 5 for the respondent by this court, Exhibits 49 and 61 bear the proper cross opposite the names of the township officers of Palsade township, and should have been rejected under the averments of the petition for rehearing. The other ballots cast in this precinct, and before this court, are correct. The ballots from the other precincts, not considered herein, were passed upon by this court in its opinion. Under the allegations of the petition for a rehearing, and by giving the appellant the benefit of the ballot counted for him in precinct No. 9, and the one counted for him in precinct No. 8, marked Exhibit JJJ, and the one counted for him in Keystone precinct No. 11, marked Exhibit PPP, and without considering the 22 ballots cast in Eureka precinct No. 2 and rejected by this court in its opinion, the count will stand as follows: Sweeney, 131 votes; and Hjul, 125 votes. A rehearing is therefore denied.

BELKNAP, C. J., and BONNIFIELD, J.,
concur.

ROBINSON v. TEMPLAR LODGE, NO. 17, I. O. O. F. (S. F. 488.)¹

(Supreme Court of California. June 22, 1897.)

**BENEFICIAL ASSOCIATIONS—AMENDMENT OF LAWS
—CLAIM FOR BENEFITS—DEFENSES.**

1. Where the right to amend its laws is expressly reserved to a mutual benefit society, a member cannot complain of an amendment, though it may injuriously affect him.

2. In a suit against a mutual benefit society to recover sick dues, it is a good defense that plaintiff has not submitted his claim to the society, as required by its laws, to which he has assented by becoming and continuing a member, and which provide that the decision of the society shall be final.

3. A regulation which requires an application for sick benefits to be made within five weeks after they accrue is not unreasonable.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Thomas B. Robinson against the Templar Lodge, No. 17, I. O. O. F. From a judgment for defendant, plaintiff appeals. Affirmed.

George D. Collins, for appellant. Davis Louderback, for respondent.

TEMPLE, J. Appeal from the judgment. The action was brought to recover \$800 for sick benefits. The complaint charges that defendant, by a contract in writing, agreed to pay plaintiff four dollars per week in case he became incapable of earning a livelihood through sickness; that he was so incapacitated during the month of April, 1889, and has so

remained ever since; that no part of the said sum of four dollars per week has been paid. Defendant, in its answer, denies the contract, and also that plaintiff was sick or incapacitated to earn a livelihood. Defendant also avers, in effect, that it is a subordinate lodge of the Independent Order of Odd Fellows, which is an organization having a constitution and by-laws, as well as rules and other regulations; that its members are subject to and controlled by such constitution and regulations, and enactments, resolutions, orders, decrees, and decisions made in pursuance thereof; further, that plaintiff is a member of said order, and his alleged claim arises out of his said membership. The answer then charges, in substance, that plaintiff has not submitted his claim to the order for its action, as the constitution and other regulations of the order require. The contention is that, under the constitution of the order, it is merely a charitable institution, organized for the mutual protection of its members, and, although the rules governing its charities are prescribed, still it is expressly stipulated that they do not create contract obligations, and all rights are made dependent upon the voluntary action of the order itself. Therefore, one can never have an enforceable claim against the order for the so-called "beneficence" until after it has been awarded by the order in the mode prescribed.

Section 6, of article 4, upon this subject, reads as follows: "This constitution and all laws, rules, and regulations providing for the granting of sick, funeral, and other benefits, or of any aid, relief, assistance, allowance, expenses, or money to any member, wife, widow, orphan, or any person whatever, or providing for the payment to the lodge of dues, assessments, and demands by a member, are not intended, and shall not be construed, to create the relation of debtor and creditor, nor to create legal rights, liabilities, nor responsibilities, nor any legal contractual relation, nor confer any right to enforce the granting or payment of the same by resort to courts of law. On the contrary, all questions, whether of law or fact, relative to the granting, payment, or refusal of the same, relate to moral duties or obligations, and not to legal ones, and appertain to the sole jurisdiction of this lodge and the authorities of this order, and their decisions in the premises shall be binding, conclusive, and final upon all members, wives, widows, orphans, or persons. Every person, by becoming or continuing a member of this lodge, consents to and agrees to abide by all the laws and decisions of this lodge, and of the authorities of the order." This section was amended so as to read as above in May, 1889. Prior to that amendment it was provided, in effect, that the provisions for benefits were not intended to, and did not, confer upon any one the right to enforce the same in a court of law, but, on the contrary, all questions in regard to the same were for the authorities of the order only, and their decision should be final. The right to make amend-

¹ Rehearing denied.

ments was expressly reserved to the order, and we must presume that they were made in pursuance of the power given. The constitution and by-laws are in the nature of a contract as between the members, and the plaintiff, having stipulated that such amendment may be made, cannot complain, although it may injuriously affect him. The alleged dues accrued, if at all, after the amendment. *Stohr v. Society*, 82 Cal. 557, 22 Pac. 1125.

Section 7 of article 4 provides that the constitution, laws, and decisions of the Sovereign Grand Lodge, of the Grand Lodge, and of this subordinate lodge are the laws of the lodge, and all persons, by becoming or continuing members, "consent to and agree to abide by the same." I do not doubt that the obligation resting upon the lodge is a contractual obligation, and that the constitution, laws, and other regulations of the order constitute a contract. It is difficult to see how it can be called a mere moral obligation, notwithstanding the language of the constitution. The consideration is fixed, and the agreement to pay the benefit is unequivocal. The member, being in good standing, and not delinquent, if through sickness he is incapacitated for work, is entitled to four dollars per week. The provision is not that he may apply, and the lodge may at its option allow a benefit. The lodge contracts that it will allow it. The stipulation then is that the member will submit his claim to the lodge, which, by its appointed tribunals, will consider and act upon the same; that the member, feeling aggrieved, may appeal to the Grand Lodge and to the Sovereign Grand Lodge, and the conclusion reached in the order through the proceeding thus inaugurated shall be final and conclusive. It is contended that these provisions of the order are invalid, because, if valid, they would oust the courts of the state of their jurisdiction. Upon this proposition many authorities are cited, which, however, I do not deem it necessary to review. A great variety of views has been expressed upon the subject. The question is no longer an open one in this state. It was ruled adversely to appellant in *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887. That case did not involve the question as to sick benefits, but as to the conclusiveness of a proceeding for the expulsion of a member. The principle involved was the same, or, if there be a difference, it is that there would be more question as to the reasonableness of the rule when applied to the expulsion of a member than when applied to the claim for sick benefits. In the case it is said that the right of appeal is provided, and the stipulation is to the effect that the decision reached in the proceeding shall be conclusive. As there said, the member, by becoming or continuing to be a member, did all he could to waive his right to resort to a court of law, and it is held that he could waive the right. It cannot properly be said that thereby the parties oust the courts of their jurisdiction. I presume no one ever supposed

that the contract could have that effect, or that the parties so intended. The courts still have jurisdiction to entertain the suit, and any rule or law which would impose a forfeiture upon a member for bringing suit would be void as against public policy. When a suit has been brought, it is, however, a defense to his claim to show that he has agreed to submit his demand to the tribunals of the lodge under the prescribed procedure. The defendant is not engaged in business for profit. It is a semi-charitable institution. It collects dues from its members merely to distribute to members in need, according to a plan agreed to by all. It would seriously interfere with the usefulness of these mutual aid societies if their funds could be tied up by endless litigation. These benefits are not charities in the strict sense. They are dues, which the society becomes obliged to pay in certain events. It is a matter of right, and not of grace. A consideration is paid, and the lodge reserves no right to withhold payments when the conditions arise. Yet the society has many of the features of an organized charity, and it has been said that the claim for a sick benefit is not a property right. In short, the rules of law have not been applied to these institutions with the same strictness with which they have been applied to corporations organized for profit. In an ordinary case I should be loth to hold that one can effectually waive his right to sue in a court of law before his right of action has arisen, or that he can in advance agree to an arbitration, but it has been so held with reference to these mutual benefit societies, and with reference to them I think the regulation reasonable. *Rood v. Association*, 31 Fed. 62; *Van Poucke v. Society*, 63 Mich. 373, 20 N. W. 863; *Canfield v. Great Camp*, 87 Mich. 626, 49 N. W. 875.

But, even if this view were not correct, there can be no doubt of the proposition that he must first exhaust all the remedies afforded within the order before he can maintain an action at law. No such fact is averred in the complaint, and, as I understand the record, although previous applications had been made for benefits which had accrued before the time during which the benefits here sued for accrued, there is no evidence which tended to show that any application at all had been made to the lodge for the amounts here sued for. The authorities all seem to hold that this resource must be first exhausted. They are too numerous to admit of a full citation. In this state the following cases so hold: *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887; *Robinson v. Society*, 87 Cal. 135, 7 Pac. 435. I can discover no support whatever for a contrary opinion in *Robinson v. Templar Lodge*, 97 Cal. 62, 31 Pac. 609. That case went off on demurrer to a complaint which merely showed a contract, by the terms of which, it was alleged, the benefit became due. The real nature of the contract, or of the organization of the order, did not appear. The opinion simply refers to such a contract

as was alleged. It was immaterial, if the above views are correct, whether the plaintiff could be required to submit his claim to a committee of the lodge or not. Whatever tribunals the order established must be resorted to. I see nothing unreasonable in a regulation which requires an application for benefits to be made within five weeks after the benefits accrued, even if the order may construe this to mean that in case of chronic illness the application must be renewed every five weeks. The order can control their procedure in such respects.

Entertaining the foregoing views, it is unnecessary to consider the rulings in regard to the instructions. Those asked by the appellant, and refused by the court, present the case upon the theory advocated by the appellant, and upon which he based his right to recover, that it was not necessary to exhaust his remedies under the laws of the order before he could maintain an action. His views upon that subject have been sufficiently discussed. If appellant was wrong in his theory, as we hold, the court properly instructed the jury to find for the defendant. The judgment is affirmed.

We concur: **McFARLAND, J.; HENSHAW, J.**

(117 Cal. 262)

In re **WILSON'S ESTATE.**

WILSON et al. v. McCONNACHIE et al.
(L. A. 233.)¹

(Supreme Court of California. June 16, 1897.)
WILLS—CONTEST—AMENDMENT—UNDUE INFLUENCE—EVIDENCE—TRIAL.

1. An amendment of a written contest of a will after probate on the ground of undue influence, by adding thereto charges of fraud by the person alleged to have exercised such undue influence, adds a new cause of action, and hence cannot be made after the expiration of a year from the probate.

2. No new cause of action is added to a written contest of a will charging that a certain person had conveyed to testator false reports about the contestant by an amendment merely stating the nature of such reports.

3. A new cause of action is added to a contest of a will charging undue influence by one person by an amendment charging like undue influence by other persons.

4. On an issue of testamentary capacity, the subscribing witnesses, one of whom was a physician, testified that testatrix was in full possession of her mental faculties at the time of making the will and codicil. A large number of intimate acquaintances testified to the same effect. Testatrix, though illiterate, was a shrewd business woman, and her acts at and about the time of making the will and codicil showed full command of her faculties. No one testified to a contrary opinion, and the only evidence impeaching her capacity was that she had for years been addicted to the use of liquor, being sometimes intoxicated, and that she was at the time of the testamentary acts suffering severely from burns, which subsequently caused her death. The original will gave only a small monthly income to her husband, with whom she was not on good terms, but the codicil made him residuary legatee, partial reconciliation between them appearing. Testatrix had made several wills, fre-

quently changing the beneficiaries. *Held*, that a finding of a lack of testamentary capacity should be set aside.

5. There is no error prejudicial to proponent in ordering separate contests of the original will and a codicil to be heard together.

6. On an issue of testamentary capacity, contestant may show the manner in which deceased acquired the property disposed of by the will.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by John Wilson and others to vacate the probate of the will of Bridget Wilson, deceased (John McConnachie and others proponents). There was judgment vacating the probate; a new trial was denied; and proponents appeal. Reversed.

Smith & Winder, Albert M. Stephens, and Anderson & Anderson, for appellants. Chapman & Hendrick, White & Monroe, Geo. J. Denis, Reddy, Campbell & Metson, James Gartlan, J. T. Houx, and R. H. F. Varrel, for respondents.

McFARLAND, J. This is an appeal by the proponents of the will of Bridget Wilson, deceased, which was probated on May 9, 1893, from a judgment vacating the probate, and from an order denying proponents' motion for a new trial.

The said Bridget Wilson died on the 14th day of March, 1893, at Los Angeles, Cal. She left a will, dated February 27, 1893, and executed on that day, and a codicil to said will, executed and dated on the 11th of March, 1893. These two instruments were admitted to probate as constituting the last will and testament of the deceased. She left no children or lineal descendants, and her husband, John Wilson, was her only legal heir. By the instrument of February 27th (which, for convenience, we will call the will, to distinguish it from the codicil), after making bequests and devises to several different parties, and, among others, \$1,000 to Charles McMahon, she left the residue of her estate to Alicia McMahon, who is the mother of said Charles McMahon. She also, in this will, gave to her husband \$50 per month. By the codicil she revoked the gifts to both said Charles and Alicia McMahon, and left the greater part of her estate undisposed of, so that it would go to her husband as her legal heir. On the last day of the year succeeding the probate of said instruments as the will of the deceased, the said John Wilson filed a written contest of the same, in which he averred that, for various alleged reasons, the will had not been properly executed. He further alleged that, at the time of the execution of both the will and the codicil, the deceased was not of sound mind or competent to make a will; and also that the will and codicil were procured by the undue influence of one John McConnachie, the undue influence alleged being that the said McConnachie was the agent of the deceased, and possessed great power and influence over her, and "was continually poisoning the mind of"

¹ For opinion on rehearing, see 49 Pac. 711.

said Bridget Wilson against the contestant herein, the said John Wilson, her husband, by reporting to her false and scandalous reports concerning the conduct of the said John Wilson"; and that by means of said false reports, while she was physically and mentally weak and suffering great pain, he induced her to change her will, and leave property of great value to him. The attack of the contestant Wilson was against both the will and the codicil. On the same day, the said Alicia McMahon and Charles McMahon also filed a contest, directed against the codicil alone, averring that the deceased, at the time of making said codicil, "was not of sound and disposing mind, but was, on the contrary, of unsound mind and insane, and mentally incompetent to make a will"; and that the codicil was procured to be made by the undue influence and fraud of the said McConnachie and Michael Curran and his wife, Mary Curran, who, it is alleged, falsely represented to the deceased that the McMahons had no love or affection for her, and that they were exceedingly wealthy, and in no need of any gifts from her, and thus poisoned the mind of the deceased against them, and induced her to revoke the said gifts to them. They also allege that McConnachie and the Currans prevented friends of the deceased from seeing her, etc. It thus appears that the contest of John Wilson goes upon the theory that the deceased was of unsound mind, and incompetent to make a will, and was improperly influenced at the time this will was made, and also at the time the codicil was made; while the theory of the McMahons is that she was competent to make a will, and was free from any undue influence on the 27th of February, but was incompetent and improperly influenced 12 days afterwards, when the codicil was made. To complicate the matter further, Wilson filed an answer to the written contest of the McMahons, in which he denied all its allegations. Afterwards Wilson was allowed, over the objections of the proponents, to file an amendment to his contest, in which he sets up the facts which he claims to have constituted undue influence, by averring substantially that McConnachie falsely poisoned the mind of deceased with stories about her husband being too intimate with a woman by the name of Sanchez, and also that deceased was unduly influenced by Michael and Mary Curran, the averment being substantially that McConnachie and the Currans prevented the friends of John Wilson from seeing the deceased, and made false representations to her about the conduct of John Wilson and the said Sanchez. The jury returned a special verdict in answer to 11 interrogatories proposed to them. In answer to all the interrogatories touching the signing of the will and codicil, their proper attestation, publication, and execution, the verdict was in favor of proponents. They found also that, at the date of the execution of both the will and

the codicil, the deceased was not of sound mind. The interrogatory as to undue influence was as follows: "Was the execution of said instrument of date February 27, 1893, procured through the undue influence of John McConnachie, Michael Curran, and Mary Curran, or either of them?" and the answer was, "Yes." The interrogatory as to the codicil was in the same form, and the answer was the same. The interrogatory as to whether the instruments were procured through fraud was also in the same form, and the answers were the same; that is to say, was the instrument "procured through the fraud of John McConnachie, Michael Curran, and Mary Curran, or either of them?" and the answer was, "Yes."

Appellants took a great many exceptions to rulings of the court, which are elaborately argued by the respective counsel; but, under our views of the case, it is not necessary to notice all, or, indeed, the greater part, of these exceptions. Such as are necessary to be considered we will notice hereafter. We may say here, however, that the part of the amendments to the Wilson written contest which set up fraud should have been stricken out, because the amendments were made more than a year after the probate of the will, and, as the alleged fraud was a new cause of action, it could not be set up for the first time after the expiration of the year. Appellants also contend that the court erred in allowing the Wilson amendments made after the year on the subject of undue influence. In the original, undue influence was charged against McConnachie, which was averred to consist in "reporting to her false, scandalous reports concerning the conduct of the said John Wilson," but the nature of the reports was not stated; and in the amendments it was stated what those reports were, and also that undue influence was exercised by Michael and Mary Curran. The point of appellants is that these amendments state new matters, which could not be set up after the expiration of the year. This contention of appellants cannot be maintained as to the amendment about the alleged undue influence of McConnachie. It was a mere amplification of the original charge, and may properly be considered as simply a more definite statement of what had been formerly averred. But the point must be sustained as to the averment in the amendment about the undue influence alleged to have been exercised by Michael and Mary Curran. These averments are not amendatory or explanatory, or in amplification of anything alleged in the original, but are statements of entirely new matters, constituting another and independent cause of contest, which could have been presented only within a year after the probate. Therefore the demurrer to these should have been sustained or they should have been stricken out or disregarded. And, for this reason, the answer of the jury, "Yes," to

the various interrogatories asking whether the will or codicil was procured through the undue influence of McConnachie, Michael Curran, and Mary Curran, "or either of them," has no significance. It is not a finding that it was procured through the undue influence of McConnachie, and the question of the undue influence of the Currans was not properly before the jury. As to the undue influence alleged in the contest of the McMabons, there is no pretense that there was any proof of it; and there was none. And, if it were allowable to consider the answers of the jury to the interrogatories submitted to them by the court as findings that the will and codicil were procured through the undue influence of McConnachie, we are satisfied that under the decisions of this court in former cases, and particularly in *Goodwin v. Goodwin*, 59 Cal. 560; *In re Carpenter's Estate*, 94 Cal. 406, 29 Pac. 1101; *In re McDevitt*, 95 Cal. 33, 30 Pac. 101; *In re Carriger's Estate*, 104 Cal. 81, 37 Pac. 785; *In re Langford's Estate*, 108 Cal. 608, 41 Pac. 701,—the evidence was clearly insufficient to support such finding, or any finding of undue influence by any person.

The real question in the case is whether or not there was evidence sufficient to justify the findings that, at the time of the execution of the will and the codicil, the deceased was not mentally competent to make a will; and we are satisfied that the question should be answered in the negative. Counsel for respondents say very properly that the rule as to conflicting evidence is the same in will contests as in other cases; and they seem to intimate that the rule has not been applied in some former probate cases, and to indicate a fear that it may not be applied in the case at bar. Of course, the rule is the same in all cases. Wherever there is a fair and reasonable amount of evidence to support the finding of a jury, it will not be disturbed here, though, in our opinion, it is against the preponderance of evidence; but where one side of an issue is clearly, amply, and firmly established by an unbroken line of evidence, and the jury find the other way upon no evidence that is "really and substantially conflicting," or upon a mere pretense of such evidence, or upon evidence so slight as to leave no room to doubt that the verdict was the result of passion or prejudice, there the finding should not be allowed to stand. This has always been the rule. And, if it has happened here that quite a number of verdicts upsetting wills have been reversed, it was not because the rule as to conflicting evidence had not been properly applied, but because in will contests more than in any other class of cases are juries wont to render verdicts upon insufficient evidence. The history of this species of litigation shows that quite a number of people have come to think that the right to dispose of property by will has but little significance, and may be legally disregarded when-

ever the testator has not disposed of his property in a manner which suits the views of a jury. "But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners; and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper." *In re McDevitt*, 95 Cal. 33, 30 Pac. 106.

With respect to the mental competency of the deceased at the date of the will, and at the date of the codicil, the court, among other things, correctly instructed the jury as follows: "Upon these two issues I instruct you that the burden of proof rests with the contestant John Wilson. The law presumes that every person possesses a sound and disposing mind, and it is incumbent upon the contestant to establish by a preponderance of the evidence that Bridget Wilson did not on February 27, 1893, or on March 11, 1893, possess a mind sufficiently clear and strong to enable her to know and understand the nature of the act in which she was then engaged, to know and recollect those who were the natural objects of her bounty, to know and remember the character and extent of her property, the manner in which and the persons to whom she wished it distributed; and if he has failed to show that such was the condition of the mind of the deceased on February 27, 1893, your answer to interrogatory number 1 should be 'Yes;' and if he has failed to show such to have been the condition of her mind on March 11, 1893, your answer to interrogatory number 2 should be 'Yes.'" Now, the evidence introduced by appellants showed clearly and fully that, on the two occasions referred to, the deceased did "possess a mind sufficiently clear and strong," within the meaning of said instruction, to make a valid will. It leaves no doubt on that subject. The witnesses to the will were Mr. Winder, the lawyer who wrote it at her dictation, and who had been one of her legal advisers for a long time, Mr. Hannon, who was then a clerk in Winder's office, and Dr. Boyd, who was one of the physicians attending the deceased. The witnesses to the codicil were the said Winder and Boyd, and a gentleman named Wiskotschill. All these attesting witnesses were examined at the trial, and their testimony was clearly and fully to the point that, when the will and codicil were executed, the deceased was in full possession of her mental faculties, knew what she was doing, and was perfectly competent to do it. There were three physicians who attended the deceased during her last illness,—Dr. Worthington, who had attended her on several former occasions; Dr. Boyd, who was called upon immediately after the accident which caused her illness and subsequently her death, and

attended her during nearly the whole period of her illness; and Dr. Lasher, who was in attendance for several days before her death. Appellants put all these physicians on the stand as witnesses; but on the objections of respondents, based on subdivision 4 of section 1881 of the Code of Civil Procedure, the offered testimony of Worthington and Lasher was excluded. Dr. Boyd, being an attesting witness, was allowed to testify, and his testimony was fully to the point of the competency of the deceased. He said: "At the time the will was executed, and also when the codicil was executed, her mind was perfectly clear. At either of those times I had noticed nothing at all to indicate any failure of mind in any way. My opinion is that her mind was perfect, both at the time of the execution of the will and of the codicil. On the day after the codicil was written, her mind was perfectly clear." Dr. Worthington was afterwards recalled by appellants for the purpose of proving a conversation which he had with deceased about a certain child who was a beneficiary in the will, and also for the purpose of trying to show that he had formed an opinion of her mental soundness from matters not of a professional and confidential nature; and it clearly appeared from testimony that was admitted that he considered her of sound mind. In the course of his examination, counsel for respondents asked him this question: "Well, doctor, in treating patients such as Mrs. Wilson was, is it not necessary, and is it not your habit, in prescribing for her, to ask her something in connection with the condition of her mind?" To which he replied: "Well, in this case it never occurred to me." He was then asked by counsel for respondents: "Well, I say, isn't it necessary?" To which he replied: "Well, if there was any,—if there was any doubt about her mind at all, then I should: but in this case I didn't think so. Therefore I didn't, you know, pay any particular attention at all. She was perfectly clear, of course, in every way, and I therefore—" Question: "Well, that isn't, I think, in response to my question." What he afterwards said on the subject of her mental condition we will not allude to, because it seems, although it does not clearly appear, that it was stricken out. In addition to the testimony of the physicians and the attesting witnesses, a large number of persons who were intimate acquaintances of the deceased, who saw her during her last illness, about the time of and before and after the dates of the execution of the will and codicil, testified to her mental soundness; and the testimony of these witnesses need not be detailed here or commented on, because no witness of respondents testified to the contrary, although many of their witnesses were intimate acquaintances of the deceased, and visited her during her last illness. In addition to the opinions of appellants' witnesses that her mind was sound, conversations and acts of the deceased about the time of the

execution of the will and codicil were testified to by various witnesses, which showed mental capacity and her ability "to know and understand the nature of the act in which she was then engaged, to know and recollect those who were the natural objects of her bounty, to know and remember the character and extent of her property, the manner in which and the persons to whom she wished it distributed." To the lawyer who drew the will and codicil she gave descriptions of her property, and named with apparent accuracy many persons and places in California and Ireland. Some of her acts especially showed a strong and determined will. For instance, she was much attached to a member of the firm of lawyers who had done her legal business for many years, and desired to make a bequest to him, which he declined, but, when he requested her to bequeath a certain amount to the public library of the city of Los Angeles, she peremptorily refused, because she thought that in certain matters the city had treated her very unjustly. There were many other incidents in proof which present cumulative evidence of her mental competency; and it is beyond doubt that the evidence touching her mental condition at the times of the testamentary acts clearly shows her testamentary capacity at those times.

A clear case of the testamentary capacity of the deceased at the very time of the execution of the will and codicil having been made by the evidence of the appellants above noticed, the question is: Did the respondents introduce evidence so inconsistent and contradictory of that introduced by appellants as to protect the verdict of the jury by the shield of the doctrine of "conflicting evidence"? We think not. In the first place, there is no contradiction of the direct testimony of the numerous witnesses who knew the deceased, and saw and conversed with her during her last illness, that, in their opinion, she was of sound mind. It is a remarkable circumstance that, although respondents examined about 30 witnesses, many of whom were intimate acquaintances of the deceased, none of them were asked by respondents if, in their opinion, she was mentally competent, and none of them testified that she was not. Looking through the evidence, it is apparent that respondents' claim that the deceased lacked testamentary capacity at the date of will and codicil rests almost entirely upon these two facts: (1) That for many years prior to that date she had been addicted to the intemperate use of intoxicating drinks; and (2) that at the time of the execution of said instruments she was suffering from very distressing wounds on her person, caused by a burn, from the effects of which she afterwards died. There is no doubt that, under the evidence, it must be taken as true that at times she drank to excess, and was sometimes greatly intoxicated. As to the extent to which her habit of drinking went, there is a marked conflict of testimony, it

being much more excessive according to respondents' witnesses than as represented by witnesses of appellants. But the jury had the right to accept the testimony of respondents' witnesses on the point. That testimony, however, leaving out of view the contradictory testimony of appellants' witnesses, went no further than this: that for many years the deceased used intoxicating liquors; that she frequently used them to excess; that she was sometimes drunk, when, like other people in that condition, she talked foolishly, but then, when not in that condition, she was, as one of respondents' witnesses said, "perfectly straight"; and that, although an illiterate woman, being unable to read or write, she had ordinary intelligence and shrewdness, and capacity such as an illiterate person may have to do business. Mark Leonard, one of respondents' witnesses, and certainly not an unwilling one, after having testified to her intoxication on certain occasions, said: "She was sober enough to transact business most of the time, but I am only speaking of a few times." William Maxey, another witness for respondents, having testified that he saw her intoxicated on a certain occasion, said: "I used to see Mrs. Wilson quite frequently. I have seen her at times when not under the influence of liquor. When I saw her at her house, I couldn't say that she was under the influence of liquor as far as I could see. I used to see her in town when she was not under the influence of liquor, and I have seen her at times when she was. I have seen her sober. She attended to her business personally,—a great deal of it." Another witness for respondents, Mrs. Blewett, having testified that the deceased "drank pretty often," said: "In the afternoon, generally, she seemed to be more inclined to the effects of it. I know in the forenoon she was always right, but in the afternoon I would often find her asleep. Sometimes, at such times as I would find her asleep, she would be under the influence of liquor." George J. Dalton, a witness for respondents, said: "I have seen her sometimes that I thought she was under the influence of liquor or something else, and other times that she seemed to be perfectly straight." I. W. Hellman, a witness for respondents, testified that he had known her about 25 years, and had done business with her as her banker for a long time, and that she came very frequently to his bank. He further testified as follows: "She was generally sober when she came. Bridget Wilson, though an illiterate woman, was a very bright woman, and a woman of a good deal of business. She talked nicely. Was rather an attractive woman in some respects, in her way of talking." Other quotations of a similar character might be made, but the foregoing are sufficient to indicate the general nature of her drinking habit, and the limitations put upon it by respondents' own witnesses.

Of course, it is possible for long-continued

excessive use of alcoholic stimulants to so permanently impair the intellectual faculties of the person indulging in them as to degrade him or her to the condition of imbecility or mental incompetency to do any legal act. But the question in a case like the one at bar always is, not what might have been the mental condition of the testator at the time of the execution of the will, but what was that condition? While evidence of the condition of the testator's mind both before and after the date of the testamentary act is admissible, yet it is important only as it bears upon that condition at the very time of the execution of the will. It unfortunately is often the case that exceedingly bright and strong-minded people are addicted to the excessive use of alcoholic drinks, and are frequently intoxicated; and to hold that the wills of such persons, although shown to have been executed when they were in full possession of testamentary capacity, can be upset by a jury upon mere proof of such drinking habit, would be to carry the rule of "conflicting evidence" beyond all reasonable bounds. Upon the point of excessive drinking, see *Ayrey v. Hill*, 2 Addams, Ecc. 206; *Peck v. Cary*, 27 N. Y. 9; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391; *Andress v. Weller*, 3 N. J. Eq. 604; *Harmony Lodge's Appeal*, 127 Pa. St. 276, 18 Atl. 10; *Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. 692; *Wheeler v. Alderson*, 3 Hagg. Ecc. 574; *Kahl v. Schober*, 35 N. J. Eq. 461 (in which it is said that "it is familiar law that habits of drunkenness do not of themselves take away a man's capacity to make a will"). Under the circumstances of the case at bar, the testimony of respondents' witnesses as to the use of alcoholic liquors by the deceased is entirely insufficient to justify the finding of the jury that, at the time of the execution of the will and codicil, she was not of sound mind; and the evidence affords no pretense for contending that she was intoxicated at the time of the testamentary acts. Neither does the fact that deceased, at the time of the testamentary acts, was suffering from the injury which afterwards caused her death, afford any sufficient ground for the finding that she was incompetent to make a will at the time the will and codicil were made. A couple of days before the execution of the will, she was badly injured by a fire which occurred in her house while she was beyond doubt in a state of intoxication; and she afterwards died from the effects of the wounds then received. She was badly burned on her thighs, and almost her entire abdomen was blistered, and a spot on it about the size of a silver dollar was burned through the skin. It is possible that these wounds might have had the effect of destroying her testamentary capacity, but the question is, did they have that effect? And the evidence abundantly shows that they did not. A multitude of wills could be conveniently set aside by juries who do not like their con-

tents, and the beneficiaries left without any redress, if mere evidence that a will was made during the last illness of the testator, which might have rendered him incompetent, is a sufficient "conflict" with clear proof that he was competent at the time of the testamentary act to warrant a verdict against the validity of the will. Would mere evidence of old age, which might possibly have so impaired the mental faculties of a testator as to render him incompetent, be sufficient to justify a verdict upsetting his will in the face of clear proof that he was competent at the time of the testamentary act? See *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599, and cases cited in note on pages 61, 62, 1 Jarm. Wills, 6th Ed.

The other arguments in favor of upholding the verdict do not need much notice. It is said that the will was unnatural, because but little was left to the husband of the deceased. This is not the fact if we consider both the will and codicil, which were probated together; but, as was said in *Estate of Langford*, 108 Cal. 624, 41 Pac. 705: "The consideration of the question whether or not a will is 'unnatural'—by which is meant, we suppose, different from what it might have been expected to have been—is of no importance except in a case where there is some evidence immediately tending to show mental incapacity, fraud, or undue influence, in which event it might serve to help out a weak case. * * * A will cannot be upset because, in the opinion of a jury or court, it is unnatural." And in the *McDevitt Case*, *supra*, Temple, C., speaking for the court, said: "Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will, or even a cruel will." However, if a man who had always lived in apparently the most affectionate relations with his family should leave a will in which all his property was granted to strangers, and no reason could be suggested or explanation made why he thus disinherited those near relatives whom he had always seemed to love, this circumstance would certainly tend to show some delusion or alienation of reason at the time of the testamentary act. But it would not be sufficient to overturn the will in the face of clear and plenary proof of full testamentary capacity at the time the will was executed; and it would vanish in the presence of a reasonable explanation of the act, and a clear intent to do it with a full present knowledge of conditions and consequences. In the case at bar the facts are such as to put it beyond the reach of the rule that, under certain circumstances, importance should attach to the consideration that a will was unnatural. Here the deceased and her husband had been for a long time on unfriendly terms. They had frequent quarrels, and she was highly incensed against him for what she believed to be improper relations between him and another woman.

When the will was being drafted, she said that \$50 per month was enough for her husband, and that, if he got any more, "he would only spend it on Eliza Sanchez," and that "he had told her that he would marry Eliza Sanchez before she was cold in the ground." Here, then, the fact that she did not give her husband more is fully and reasonably explained, and affords no evidence of testamentary incapacity; and the case presents no just reasons for a finding that the will was invalid because "unnatural."

Some contention is made that the contents of the will and codicil, considered in connection with two former wills, show mental incapacity. We see nothing in this contention. The deceased had made two former wills, which she had canceled; and the worst that can be said about the contents of those wills is that she a number of times changed some of the beneficiaries, and particularly her residuary legatees. We see nothing extraordinary in this. It certainly affords no evidence of testamentary incapacity. A steady purpose to cut off her husband with a small monthly allowance runs through all these wills, except the codicil in contest. That being her fixed purpose, and having a large estate and no other near relatives, it is not at all strange that she changed her mind as to whom the great residue of her property, remaining after certain legacies, should go. But during her last sickness, and after she had made the will of February 27th, her husband frequently went to see her, and they were often together alone; and it was quite natural that, under these circumstances, her animosity to him should soften, as it evidently did. So, with full knowledge of the consequences of the provisions of the codicil, which were explained to her by the lawyer who drafted it, although she apparently had such knowledge before the explanation, she, by that instrument, disposed of only a part of her estate, and knowingly left the greater part to go to her husband by operation of law.

There are no other suggestions made in the interest of respondents which we deem it necessary to notice. Looking through the entire record, we are forced to the conclusion that there is not sufficient evidence to support the verdict; and that the case presents another instance of a jury being, insensibly perhaps, carried away from the real issues legitimately before them by the notion that the will was not such as in their opinion it ought to have been, and therefore should be set aside.

There are one or two other points made by appellants which, perhaps, need notice. We do not think that the court committed any error of which appellants can complain by ordering the contests to be tried together. They were proponents of the will and codicil, and bound to maintain them against all attacks; and, if the contestants were willing to proceed together, there were no just

grounds upon which appellants could object. Whether or not the contestants could have rightfully demanded separate trials is a question not before us.

The court did not err in allowing respondents to introduce evidence of the manner in which the deceased acquired property disposed of in the will. It bore in some degree, however remotely, on the question of testamentary capacity. *Estate of Ruffino* (Cal.) 48 Pac. 127.

The instructions of the court as to the general propositions of law applicable to the case were clear and correct; and the contention that there was no evidence at all to warrant some parts of the charge can hardly be maintained.

We do not think it necessary to notice the numerous exceptions to rulings of the court as to the admissibility of various items of evidence, as the questions may not again arise; and there are no other matters which demand further discussion. The judgment and order appealed from are reversed.

I concur: TEMPLE, J.

HENSHAW, J. I concur in the foregoing judgment. I also concur in the opinion of Mr. Justice McFARLAND, saving that I think the amendments to the charge of undue influence, whereby such influence is alleged to have been exercised by Michael and Mary Curran, did not add a new ground of contest. But, as the opinion points out, the evidence fails to sustain the charge of undue influence against any of the persons named.

117 Cal. 298

PRESCOTT v. EDWARDS. (Sac. 241.)
(Supreme Court of California. June 17, 1897.)

DEDICATION—REVOCATION—VENDOR AND PURCHASER—APPURTENANT EASEMENTS.

1. A landowner has a right to revoke an offer to dedicate land for a street where such offer has stood unaccepted for several years, and the land has not been used by the public.

2. Where a vendor marks strips of his land with stakes, and informs the vendee of the abutting land that such strips are streets, and the vendee buys partly because thereof, the vendee takes the right to use such strips as streets, as appurtenant to the land purchased, though his deed described the land by metes and bounds, and made no reference to streets.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by A. A. Prescott against D. P. Edwards. There was a judgment for plaintiff, and a new trial was denied, and defendant appeals. Affirmed.

Charles W. Thomas, for appellant. Philip Bruton, for respondent.

GAROUTTE, J. Upon the face of the complaint, the cause of action and relief sought are not perfectly clear. The trial court held the action to be one to enforce a right of way

by plaintiff, as appurtenant to his land over and across certain parcels of defendant's land, and respondent's counsel agrees with the trial court as to the nature of the cause of action. Upon these parcels defendant constructed houses and fences, which interfered with plaintiff's use thereof as a right of way. Treating the action as of the character denominated, we shall consider the merits of the litigation; judgment having gone for plaintiff, and defendant appealing. Viewing the action from the standpoint of the trial court, there are matters alleged which give it no strength, and may be termed surplusage; but it cannot be said that the court committed any material error in overruling defendant's demurrer pointed at these matters. There are some allegations of the complaint declaring that the defendant dedicated these parcels of land to the public as a highway. As to the fact of dedication, the trial court found that defendant offered to dedicate them to the public as streets, and abandoned them as such to the public, but that the public never accepted such offer of dedication. The court further found that such parcels of land had never been used by the public as highways. Conceding, for the purposes of the case only, that the evidence at the trial was sufficient to support a finding of fact to the effect that an offer of dedication to the public was made, still many years had intervened since that offer was made, and it had not been accepted by the public, either expressly, impliedly, or presumptively. Under such circumstances, the owner, beyond question, had a right to revoke it, and that right he exercised by placing obstructions upon the land, of which acts complaint is now made. This revocation eliminates the whole question of dedication and offer of dedication and abandonment to the public from the case, and plaintiff's right must rest upon other principles. The finding of fact that defendant abandoned these lands to the public as streets is a purely evidentiary matter, tending to show dedication, and adds no strength in support of the judgment. In saying that there is no question of dedication in the case, the term "dedication" is used in its strictly legal sense. In that sense, dedication is a matter purely between the owner and the public. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed. The statement is not absolutely correct, as a legal principle, as may be seen from what has already been said.

Has the plaintiff a right of way over and upon the lands described? The court found that both the plaintiff and his predecessors in title did purchase an interest in said strips of land, which interest was an easement of a right

of way, as appurtenant to the lands now owned by plaintiff. The facts in support of this conclusion may be briefly stated, and the facts we state are largely those drawn from the evidence of plaintiff's witnesses. Wherever contradictions appear in the evidence, that evidence which tends to support the judgment is adopted. Defendant, as the owner of a certain tract of open land near the town of Winters, went upon the ground with his surveyor, and, by stakes marking boundary lines, divided the tract into small parcels. Between these parcels he left two strips of land, respectively 60 by 400 feet. No plat or map of these lands was made at the time, but defendant, accompanied by parties contemplating purchasing, went upon the ground, and there viewed the conditions, as delineated by the stakes. In selling to plaintiff's predecessors, the defendant sold by metes and bounds, at the time of the sale informing the purchasers that the strips marked upon the ground by stakes were streets. The tracts sold adjoined these strips. Thereafter the purchasers entered upon the lands bought, and improved the same by fences and otherwise. The trial court found as a fact that plaintiff's predecessors would not have purchased these tracts if the representations had not been made by defendant that these strips of land were streets. In principle, there can be no difference, as to any question of streets, in the legal status of a purchaser who buys a lot according to a plat made by the owner, whereon streets are delineated, and a purchaser who buys as plaintiff's predecessors bought. This land was platted upon the ground. The plat was as perfect and probably more satisfactory than though pictured upon paper. To be sure, the blocks were not numbered and the streets were not named, as would probably have been the fact if the plat had been transferred to paper. But we do not see that either numbers or names are essential. Again, by the deeds the lands were described by metes and bounds, and no reference is found therein to any street, but at the time of sale the defendant pointed out these strips of land as streets, and the land sold bordered on such strips. The purchaser's condition was thus the same as if the land had been sold by a recorded or unrecorded plat. Under the circumstances we have depicted, it would be a gross injustice for the owner to deprive a purchaser of the privilege of using such strips of land as streets, and an injustice which the law does not countenance. While the case, in its facts, is out of the ordinary, upon principle it is analogous, as we have shown, to all those cases where plats have been used in the making of sales; and we know of no case of that kind where relief has been refused when sought in courts of justice. While courts may not all have agreed upon the legal principle to be invoked in administering relief, yet the result has always been the same,—relief has always been granted. Dedication is but a phase of estoppel. In speaking of dedication of land

to public use, Herman, in his work on Estoppel (section 1141), says, "It does not operate as a grant, but is in the nature of an estoppel in pais, which debars the owner from recovering it back." And the decisions of this court where it is declared that, as to the purchaser of lots adjoining platted streets, such streets are dedicated by the owner, mistake the controlling doctrine in form, rather than in substance; for it is the doctrine of estoppel in pais that gives the vendee his remedy, and prevents the practice of injustice by the vendor. In *Grogan v. Town of Hayward*, 6 Sawy. 498, 4 Fed. 161, Justice Field, in speaking as to the respective rights of the public and a purchaser by a plat, said: "In the one case, the acceptance completes the transfer of the property or easement in it from the owner to the public; in the other case, the contract with the owner estops him from asserting any interest except in common with the purchasers from him." Again: "The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the land, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an ample covenant that subsequent purchasers should be entitled to the same rights." This principle is reiterated in *People v. Reed*, 81 Cal. 78, 22 Pac. 474. In *Schmitt v. San Francisco*, 100 Cal. 303, 34 Pac. 961, this court said: "In other words, if the dedication has not been accepted or the property used by the public, it is purely a question of estoppel in pais. If no one has acted upon the offer in such a mode that they would be injured by the revocation, the owner may revoke the dedication, even though it be an actual dedication, and not a mere offer." It is plain that the word "dedication," as here used, only implies the doing of all those acts by the owner which leave nothing to be done to perfect a complete and perfect dedication save an acceptance of some kind upon the part of the public. In the present case these strips were outlined upon the ground, and, at the date of the purchase, were declared by the owner to be streets. The right to use them as such formed part of the consideration moving to the vendee for the purchase, and such right of use became appurtenant to the land granted. The owner declared to the purchasers that the parcels were streets, the purchasers acted upon such declaration, and as to such purchasers those parcels are streets. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

5 Cal. Unrep. 707

PURSER v. CADY. (Sac. 183.)

(Supreme Court of California. June 17, 1897.)

EXECUTION SALE—TITLE OF PURCHASER—REVERSAL OF JUDGMENT—LIEN OF JUDGMENT.

1. Plaintiff claimed title to certain land under execution sale and sheriff's deed to his grantors. After such sale the judgment was reversed in the supreme court as far as it awarded counsel fees, but was in all other respects affirmed. *Held* that, since no order for the restitution of the property sold was ever made, as provided by Code Civ. Proc. § 957, plaintiff's title acquired by the execution sale was not affected by such reversal.

2. Where judgments are rendered foreclosing liens for labor, the liens relate back to the time when the labor for which they were claimed commenced, and the deeds executed in pursuance thereto take effect by relation to the time the liens attached.

3. In order to recover possession of property purchased at execution sale, it is necessary to introduce in evidence the judgment as a basis of the execution.

Commissioners' decision. Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Edward T. Purser against Frank P. Cady. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodwin & Goodwin, for appellant. L. A. Shinn, for respondent.

BELCHER, C. The property involved in this case is situated in Lassen county, and described as that certain storage reservoir known as "Ball's Canyon Reservoir," or "Ward's Lake," located upon certain described sections of land, and a canal leading from said reservoir in an easterly direction to or near the town of Amedee, and known as the "Eagle Lake Company Canal." The action was commenced April 3, 1895, and it is alleged in the complaint that the plaintiff is the owner, in possession, and entitled to the possession of the said property, and of all water, water rights, and appurtenances connected therewith; that defendant threatens and intends wrongfully and forcibly to take possession of said property, and to deprive plaintiff of the use thereof, and will do so unless restrained by an order of the court, to plaintiff's irreparable damage; and that defendant is insolvent, and unable to respond in damages, wherefore judgment is asked that defendant be perpetually enjoined from entering upon, taking possession of, or in any way interfering with the said property. Defendant answered, denying each allegation of the complaint, and by way of cross complaint alleged that he was, and ever since the 24th day of August, 1894, had been, the owner of the said reservoir and canal, and asked the court to quiet his title thereto as against the claims of the plaintiff. Plaintiff answered the cross complaint, denying all of its allegations, and again setting up title in himself. The issues raised by the cross complaint were first tried, and as the result of the whole trial the court found all the facts in favor of the plaintiff, and on July

12, 1895, gave judgment as prayed for in the complaint. From that judgment the defendant appealed, and has brought the case here on a bill of exceptions.

At the commencement of the trial it was stipulated that both parties claimed title to the premises from a common source, the Eagle Lake Land & Irrigation Company, a corporation. To establish his title, the defendant relied on a judgment recovered by him against the said corporation in the superior court of Lassen county on June 13, 1893, upon a money demand; an execution issued on the judgment on January 25, 1894, and a sale thereunder on February 23, 1894, at which he was the purchaser, and a sheriff's deed executed to him on August 24, 1894. To establish his right to the property the plaintiff relied upon the following three sources of title: (1) Two judgments recovered in the superior court of Lassen county on February 5, 1894, by T. C. Riggs and J. P. Keener against the said corporation, foreclosing alleged liens for labor performed by the plaintiff in the actions on the said reservoir and canal during the years 1892 and 1893; orders of sales issued on the said judgments, and sales thereunder on March 24, 1894, at which Riggs and Keener were the purchasers; two sheriff's deeds to the purchasers, executed October 2, 1894; and conveyances of the said property subsequently made by Riggs and Keener to the plaintiff here for the consideration of \$450 paid to each of the grantors. (2) A decree of foreclosure rendered December 4, 1894, in an action commenced March 26, 1894, in the superior court of Lassen county by the plaintiff herein against the said corporation, the defendant, Frank P. Cady, and others, to foreclose a mortgage upon the said reservoir and its appurtenances, executed on May 24, 1892, by the corporation to the plaintiff, to secure payment of its promissory note for \$6,800, of the same date; an order of sale on the said decree issued December 5, 1894, and a certificate of sale showing plaintiff to be the purchaser of the property, dated January 7, 1895. (3) A decree of foreclosure, rendered May 1, 1894, in an action commenced December 15, 1893, in the superior court of Lassen county by the plaintiff herein against the said corporation, the defendant, Frank P. Cady, and others, to foreclose a mortgage upon the Leavitt irrigation system, executed August 2, 1892, to secure payment of certain promissory notes; an order of sale and a deed of the property executed to the plaintiff herein before the commencement of this action by the commissioner duly appointed to make the sale.

The finding of the court that plaintiff was in possession of the property in controversy is not questioned, and there was evidence tending to show that his possession commenced, with the permission of the owner, early in 1893. Appellant, however, contends that none of the other findings in favor of the plaintiff were justified by the evidence. The first questions, then, to be considered

relate to the Riggs and Keener judgments and the deeds executed in pursuance of sales thereunder, through which plaintiff claims title. It appears from the record that on February 1, 1895,—a year less four days after the judgments were entered,—the defendant corporation caused to be served and filed notices of appeal therefrom to the supreme court; and our attention is called by counsel to the fact that in December following the judgments were reversed in so far as they awarded counsel fees, and declared that the plaintiff was entitled to a lien upon the property of the defendant, and directed a sale of such property, but in all other respects affirmed. *Keener v. Irrigation Co.*, 110 Cal. 627, 43 Pac. 14; *Riggs v. Irrigation Co.* (Cal.) 43 Pac. 15. Did these reversals have the effect to destroy the title which had apparently vested in the plaintiff more than a year before the decisions were rendered? The judgments were regular in form, directing the sale of the property to satisfy liens which were adjudged to exist, and were rendered by a court having jurisdiction of the parties and the subject-matter, and at the time of the commencement of the actions notices of lis pendens in due form were recorded in the office of the county recorder.

The Code of Civil Procedure contains the following provisions:

"Sec. 945. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant," etc.

"Sec. 957. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale."

In the cases referred to it does not appear that any order for the restitution of the property sold was ever made by the appellate court or the superior court. The purchaser's title to the property was, therefore, not affected by the reversals, and appellant's remedy, if any he had, was an action for damages. *Reynolds v. Hosmer*, 45 Cal. 616; *Withers v. Jacks*, 79 Cal. 297, 21 Pac. 824; *Waterworks v. Drinkhouse*, 95 Cal. 220, 30 Pac. 218. The liens foreclosed related back to the time when the labor for which they were claimed commenced (*Association v. Wagner*, 61 Cal. 349; *Insurance Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758), and the deeds executed in pursuance of the judgments of foreclosure took effect by relation at the time

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the liens attached (*Freem. Ex'ns*, § 333; *Sharp v. Baird*, 43 Cal. 577; *Porter v. Pico*, 55 Cal. 165; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52). Appellant had at least constructive notice of the liens claimed at the time of his purchase, and he was, therefore, not a bona fide purchaser without notice. "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment, for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser." *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641; *Willhoit v. Lyons*, 98 Cal. 409, 33 Pac. 325.

There was no error in admitting in evidence the Riggs and Keener judgments. "For the purpose of recovering possession of the property purchased at a sale under such execution, it is necessary to introduce in evidence the judgment as the basis of the execution, and, if the enforcement of the judgment has not been stayed, the fact that an appeal therefrom has been taken does not prevent the judgment from being received in evidence and considered." *Water Co. v. Swartz*, 99 Cal. 284, 33 Pac. 878. There was evidence that defendant said he had been advised to take possession, if need be, with a shotgun, and that he was going to take possession. Under the circumstances shown, plaintiff was clearly entitled to institute and maintain an action to enjoin defendant from entering upon and taking possession of the property. In view of what has been said, it is unnecessary to consider the plaintiff's second and third sources of title. We find in the record no valid ground for reversal, and advise that the judgment be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

117 Cal. 281

In re WILMERDING'S ESTATE. (S. F. 375.)

(Supreme Court of California. June 17, 1897.)

INHERITANCE TAX—DISCRIMINATION—CONSTITUTIONALITY.

1. St. 1893, p. 193, establishing a collateral inheritance tax, is not unconstitutional, as a discrimination between persons standing in the same relation, merely because it does not tax inheritances by brothers and sisters of deceased, and does tax inheritances by children of such brothers and sisters, while Civ. Code, § 1386, provides that in certain cases the children of deceased brothers and sisters may take by representation, since such regulation of descent is not a classification for the purpose of taxation.

2. St. 1893, p. 193, establishing a collateral inheritance tax, is not unconstitutional because it exempts inheritances not exceeding \$500; the tax being on the right of succession, and hence

not within the constitutional requirement that property shall be taxed according to its value.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings for the valuation of the estate of Wilmerding, deceased, for the imposition of the collateral inheritance tax. From an order for the payment of such tax, the executors appeal. Affirmed.

Edward J. McCutchen (Page McCutchen & Eells, of counsel), for appellants. W. S. Barnes (Elliott McAllister, of counsel), for respondent.

HARRISON, J. The decedent by his last will and testament left various legacies to his brothers and sisters, and also a legacy of \$200,000 to his nephew, Henry W. Payne. Upon proceedings therefor in the superior court of the city and county of San Francisco, by virtue of the act commonly known as the "Act Providing for a Collateral Inheritance Tax," passed March 23, 1893 (St. 1893, p. 193), it was determined that the value of the legacy was \$148,999.34; and thereupon the court made an order directing the executors to pay to the treasurer of the city and county the sum of \$7,444.96, as and for the tax upon this legacy. From this order the executors have appealed.

The act under which the order appealed from was made is entitled "An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of the proceeds." Section 1 of the act declares: "After the passage of this act all property which shall pass by will, or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state * * * to any person or persons * * * 'other than to or for the use of his or her father, mother, husband, wife, lawful issue, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of California, and any lineal descendant of such decedent born in lawful wedlock, or the societies, corporations and institutions now exempted by law from taxation' * * * shall be subject to a tax of five dollars on every hundred dollars of the market value of such property, to be paid to the treasurer of the proper county, as hereinafter defined, for the use of the state; and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed; provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." Similar statutes have been enacted in other states, and, with the exception of New Hampshire, have been sustained by the courts in those states upon the ground that the charge thus imposed is in the nature of an excise tax, or a tax upon the right of

succession, and is within the constitutional power of the legislature. *State v. Hamlin*, 86 Me. 495, 30 Atl. 76; *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512; *In re Hoffman's Estate*, 143 N. Y. 330, 38 N. E. 311; *Strode v. Com.*, 52 Pa. St. 181; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82; *Eyre v. Jacob*, 14 Grat. 422; *State v. Alston*, 94 Tenn. 674, 30 S. W. 750. See, also, *U. S. v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073. The principles upon which the tax is upheld have been so fully and clearly elaborated in the above cases that it is necessary to do no more than refer to the cases. The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion.

The appellants do not contest the power of the legislature to pass an act providing for a tax upon inheritances and legacies, but they contend that the provision of the act under consideration, by which the tax is imposed upon the inheritances of the children of a deceased brother or sister, while the inheritance of the surviving brothers and sisters is exempted from the tax, contravenes the constitution of this state, in that it is applicable only to a special class of persons, arbitrarily selected from others standing in the same relation to the subject of the law. In support of this contention they rely upon the fact that by subdivision 3 of section 1386 of the Civil Code the legislature has provided that in cases of intestacy the estate of the decedent shall in certain instances go "in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation"; and they argue that the legislature has thus created an inheritable class, all the persons of which stand in the same relation to the estate of the decedent, and that, so long as this classification remains upon the statute book, there can be no discrimination in the burdens imposed upon the members of this class. The appellants do not contend in their argument that there is any limitation upon the power of the legislature to impose a tax upon a legacy, without regard to the kinship of the legatee to the testator, but their argument is directed to the want of power in the legislature to make a discrimination in the successions to those dying intestate. Section 1386, Civ. Code, does not purport to be legislation for the heirs of an intestate, or to make a classification of the

heirs with reference to any legislative object. The subject-matter to which the legislation is directed by this section, and for which the section was enacted, is the estate of a person dying intestate, and the designation of the persons who shall succeed thereto, under the various conditions liable to exist at his death. The fact that the children of a deceased brother or sister are, in one of these conditions, placed in the same subdivision with the surviving brothers and sisters, is due to the form in which the section is arranged, and is merely incidental to its purpose. By the provisions of the second sentence in subdivision 2 of the section, the children of a deceased brother or sister, under certain contingencies, succeed to the estate, in connection with a surviving husband or wife, and the same argument which is presented by the appellants herein would make them members of another class; thus showing that it was not the intention of the legislature, by the section, to classify the successors to an estate, but merely to declare the individuals upon whom the title would devolve under different conditions. If the legislature had made a special subdivision of the section, in which provision was made for the conditions under which the children of a deceased brother might inherit, there would have been room for the argument of the appellants; but the section must be read as a whole, and, when it appears therefrom that there are several contingencies upon which their right to inherit arises, the argument for a classification of heirs falls to the ground. There is, however, no necessary connection between inheritance and taxation, and in making laws relating to these two subjects the legislature is not required to consider them together. Having plenary authority in reference to each, it is not required to shape its legislation concerning one in the form or with any regard to the manner in which it has shaped it concerning the other. In determining the mode in which the estate of one dying intestate shall be distributed, or designating the persons who shall succeed to his estate, the legislature did not in any respect impair its right to distribute the burdens of taxation, or to determine the classes by which that burden shall be borne. When that body determined to impose a tax upon the right of inheritance, it was not limited in the imposition of such tax to the inheritance of any particular heir, nor was it required to impose the tax in accordance with the mode in which it had provided for the succession to the estate. The fact that, in making provision for succession, it has placed relatives of different degrees to the deceased in the same class of successors did not require it to observe the same classification in legislating for a purpose entirely distinct from inheritance. Under its plenary power to designate the kindred of the decedent upon whose right of succession it was proper to impose a tax for the privilege of enjoying this right, it had the right to select

the nephews of the decedent, and was not precluded from so doing by the fact that it had declared that in certain contingencies they should share in the estate equally with a surviving brother. If the legislature had provided that the inheritance of every heir of the decedent except those within the third degree should be subject to the tax, there would have been no room for the contention of the appellants. Such classification would have been in accordance with a natural distinction, and upon a matter in which classification is permissible. The act is none the less valid because, instead of designating the class of persons to whom it applies, it excludes from its operation those that do not fall within that class.

It is also contended that the act is invalid for the reason that it exempts from the tax "estates which may be valued at a less sum than five hundred dollars." The estates which are thus exempt are not the estates of the decedents which are less than \$500 in value, but the "estates" taken by inheritance or devise which, under the provisions of the act, are "valued" at less than that sum. In *re Hoffman's Estate*, 143 N. Y. 327, 88 N. E. 311. As this tax is not upon property, but upon the right of succession, the constitutional provision that all property shall be taxed according to its value is inapplicable. The right of the legislature to impose an excise tax includes the right to select the subjects upon which it shall be imposed. In the law under consideration, that body has determined that it is in the public interest that this tax shall be imposed upon the inheritances which exceed \$500 in value. There is no constitutional requirement that it shall be imposed upon every inheritance, and the judgment of the legislature in that respect is not open to review by the courts. It may have considered that, as the tax upon an estate of less than that amount would be greatly absorbed in the expense of valuing it as required by the act, it was wise to provide for the exemption. Similar exemptions have been made in the statutes of other states, and we are not aware that they have ever been held invalid. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 712
SPAULDING v. MAMMOTH SPRING MIN.
CO. et al. (Sac. 186.)

(Supreme Court of California. June 17, 1897.)
LIEN FOR WAGES — EMPLOYEES OF CORPORATIONS.

Plaintiff alleged that between June 1 and December 27, 1893, he performed 170 days' labor on the mine of defendant corporation, that said services were worth \$200 per month, and that a balance of \$1,200 was due him. A second count alleged that about March 1, 1893, he was employed by defendant at \$200 per month; that from said date until December 27, 1893, he labored on defendant's mine 9½ months; and that he had received \$700, leaving a balance of

\$1,200. A third count was on a claim assigned to him for services performed by one D., and alleged that such services were reasonably worth \$3 per day. The court found that plaintiff's services were reasonably worth \$150 per month, and that D.'s services were reasonably worth \$3 per day. *Held*, that plaintiff was not entitled to a lien under St. 1891, p. 195, providing for the payment of wages of laborers employed by certain corporations, and creating a lien therefor that can be enforced only when plaintiff shows that the wages were payable weekly or monthly.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Action by E. Spaulding against the Mammoth Spring Mining Company and J. D. Reilly to recover of defendant company money due plaintiff for services, and to establish a lien therefor. Pending the action, plaintiff died, and H. Spaulding, administrator of his estate, was substituted as plaintiff. There was a judgment against defendant company by default. From that portion of the judgment declaring plaintiff entitled to a lien, and that such lien is superior to an attachment lien of defendant Reilly, the latter appeals. Reversed.

Frank R. Wehe, for appellant. F. D. Soward, for respondent.

HAYNES, C. On December 18, 1893, J. D. Reilly, the appellant in this case, commenced an action against the Mammoth Spring Mining Company to recover the sum of \$428.53 due him from said corporation for timber theretofore sold and delivered to said corporation, and on the same day caused a writ of attachment to be issued in said action, which was levied upon all the property of the corporation. At and prior to the date of said attachment, said corporation was indebted to E. Spaulding and Daniel Dever for labor performed upon the mining property of said corporation. Dever assigned his claim for said labor to Spaulding, and on January 2, 1894, E. Spaulding commenced an action against the corporation to recover the same, and made appellant, Reilly, a party defendant. Pending the suit, E. Spaulding died, and his administrator was substituted as plaintiff. The action of Spaulding against the corporation was brought under an act entitled "An act to provide for the payment of the wages of mechanics and laborers employed by corporations," approved March 31, 1891 (St. 1891, p. 195), and which purports to create a lien in favor of laborers under the circumstances therein stated. Reilly was made a defendant for the purpose of determining the priority of liens. The corporation made default. Defendant Reilly moved to strike out a portion of the complaint, which motion was denied, and he excepted. A demurrer interposed by him to the complaint was also overruled, and he thereupon answered. This cause and the case of Reilly against the corporation were tried at the same time by the court without a jury, and judgments were entered in each case against

the corporation. The findings in this case show all the facts necessary to establish Reilly's attachment lien, and also find that the plaintiff is entitled to a lien under said statute, and that the lien of the plaintiff is superior to that of appellant, Reilly, and should be first satisfied out of the property of the corporation. Appellant contends, "as it is not alleged or found that the wages earned were due weekly or monthly, that that portion of the judgment awarding counsel fees, and decreeing that plaintiff is entitled to a lien as against appellant, should be reversed." As to the labor of the plaintiff, it was alleged that between the 1st day of June and the 27th day of December, 1893, he performed 170 days' labor upon the mine of the defendant corporation, and that his said services were reasonably worth \$200 per month, and claiming a balance of \$1,200. A second count alleged that on or about the 1st day of March, 1893, he was employed by the defendant corporation at the wages of \$200 per month, and that from said 1st day of March, 1893, until the 27th day of December, 1893, he labored upon defendant's mine $9\frac{1}{2}$ months, making the aggregate amount earned \$1,900, admitted a payment of \$700, leaving a balance of \$1,200. The third cause of action was upon the claim assigned to the plaintiff for services performed by Dever, and as to those services it was alleged that they were reasonably worth \$3 per day. The court found that the services of the plaintiff were reasonably worth \$150 per month, and that the services of Dever were reasonably worth \$3 per day. Under these allegations and findings, the plaintiff is not entitled to a lien under said statute. In *Keener v. Irrigation Co.*, 110 Cal. 627, 43 Pac. 14, this statute will be found set out in the opinion, at page 630, 110 Cal., and page 14, 43 Pac., and it was there said: "By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability towards all the mechanics or laborers whom they may employ, or to create a right in favor of those of its employes whose wages are not earned or payable by the week or by the month. As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were due weekly or monthly." That case was decided in department 1, and a hearing in bank was denied. In *Ackley v. Mining Co.*, 112 Cal. 42, 44 Pac. 330, the same question was again presented, and again decided in the same way in department 2. Hence the question has been considered by both departments. And in the later case *Keener v. Irrigation*

Co. was followed and approved, and we see nothing in the argument of respondent which would seem to require a reconsideration of the former decisions. The findings in this case clearly show that there was no agreement under which either Spaulding or Dever could be said to have been working by the week or the month, or that their wages, however earned, were payable either weekly or monthly.

In view of the above authorities, it is not necessary to consider the point made by appellant that the act of 1891, under which respondent claims a lien, is unconstitutional, nor is it necessary to notice either of the rulings above referred to. We advise that the judgment in favor of the plaintiff for the amount found due for labor, to wit, \$1,715.43, and costs, \$33.90, be affirmed, and that that portion of the judgment awarding counsel fees to the plaintiff, and declaring that plaintiff is entitled to a lien upon the property described in the complaint and judgment, and directing the sale of said property, be reversed, and that appellant recover his costs on this appeal.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment in favor of the plaintiff for the amount found due for labor, to wit, \$1,715.43, and costs, \$33.90, is affirmed; and that portion of the judgment awarding counsel fees to the plaintiff, and declaring that plaintiff is entitled to a lien upon the property described in the complaint and judgment, and directing the sale of said property, is reversed; and it is ordered that appellant recover his costs on this appeal.

117 Cal. 257

NIOSI v. EMPIRE STEAM LAUNDRY et al.
(L. A. 225.)

(Supreme Court of California. June 16, 1897.)

REVIEW ON APPEAL—TRIAL—VIEWING PREMISES—
ACCIDENTS AT STREET CROSSINGS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. Objections to rulings not set out in the statement, with the exceptions thereto, cannot be considered.

2. There is no abuse of discretion in refusing to let the jury view the place where the accident occurred, such place being on a well-known street, and there being nothing complicated in the facts nor obscure in the locality.

3. One who walks along the sidewalk of a street bisected by a public alley is bound, before crossing the alley, to look both ways to avoid injury from vehicles.

4. Plaintiff, who had stopped on the curb of a sidewalk at the entrance of a public alley to watch a fight, stepped off the curb, and, not heeding the shouts of the driver, was struck by a wagon, which was being slowly driven into the alley. *Held*, in an action to recover for the injury, that an instruction that defendant would not be liable for inevitable accident occurring without his fault was warranted.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Rosario Niosi against the Empire Steam Laundry and another to recover for personal injuries. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Murphey & Gottschalk, for appellant.
Chapman & Hendrick, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying the plaintiff a new trial. Defendant Frank Staut was the driver of a wagon of the defendant Empire Steam Laundry. Plaintiff charged that he was injured by the negligence of the defendant laundry and its employé, Staut, under the following circumstances: About the hour of noon he was walking on the north sidewalk of Second street, in the city of Los Angeles, going east, to his home. Mott alley, a public highway of the city of Los Angeles, extends from First street to and across Second street, and bisects the block upon which plaintiff was walking. The roadbed of Mott alley is about six inches lower than the curb of the sidewalk upon Second street. Plaintiff had stepped from this curb into Mott alley when a wagon of the defendant laundry driven by Staut struck him, fractured his kneecap, and subjected him to grievous bodily injuries. The defendants denied negligence upon their part, and pleaded affirmatively the contributory negligence of the plaintiff. The verdict of the jury upon the evidence was in favor of the defendants. Without entering upon an extended presentation of that evidence, it may be said that while, as is usual in such cases, there was a conflict of testimony, yet the verdict of the jury was fully warranted. It appeared that Niosi's attention when he had reached the curb was attracted by two newsboys who were fighting in the alleyway. He stopped, and watched them. Then, either with his attention still directed to the boys, or, in any event, without exercising proper circumspection and care, he stepped into the alleyway, when his leg came in contact with the wheel of the laundry wagon being slowly driven therein from Second street. The driver of the wagon appeared to have been watchful, and to have shouted to the plaintiff when he saw that the accident was imminent, but the plaintiff either could not or did not heed the warning.

Appellant contends that it was error for the court to refuse to permit the jury to view the premises. There is no specification of error in the statement in this regard, nor yet does the statement contain the alleged ruling of the court and the exception thereto, which alone would save the point for consideration by this court. Moreover, the accident occurred upon a well-known street of a populous city. There was nothing intricate or complicated in the facts nor obscure in the place of the happening, and we can discern no abuse of discretion in the refusal.

The court instructed the jury as follows: "As already stated, ordinary care or its oppo-

site, neglect, are not absolute terms, but they have reference to times, places, and circumstances, and where a foot traveler is crossing a street where vehicles are numerous it is his duty to look both ways before crossing, and he is bound generally to the exercise of the same care to avoid injury that the drivers of the vehicles are to prevent injuring him." Appellant complains that he was not upon the street at the time of the injury, but was upon a sidewalk; but the sidewalk was interrupted by Mott alley, a public highway upon which vehicles were frequently driven. The roadway of Mott alley along the line of the sidewalk of Second street was necessarily a part of the public highway for vehicles, as much so as are the street crossings of any of the main thoroughfares. The attack upon the proposition of law embraced in this instruction is no better founded. It is well settled by both English and American cases that, while it is the duty of the driver of a vehicle to look out for foot passengers, it is equally the duty of the foot passenger to use care before entering upon a highway where vehicles frequently pass and repass, to see that he is not in immediate danger from the near approach of any of them. Thus it is said by Pollock, C. B., in *Williams v. Richards*, 3 Car. & K. 81: "It is the duty of persons who are driving over a crossing for foot passengers which is at the entrance of a street to drive slowly, cautiously, and carefully, but it is also the duty of a foot passenger to use due care and caution in going upon a crossing at the entrance of a street, so as not to get among the carriages, and thus receive injury." Again, it is said by Erle, C. J., in *Cotton v. Wood*, 8 C. B. 568: "It is as much the duty of foot passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot passengers." In *Barker v. Savage*, 45 N. Y. 191, it is declared: "To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without looking in both directions along the street to ascertain whether any are approaching, and, if so, their rate of speed, and how far from the crossing, would not only be the omission of reasonable care for one's own safety, but an act of rashness. * * * Neither footmen nor teams have any right of way superior to the other. They each have the right in common and equally with the other, and in its exercise are bound to exercise reasonable care for their own safety, and to avoid doing injury to any others who may be in the exercise of the equal right of way with them."

Complaint is also made of certain instructions given by the court announcing the well-settled rule of law that for inevitable accident occurring when one is engaged in a lawful business, and in the exercise of due care, damages may not be recovered. It is contended that there is nothing to disclose that the accident was inevitable, and occasioned with-

out fault. To the contrary, we think that under the facts of the case the jury might reasonably have believed that the injury was the result of a casualty occasioned without fault, and it was to this theory of the case that the instruction was addressed. Upon the whole, we can see no just cause for complaint of the action of the court, either in giving or refusing instructions.

The affidavit of newly-discovered evidence upon motion for a new trial, even if properly here considered, discloses that the new-found evidence was merely cumulative upon matters fully presented to the jury. The judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

117 Cal. 244

PEOPLE v. BALDWIN. (Cr. 236.)

(Supreme Court of California. June 16, 1897.)

RAPE — EVIDENCE — HARMLESS ERROR — INSTRUCTIONS — CROSS-EXAMINATION — SELECTING NAMES FOR JURY — ORDINANCE — VALIDITY.

1. On a trial for rape committed on a child, testimony of a physician that it would be physically impossible to commit the act in the manner described by the prosecutrix was erroneously excluded.

2. The fact that defendant was convicted of the lesser crime of assault with intent to commit rape did not cure the error, since the admission of such evidence would have tended to discredit prosecutrix's whole testimony, and thereby raise doubts as to defendant's guilt of any crime.

3. It was proper to show by a physician that the child's condition might have been produced by disease, or other means than that testified to by her.

4. It was proper to ask a physician as to how long the evidence of such an act could be detected on the clothing.

5. In such prosecutions the widest latitude compatible with the rules of evidence should be allowed defendant in cross-examining the state's witnesses.

6. Selection of names for the jury may be made at an adjourned meeting of the supervisors, at which all are present.

7. The introduction of an ordinance from the record book of the board of supervisors, with the usual recitals as to its adoption, together with evidence that the board had acted in pursuance thereof, is prima facie proof that it was legally adopted, though there be no record evidence that such ordinance was ever published as required by law.

8. An order designating the number of jurors to be selected by the board of supervisors, if made in open court and entered in the minutes, need not be signed by the judge.

9. It was within the sound discretion of the trial court to admit the testimony of the prosecutrix, against defendant's objection that she was incompetent by reason of her youth.

10. Nor was it necessary for the judge to re-examine the prosecutrix to determine her competency in such respect: an examination for that purpose having been made at a previous trial.

11. Evidence of prosecutrix's mother that her child made complaint immediately on reaching home after the alleged rape, and that witness examined her condition, was admissible, together with the result of such examination.

12. In a trial for rape upon a minor under the age of consent, the court was justified in referring to prosecutrix's age in his charge; defendant having made no attempt to refute the state's evidence in respect thereto.

13. In a prosecution for rape, it was improper for the court in its charge to suggest that, under the evidence, there could not be a conviction of an attempt to commit the crime, and that, if the evidence satisfied the jury that an attempt was made, it must, as well, satisfy them that it was accomplished.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

George Baldwin was convicted of assault with intent to commit rape, and from the judgment and an order denying a new trial he appeals. Reversed.

McKelvey & Bowes, for appellant. W. F. Fitzgerald, Atty. Gen., and H. C. Carter, Dep. Atty. Gen., for the People.

VAN FLEET, J. Defendant was charged with rape committed upon a minor under the age of consent. He was convicted of assault with intent to commit rape, and appeals from the judgment and an order denying him a new trial.

1. The prosecuting witness was a young girl between eight and nine years of age. Her story as to the circumstances of the offense was, briefly, that in returning from school in the country district where she lived, in company with a little brother and another child companion, she took a short cut through defendant's premises; that the defendant, who was in his milk house at the time, stopped her, and induced her to go into the building by giving her some pretty shells, and there committed the act while she "was standing up, * * * standing in the middle of the floor," and the defendant was "kneeling down." The defendant, a married man, denied positively committing the act charged, or any other improper act towards the child. His statement was that he was standing at the well when the little girl came past, crying as if in pain or distress; that he spoke kindly to her, and gave her a drink of water and some shells that were there, when she immediately passed on towards her home; that he did not put his hands upon her in any way. In support of his defense the defendant called Dr. Ball, a physician, and was proceeding to show by the witness that it would have been physically impossible for a man to commit the act complained of, or produce the conditions found on the person of the child, in the manner and under the circumstances described by her. This evidence was excluded by the court as irrelevant and immaterial. We think the evidence was both relevant and material, and its exclusion error. The respondents in fact have made no effort in their brief to sustain the propriety of the ruling. Such evidence, if believed, would certainly have had a logical tendency not only to refute the testimony of the girl in a most material feature, but to sustain that of the defendant, and support the theory of the latter that the condition in which the child's person was found had been produced by some other means than that claimed by her, or at least by another agency

than that of the defendant. Nor was the error rendered harmless by the fact that the defendant was convicted only of the lesser offense of an assault with intent to commit the act, since, had the evidence been admitted, it might well have satisfied the jury that the girl had willfully misstated the circumstances of the alleged act,—a result which would have had a legitimate tendency to discredit her entire statement, and thus possibly have given rise in the minds of the jury to a reasonable doubt of the defendant's guilt of any offense. The court should also, for similar reasons, have admitted the evidence of the same witness as to whether the child's condition might not have been produced by disease, or other means than that testified to by her, and as to how long the evidences of such an act could be detected on the clothing. These inquiries were material and relevant to the issue before the jury, and the evidence was competent.

2. We think the court also erred in restricting defendant's right of cross-examination in several instances,—notably, in the examination of the girl complainant with reference to the circumstances of the alleged offense, and in the examination of her mother as to when she had examined her child's person previous to the occasion testified to. The testimony is not of a character to invite its recitation, and it is therefore not desirable, nor is it necessary, to go into its details in order to show the materiality of the rulings of the court in this particular. It will be sufficient to say, in a general way, that in a case of this character the very widest latitude compatible with our somewhat technical and restricted rules of evidence should be allowed the defendant in his cross-examination of the witnesses of the people. More especially is this true with reference to the prosecuting witness, and those who, by reason of blood or other circumstance, may be charged with a deep interest in the case. In this class of prosecutions, the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right in an endeavor to maintain his innocence. We think the rulings of the learned judge of the court below in the instances noted, and one or two others observed in the record, transgressed the defendant's rights in this respect.

3. The challenge to the panel was properly disallowed. The statute does not require the selection of names for jury service by the supervisors to be made at either a regular meeting of the board, or a meeting specially called for the purpose; and we perceive no good reason why such selection may not, as in this instance, be made at an adjourned meeting at which all the members were present. The real point of the objection, however, was that the board could not competently meet at all to

make such selection, because the ordinance fixing the date for regular meetings had, it was claimed, never been legally adopted, in that it was not published as required by law. But this objection, assuming it can competently arise, was not borne out by the evidence. The ordinance was produced from the regular record book of the board, with the usual recitals as to its adoption, and it appeared that the board had, ever since its adoption, acted in pursuance of its provisions. There was no direct evidence offered that it had not in fact been duly published. It was simply shown, and in fact admitted by the district attorney, that there was no record evidence in the office of the clerk showing such publication. But this mere silence of the record as to the fact was not sufficient to overcome the presumption of due publication arising from the circumstances, nor put the prosecution to proof of the fact. *Merced Co. v. Fleming*, 111 Cal. 46, 43 Pac. 392. The further ground of the challenge, that the order of court designating the number of jurors to be selected by the board was not signed by the judge, is without merit. It was not required to be so signed. It was made in open court, and entered in the minutes,—a method quite as competent and more usual than having it signed by the judge.

4. We cannot review the discretionary action of the court in admitting the testimony of the prosecuting witness against defendant's objection that she was incompetent by reason of want of age, since there is nothing to indicate any abuse. *People v. Craig*, 111 Cal. 469, 44 Pac. 186. Nor was it necessary that the judge should re-examine the witness to determine her competency; he having made an examination for such purpose at a previous trial of the case. It was only necessary that he should be satisfied of her capacity, and, the objection being based solely on the ground of age, there could certainly be no presumption that she was less competent than on a former occasion. Moreover, the defendant did not ask either that he be permitted to examine the witness further, or that the judge do so.

5. The evidence of the girl's mother that the former made complaint immediately on reaching home, and that the mother examined her condition, with the result of such examination, was all material and competent evidence, and properly admitted. *People v. Stewart*, 97 Cal. 238, 32 Pac. 8. The mother was not asked, nor did she undertake to state in detail, what the child told her, but simply the fact that she complained of the violence done her person.

6. There was no error in the giving or refusing of instructions. Those asked by the defendant on the subject of circumstantial evidence, which were refused, all proceeded expressly upon the assumption that the case of the prosecution rested exclusively upon that character of evidence, which was not true, and the instructions were therefore misleading. There are no others under this head to

which particular reference need be made.

7. The reference to the age of the girl in the charge of the court was, we think, fully justified. The defendant had by his objection to the admission of her testimony expressly assumed, if not conceded, that she was under the age of 10 years, and upon this point there was absolutely no attempt to question or refute the evidence of the prosecution. Under these circumstances, the age of the girl can scarcely be said to have been an issue before the jury.

We think the trial judge should have refrained from this suggestion, made in that part of his charge referring to the offenses included in the information: "I will say here, however, that I do not think, after careful consideration, that, upon the evidence in this case, there could be a conviction of an attempt. If, gentlemen, the evidence satisfies you that an attempt was ever made, it must as well satisfy you that it was accomplished." It is unnecessary to determine whether, under the evidence in this case, this feature of the charge constituted prejudicial error. But that it was a clear transgression of the constitutional inhibition against charging juries on questions of fact, and as such was erroneous, is obvious. Such suggestions, whatever the state of the evidence, are always dangerous, and should not be indulged in. We find nothing further in the record calling for special notice. For the reasons above stated the judgment and order are reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

117 Cal. 315

ORCUTT v. GOULD. (Sac. 275.)

(Supreme Court of California. June 17, 1897.)
DECEDENT'S ESTATE — CHARGING WITH TRUST —
ACTION AGAINST EXECUTOR.

An action will not lie against an executor to have a trust declared against his testator's property for money received by the testator, where the trust fund cannot be identified by showing a separate and independent fund or value readily distinguishable from all other funds; the proper remedy being the presentation of plaintiff's claim to the executor, and suit thereon if rejected.

Department 1. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by Almeda P. Orcutt against E. T. Gould, executor, etc., of H. N. Sherman, deceased, to have a trust declared against the property of defendant's testator. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Frank W. Street, for appellant. F. P. Otis, for respondent.

GAROUTTE, J. Plaintiff, when a child of 11 years, began living with Mrs. H. N. Sherman. At that time the child had \$250

deposited to her credit by her father in a savings bank in the city of Stockton. Thereafter, at various times, Mrs. Sherman persuaded the child to draw the money from the bank in small sums, until finally it had all passed into the possession of Mrs. Sherman. When the plaintiff had arrived at the age of 25 years or thereabouts, Mrs. Sherman died. This action was then brought against her executor for the purpose of having a trust declared against her property for the amount so received by the deceased, Mrs. Sherman, and that such amount be paid from her estate. Judgment was rendered to this effect, and an appeal is now before us.

Upon the facts disclosed by the record, the relief sought cannot be secured. Conceding the existence of a trust, plaintiff's remedy was the presentation of her claim to the executor, and suit thereon if rejected. McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466. The law upon this question of trusts, as involving facts similar to those here disclosed, was laid down in Lathrop v. Bampton, 31 Cal. 17, and, as there laid down, has been approved and affirmed to the present time. McGrath v. Carroll, *supra*; Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536. The present action is one to enforce a trust, and, as said in Lathrop v. Bampton, before the cestui que trust can claim specific real or personal property, "he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form." To justify a recovery, a beneficiary must be able to follow and identify the property, either in its original or substituted form. In speaking of a money trust fund, the court, in the above case, said: "The identity of a trust fund consisting of money may be preserved, so long as it can be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value readily distinguishable from all other funds." In that case the deceased left certain money in addition to other personal property and real estate, and the court held that the money left by deceased could not be impressed with the trust, as the evidence failed to show that it was any part of the trust fund.

In the present case the trustee died, leaving, as shown by the inventory and appraisal, certain real and personal property. This property consisted of a tract of land, a mortgage lien upon real estate, \$400 in money, and household furniture. There is nothing whatever to indicate that the money of the beneficiary ever purchased the land; neither is there any evidence that it passed into the mortgage lien, or was used in the purchase of the furniture. There is also an absolute dearth of evidence as to what disposition was made of plaintiff's money after it came into the hands of the trustee. There is no claim by respondent's counsel that the \$400 left by deceased at her death was any part of the

trust fund coming to her hands 12 or 13 years before that time. If such claim had been made, the evidence would not bear it out. The identity of the \$400 left by deceased is not established by the evidence, and the burden of establishing such identity is upon the plaintiff. For the reasons suggested, we deem it unnecessary to pass upon the remaining assignments of error. The judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

117 Cal. 305

HICKS v. DREW. (L. A. 124.)

(Supreme Court of California. June 17, 1897.)

ATTORNEY AND CLIENT — ACTIONS — DAMAGES — TRIAL — APPEAL.

1. An attorney is not disqualified to appear in a case by the fact that he had a conversation with the adverse party as to the facts, and offered to conduct the case for such party for a certain fee, which offer was not accepted, the conversation being had solely to fix the amount of his fee.

2. The erection of a bulkhead on one's own land, whereby the lands of another are flooded, is not a trespass; and hence an action for damages by such flooding is not within Code Civ. Proc. § 338, subd. 2, providing limitation of actions for "trespass on realty."

3. Under Civ. Code, § 3283, providing that damages may be awarded for detriment resulting after suit brought, a supplemental pleading is not necessary for a recovery for damages accruing after the commencement of the action.

4. A statement by plaintiff's counsel that he desires to limit the proof to damage before the filing of the complaint is not a disclaimer of damages down to the trial, where questions by him as to such subsequent damages are thereafter excluded, because not confined to a time prior to the filing of the complaint, and without reference to the alleged disclaimer.

5. Error in excluding testimony is not cured by the admission of other testimony to the same effect, where all such testimony is taken from the jury by instruction.

6. In an action for damages, benefits received by plaintiff from the act causing the damage should be deducted from the damages.

7. It is not necessary for defendant to plead such incidental benefits.

Department 1. Appeal from superior court, San Bernardino county.

Action by Mrs. S. A. Hicks against H. L. Drew. From a judgment, and from an order denying her motion for a new trial, plaintiff appeals. Reversed.

Gibson & Titus, Geo. B. Cole, and John L. Campbell, for appellant. E. E. Rowell, A. Brunson, and E. R. Annable, for respondent.

GAROUTTE, J. This is an action to recover damages for injuries to real estate. An appeal is prosecuted to this court from the judgment and order denying plaintiff's motion for a new trial.

Plaintiff objected to Mr. Annable, one of defendant's attorneys, appearing in the case, upon the ground that his prior professional relations with her had been such as, in law, to deprive him of that right. On taking evi-

dence upon this question, the court held against her contention, and reversible error is now claimed upon that ruling. There is no serious conflict as to the facts bearing upon this matter, but, wherever contradictions do exist, we are bound to resolve them in such a way as to support the action of the trial court. Prior to the filing of the complaint by plaintiff, she held several conversations with Attorney Annable as to the facts of her case. At the final conversation he offered to prosecute the action in her behalf upon a contingent fee, the amount of that fee to be dependent upon the size of the judgment eventually secured. When this offer was made by Mr. Annable, plaintiff withdrew, and thereupon employed other attorneys, who inaugurated the present litigation. If these facts disqualify an attorney from appearing in a case, it would be an easy matter to disqualify all those attorneys whom a party neither desired to retain, nor to allow the opposing party to retain. In this case, in no sense was there a retainer. There was not even an implied contract to pay for advice given. Both parties concede this to be so. Mr. Annable's affidavit discloses that whatever conversation he had with plaintiff was with a view of fixing the amount of his fee. The relation of attorney and client, under these circumstances, never existed between the parties, and no disqualification was created by these acts.

The lands of plaintiff were situated immediately south of those of defendant, a public highway, known as "Colton Avenue," dividing them. The fee of this avenue, to the center thereof, was in the adjoining owners. In April or May, 1890, defendant erected a bulkhead upon his land, which diverted storm waters (that ordinarily and naturally flowed northerly and westerly across his lands) over the lands of plaintiff. As declared by plaintiff's complaint, these waters thereby caused deep washes and gullies to be cut in the aforesaid avenue, wherein she owned the fee, and by which acts of defendant she was greatly damaged.

By the instructions to the jury, the court limited a recovery against defendant to damages accruing within two years prior to the filing of the complaint. This instruction was given in view of subdivision 1 of section 339 of the Code of Civil Procedure, which provides that an action founded upon a contract, obligation, or liability not based upon a written instrument must be brought within two years. Appellant denies the application of this statute to the facts of her case, and declares that she had a right to bring the action at any time within three years from the accrual thereof, by virtue of subdivision 2 of section 338 of the Code of Civil Procedure, which provides that an action for trespass upon real property may be brought within three years after it has accrued. Is the present action one to recover damages for a trespass upon real property? While in this state all distinctions between common-law actions are abolished as relating

to the procedure, yet it is plain that we are bound to consult the common law, and the classification of common-law actions, for the proper determination as to what the lawmaking power of this state had in mind when using the phrase "trespass upon real property." It appears that the courts of England often experienced difficulty in determining whether trespass or case was the true remedy to be pursued. This same difficulty often arises in this state, when the statute of limitations is invoked. But in the case at bar, weighed and tested by the rules of the common law, the distinction between these two forms of common-law actions is clearly apparent; and that this case upon its facts is one wherein it is sought to recover upon a liability not based upon an instrument of writing, and therefore barred in two years, we are satisfied.

One of the best tests by which to distinguish trespass is found in the answer to the question, when was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential, and no trespass. Chitty says: "If a log, in the act of being thrown into the highway, hit another, the injury is immediate; but if, after it has reached the highway, a person fall over it, and be hurt, the injury is only consequential, and the remedy should be case. * * * So, if a person pour water on my land, the injury is immediate; but if he stop up a water course on his own land, whereby it is prevented from flowing to mine as usual, or if he plays a spout on his own building, in consequence of which water afterwards run therefrom into my land, the injury is consequential, because the flowing of the water, which was the immediate injury, was not the wrongdoer's immediate act, but only the consequence thereof, and which will not render the act itself a trespass or immediate wrong." Chit. Pl. *142. Gould, Waters, § 210, declares: "It is not a trespass to flow the land of another with water by erecting a dam below his land, for any one may lawfully build a dam on his own land, and the act, being injurious only in its consequences, is to be redressed by an action on the case." Angell, at section 395, in speaking as to the remedy of action on the case, says: "This remedy is the judicial one now always resorted to in the usual case of consequential injury to or by means of a water course. The general result of the English authorities renders it very clear that, where damages do not immediately ensue from the act complained of, it is consequential, and case is the proper remedy; and, on the contrary, where the act itself, and not the consequence of it, occasions the mischief, trespass is the right action." In *Perrine v. Bergen*, 14 N. J. Law, 353, where the lands of an upper owner upon the stream were overflowed by a dam of the lower owner, it is said: "So far from being an ouster, it is not even a trespass to flow the land of another with water by erecting a dam below his land, for the act in itself is lawful. Any man

may build a dam by common right on his own land, and trespass never lies when the act is lawful in itself, and injurious only in its consequences. * * * It is therefore no dispossession, no ouster, nor even a trespass, to flow water backward on another person's land. It is denominated in law a nuisance and annoyance to the tenant in possession; and his only modern remedy is by an action on the case, founded on his possession."

To support plaintiff's contention that defendant's acts, in law, constituted a trespass upon plaintiff's realty, certain decisions of this court are relied upon; but those decisions fail to accomplish the result, and are not opposed to the views of the common-law writers from which we have quoted. In *Triscony v. Brandenstein*, 66 Cal. 514, 6 Pac. 384, this court held that a cause of action for trespass upon realty was stated in a complaint which charged that defendant "wrongfully and unlawfully entered upon plaintiff's lands, and * * * depastured the same with five hundred head of cattle and ten head of horses, to plaintiff's damage." Clearly, here was an unlawful entry and damage done to the realty. The cattle and horses were but the means by which the damage was done. Any other means used to do the damage, by the party who made the entry, would have been equally sufficient in making out a cause of action. In that case there was an actual unlawful entry, accompanied by damage. The act of entry was unlawful, and the damage done was in no sense consequential. The entry and damage were inseparably connected. *Zumwalt v. Dickey* (Cal.) 28 Pac. 212, is in all respects a similar case. *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41, in principle, is more like the case at bar. At the same time there is a material and substantial difference. In addition, it may be suggested that the principles laid down by the *Conniff* Case find support in *Pumpelly v. Green Bay Co.*, 13 Wall. 166; and it was largely upon the authority of that case that the decision in *Conniff v. San Francisco* was based. Yet the same high court that decided *Pumpelly v. Green Bay Co.* in a recent decision said that case declared "the extreme limitation of the doctrine to be found." *Transportation Co. v. Chicago*, 99 U. S. 642. In considering the *Pumpelly* Case, and *Eaton v. Railroad Co.*, 51 N. H. 504, the supreme court of the United States said: "In these actions it was held that permanent flooding of private property may be regarded as a 'taking.' In these cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In the *Conniff* Case the facts were declared by this court to be the same as we have just quoted, and it is only upon such a state of facts that the decision may be supported. The facts of the case at bar do not bring it within the doctrine of *Conniff v. San Francisco*. If the dam or bulkhead, erected by defendant upon his land, had resulted in the prevention of water flowing upon plaintiff's land which had been ac-

customed to so flow, and damage to plaintiff's freehold had been the result, it could hardly be contended that such acts amounted to a trespass upon real estate. Yet, upon principle, the action for redress would be the same as in the case at bar.

The trial judge instructed the jury as follows: "No damage can be recovered in this action for injury to plaintiff's feelings, but only such pecuniary damage as accrued to her property by reason of the maintenance by defendant of a bulkhead at the foot of California street, and of such damage she can recover only so much as accrued to her before the commencement of this suit, and after the 29th day of November, 1891." Section 3283 of the Civil Code provides: "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof." By this section of the Code, plaintiff was entitled to recover damages suffered subsequent to the filing of the complaint, and for this reason: the instruction given is unsound as a proposition of law. Neither was a supplemental pleading necessary to support such a recovery. This court said in *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687: "Besides, plaintiff was entitled, under his original complaint, to recover damages for detriment resulting after the commencement of his action." In line with the legal principle declared by the aforesaid section of the Code, see *Morgan v. Reynolds*, 1 Mont. 163; *Greenl. Ev.* § 268a.

That plaintiff was entitled to recover damages accruing subsequent to the commencement of the action is substantially conceded by defendant, but it is now claimed that, during the progress of the trial, plaintiff repudiated and disclaimed any intention or purpose of making any claim for damages of that character. The record facts to establish any such disclaimer are wanting. The following are the facts relied upon: Question by plaintiff's attorney: "Now, Mrs. Hicks, tell us what you have been damaged by reason of this washout, of this cut, on Colton avenue. Mr. Rowell: To which we object, unless the testimony is directed to a time prior to the commencement of this action, or up to and including the date of its commencement, on the ground that any evidence of damage subsequent to that time would be incompetent, irrelevant, and immaterial. Mr. Waters: I state that I desire to limit the proof to the damages occurring within three years next before the filing of the complaint in this case, and down to the time that the complaint was filed, and in addition to that, inasmuch as all the damage which has occurred has related to the same tract of land and the same form, in order to divide the damages it would scarcely be possible for me to separate the evidence, to begin with, according to a definite and certain standard, but I will come as near it as I can, so as to only reply to, in this trial, upon evidence as to the injury which has resulted within three years prior to the bringing of

the suit, and such other damages which may have resulted proximately from the injury done to the time of the complaint. The Court: I am clearly of the opinion that it should be limited to two years, and that will be the order of the court. (To which ruling plaintiff then and there duly excepted.) Q. State, Mrs. Hicks, any damage that may have occurred to you by reason of that wash subsequent to the filing of the complaint in this case, as well as also any damage that will certainly occur to you in the future. Mr. Rowell: To which we object as irrelevant, immaterial, and incompetent, and not responsive to any issue tendered by the pleadings, and at a date subsequent to the commencement of the action. Mr. Annable: And is not limited to the injury arising from anything occurring within two years next preceding the commencement of the action. The Court: It will be sustained on the last statement of Mr. Annable's. (To which ruling plaintiff then and there duly excepted.) As to the testimony of the witness Baxter, the record discloses: "Q. What amount would you say was the damage sustained on either or both to the place by reason of the washing on either or both of the streets since November 29, 1893? (The defendant objects to that, for the reason that there is no foundation laid for it in any of the allegations of the complaint. They don't allege in the complaint that it is a continuing damage, but it says that the damage accruing up to the time of the filing of the complaint, without alleging any continuing or threatening to continue damage, and we object to this as irrelevant and immaterial under the allegations of the complaint. The court sustains the objection, and the plaintiff then and there duly excepts.)"

It will be observed that the ruling of the court upon the question addressed to the witness Baxter was in no way based upon any disclaimer upon the part of the plaintiff, but was a direct ruling upon the legal admissibility of certain evidence. Indeed, such were the rulings of the court upon the evidence of the plaintiff herself. The objection to her testimony upon this point was sustained upon the express ground that the damage covered by the question was not limited to a point of time prior to the commencement of the action. Mr. Annable's objection contained a limitation as to time, but the question addressed to the witness related solely to a time subsequent to the filing of the complaint, and the ruling was squarely direct upon the issue. It is further suggested that the error, if one occurred, was harmless, by reason of the fact that evidence upon the same matters was subsequently admitted. In view of the instructions of the court heretofore quoted, wherein such evidence is expressly taken from the consideration of the jury, the error, both in the ruling of the court and the giving of the instruction, is clearly prejudicial, and demands a new trial of the case.

The jury was instructed as follows: "If

the jury find from the evidence that the plaintiff has sustained any damage by the act of defendant, as she has complained against him, and that by the same act she has received benefit, then, in estimating such damage, such benefit should be deducted." This instruction was correct. Field, Dam. § 744; Suth. Dam. § 1056. There is nothing in the contention that such incidental benefit accruing to plaintiff should be pleaded by defendant. Neither are we required to pass upon the sufficiency of the evidence to support the verdict, owing to the fact that a new trial is ordered upon other grounds.

Upon a retrial of the case, that portion of the charge to the jury containing the phrase "width and depth," referring to the condition of the washout upon California street and Colton avenue, should be modified by using the disjunctive conjunction "or," rather than the copulative "and." It becomes unnecessary to pass upon the importance of this error.

For the reasons stated, the judgment and order are reversed, and cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

117 Cal. 228

In re KAUFMAN'S ESTATE.

KING v. BORCHARD. (L. A. 226.)

(Supreme Court of California. June 17, 1897.)

WILLS—UNDUE INFLUENCE—EVIDENCE.

1. Testatrix made a will disinheriting one of her daughters, with whom she had quarreled a short time previous to the execution of the will. *Held*, that evidence of this quarrel was immaterial on the question of undue influence.

2. A statement made by the testatrix several months after the execution of the will, to the effect that she was sorry that one of her daughters was not in the will, was not competent to impeach its validity.

3. Evidence of the amount of property owned, respectively, by the husbands of the beneficiaries under the will, and also that contestant and her husband were comparatively without property, is inadmissible.

4. If a person has testamentary capacity, his will cannot be avoided on the ground that it is unjust or capricious.

Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action brought by Lizzie King against J. E. Borchard to contest the probate of the last will and testament of Mary Kaufman, deceased. Defendant appeals from an order refusing probate to the will, and an order denying a new trial. Appeal dismissed. Order denying a new trial reversed.

Shepherd & Eastin and H. L. Poplin, for appellant. Barnes & Selby and Orestes Orr, for respondent.

HARRISON, J. Upon the contest of the probate of the last will and testament of Mary Kaufman, deceased, filed by the respondent herein, a jury was called to try the

issues presented thereby; and at the conclusion of the testimony the contestant conceded that all the issues raised by her contest, except those of undue influence and fraud, should be determined in favor of the proponent, and thereupon withdrew all the issues except these, and the following special issues of fact were submitted to the jury: (1) "Was the instrument now offered for probate as the last will of Mary Kaufman, deceased, procured by the undue influence of Mary Borchard, John E. Borchard, Frances Petit, Justin Petit, and John Pujol, or any of them?" (2) "Was the instrument now offered for probate as the last will of Mary Kaufman, deceased, procured by the fraud of Mary Borchard, John E. Borchard, Frances Petit, and Justin Petit, or any of them?" The jury answered each of these questions in the affirmative, and thereupon the court made an order denying probate to the will. A motion for a new trial was made and denied, and from the order refusing probate to the will, and also from the order denying a new trial, the proponent has appealed.

Mrs. Kaufman executed the will in question January 8, 1895, and died on the 11th of the succeeding May. Prior to its execution she had determined to submit to an operation for cancer, which she was informed might result unfavorably; and thereupon sent for Father Pujol, her priest, who suggested to her the propriety of making her will. Upon this suggestion she sent for Mr. Borchard, the husband of one of her daughters; and at his request Mr. Shepherd, an attorney, came to her house, and prepared the will in accordance with directions which he received from her, and it was thereupon formally executed in his presence. By the will she gave the bulk of her property to her four elder daughters, and left to the contestant only a nominal legacy. A careful examination of the record, however, fails to show that this disposition of her property was by reason of the influence or suggestion of any person, or that there was any evidence showing that the will was the result of undue influence or fraud in any respect. Father Pujol testified that he went to visit her for the purpose of administering to her, and, being there, suggested to her that the operation was dangerous, and inquired whether she had made her will, and, upon her telling him that she had not, suggested that it would be better to make one; that, if she should, it would have no force until after her death; and that if, at any time, she was dissatisfied with it, she could make a new one. He also testified that nothing was said between them about the disposition of her property: "We did not say anything of the kind. The only thing that was said was this concerning Lizzie,—that she was not willing to leave her anything whatsoever; and I said: 'It will not do, Mrs. Kaufman. You must leave her something. It is true that she has been a very wayward child, and

that she does not deserve the name of being your daughter, on account of the way she has treated you; but, notwithstanding that, it will be necessary, you will have to leave her something.' I did not tell her how much it would be necessary to leave her. I left that to her. But I said, 'You must leave her something.' I told her that it was necessary to leave her something to avoid the law, because, I said, 'If you don't leave her anything, your will will be thrown away, and the law demands that you will leave her something.' I did not mention any small amount necessary to put in the will. I said any amount would do, to avoid the law, but not saying any amount. I said first, '\$5 or \$2 or \$1 will do'; but that I said to leave her that much, that I did not." This interview with Father Pujol was on the 4th of January, and on that day, after he had left, Mrs. Kaufman sent for the proponent, through Mrs. Petit, another of her daughters, and on his arrival spoke to him about making her will, and said she wished to give her property to four of her heirs (naming them), and asked him what he thought of it. "I asked her what about the other heirs,—Mrs. King and her grandson. Just then she didn't have much to say, but at any rate I named them all, and when I came to Lizzie (Mrs. King) she objected right away. I told her she ought to divide her property into five and a half parts, under the condition,—under the circumstances of the past. I thought that the grandson was entitled to one-half of a fifth, and that she should divide the rest into five parts. She said Lizzie should not have anything, and her grandson should have no land, but she might give him some money." She determined to make deeds of her real estate to her four daughters, and, after considerable talk upon the mode of division, she finally told Mr. Borchard how she wished it divided, and to tell the attorney to fix it up that way. Borchard further testified: "This talk was about the deeds, and who should have this or that piece. With the will I really had nothing to do. I didn't know what was in the will until it was opened. * * * When the will was made, I wasn't in the room, nor did I know what was in it until it was opened here by the clerk of the court." Borchard had two or three conversations with her prior to the making of the will, and at some time in the interim he, in company with Mrs. Petit, visited the attorney, Mr. Shepherd, and informed him of the mode in which the real estate was to be divided; and, on the 8th of January, Shepherd went to the house of Mrs. Kaufman with deeds in which the descriptions were written out, but without the names of any of the grantees, and while at her house wrote in the names of the daughters, as Mrs. Kaufman directed him, for their respective pieces. This was in the forenoon of that day, and, after Mrs. Kaufman had executed the deeds, he took them to his office to authenticate them by

his notarial certificate, and in the afternoon returned to her house and wrote the will in accordance with her directions. Mr. Petit testified that he had nothing to do with the making of the will, had no talk with Mrs. Kaufman as to how she should dispose of her property, and did not know how the will was made until it was opened after her death. Mrs. Petit was present at the interview between Mrs. Kaufman and Father Pujol, and corroborates his testimony; but it is not shown that she ever had any conversation with her mother, or said anything to her about making her will or disposing of her property. Mrs. Borchard testified that she had no talk whatever with her mother about dividing the property. "I did not know how she was going to dispose of it from any source. I had no knowledge of how she was going to dispose of her real estate, except what I had heard from Mr. Borchard. I had no talk whatever, before the will was made, in regard to how the property should be disposed of. Mother never mentioned it to me. I do not know what was in the will." These witnesses, with the exception of Father Pujol, were called by the contestant, and were the only witnesses who gave any testimony relative to the circumstances attending the execution of the will, and the testimony above given was neither contradicted nor impeached; and, as it fails to show that the will was executed under any undue influence or fraud, we must hold that it fails to sustain the verdict of the jury.

In April, 1890, the contestant was living with her mother, and was then unmarried. The farm upon which they were living had been rented in the previous November, for the term of one year, to a man named King, who thereafter lived at the house with them. It was rumored that Lizzie and King, after the lease was made, intended to marry each other, and the mother was greatly opposed to this marriage. A serious quarrel took place between them one evening, in which a personal assault was made upon the mother; and the next day, apparently by an agreement of all parties, she left the house and went to live with Mrs. Borchard. The day after she left, Lizzie and King were married, and continued to occupy the farm until the expiration of the lease the following December, when they left that vicinity, and Lizzie never afterwards saw or communicated with her mother. After they had gone, Mrs. Kaufman returned to her place, and continued to live there until her death. The greater part of the record is taken up with the circumstances of this quarrel between Lizzie and her mother, apparently either for the purpose of showing to the jury that the mother had no sufficient reason therein for disinheriting her daughter, or in order to allow the jury to conjecture that the mother's dislike of Lizzie may have been fostered by her other sisters. Whatever may have been the reason for its introduction, it was imma-

terial and irrelevant to either of the issues submitted to the jury.

The undue influence which will avoid a will must be such as operates upon the mind of the testator at the time of making the will, and must be an influence relating to the will itself. 1 Redf. Wills, *534; Schouler, Wills, § 232; *Eckert v. Flowry*, 43 Pa. St. 46. Upon this proposition the court said in the case last cited: "Unless there was some evidence tending legitimately to prove that some fraud had been practiced upon the testatrix at that time, or that some misrepresentation had then been made, or that some physical or moral coercion had been employed, such as to destroy her free agency, the court erred in submitting to the jury the question whether undue influence had been exerted. It was inviting them to find as a fact that of which there was no evidence, and which the law, as well as reason, presumed had no existence." If the person has testamentary capacity, his will cannot be avoided on the ground that it is unjust or capricious. The right of absolute dominion over his property is sacred and inviolable, and whatever may be his motives, or however great or unfounded his dislikes or his resentments against those who might be thought worthy of his bounty, his will, in the disposition of his property, is paramount. 1 Redf. Wills, *535; *Woodward v. James*, 3 Strob. 552; *Clapp v. Fullerton*, 34 N. Y. 190; *In re McDewitt's Estate*, 95 Cal. 17, 30 Pac. 101. "The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own, and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust." *Clapp v. Fullerton*, supra. "The right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper." *In re McDewitt's Estate*, 95 Cal. 33, 30 Pac. 106.

Testimony was given by one witness that, in a conversation with Mrs. Kaufman about three weeks before her death, she said to him that she did not make a will, and did not know what was in the will; that she was sorry Lizzie was not in the will, and that she wanted to give Lizzie the same as the others; and that she did not feel safe if she should make another will. This statement, made by her several months after the execution of the will, was not competent to impeach its validity, and the jury should not have been permitted to consider it. *In re*

Calkins' Estate, 112 Cal. 296, 44 Pac. 577. The court permitted the contestant, against the objections of the proponent, to give evidence of the amount of property owned respectively by the husbands of the beneficiaries under the will, and also that the contestant and her husband were comparatively without any property. The evident object of this evidence was to give to the jury the impression that the contestant had been unjustly treated in the division of her mother's estate, and it should have been excluded by the court. Aside from the fact that Mrs. Kaufman had the right to exclude the contestant from the will if she so desired, the testimony was neither relevant nor competent for the purpose of sustaining either of the issues before the jury, and its introduction could have only a prejudicial effect upon their minds. When the validity of a will is contested upon the ground of undue influence in its execution, a court cannot be too careful in excluding from the consideration of the jury evidence that is incompetent or irrelevant to establish the charge. The very nature of the issue, as well as the lack of experience and of mental training on the part of the jurors in reference thereto, render them less able than the court to weigh the sufficiency of any evidence that may be offered upon this issue. The fact that the evidence has been permitted by the court to come before them justly authorizes them to consider that it is both relevant and competent for that purpose, and the evidence so received will, unconsciously it may be, produce an impression upon their minds which will not be effaced by subsequent instructions.

A motion is made to dismiss the appeal from the judgment denying probate to the will upon the ground that it was not taken until more than 60 days after its entry. This motion must be granted, although the reversal of the order denying a new trial will have the effect to set aside the judgment denying probate to the will. The appeal from the judgment is dismissed. The order denying a new trial is reversed, and a new trial ordered.

We concur: VAN FLEET, J.; GAROUTTE, J.

5 Cal. Unrep. 715

FRESNO LOAN & SAVINGS BANK v. HUSTED et al. (Sac. 257.)

(Supreme Court of California. June 17, 1897.)

MECHANIC'S LIEN—HOUSE ON ANOTHER'S LOT.

1. A. went into possession of certain lots, then owned by B., under a contract of purchase, built and paid for a house thereon, and afterwards removed the house onto the land of C., as a temporary resting place, without B.'s permission, and after default in the payments on the lots. *Held*, that it cannot be implied that B. furnished the material with which the house was built, nor that A. acted at the time of constructing the house as the agent of C., so as to subject C.'s lot to a lien under sections 1183, 1185, 1192, Code Civ. Proc.

2. C. was not required to post written notice upon this building within three days after it was moved on his lots, under section 1192, *supra*, in order to escape liability, as the house, by agreement, was to remain on the lots in question but a few days, and was therefore personal property while it rested there.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action brought by the Fresno Loan & Savings Bank to enforce a material man's lien, against Mary Husted and W. R. Flannagan. Plaintiff appeals from the judgment of the court below, and its order denying a motion for a new trial. Affirmed.

Horace Hawes, for appellant. Frank H. Short, F. E. Cook, and Strother & Strother, for respondents.

CHIPMAN, C. Plaintiff, being the owner of certain lots in the city of Fresno, entered into a contract of sale thereof with defendant Mary Husted, on March 6, 1891, for the consideration of \$2,000; payments to be \$40 upon signing the contracts, and \$40 monthly until fully paid. It nowhere appears in the transcript whether these or any payments were made, nor whether said Husted was in default in the payments. She entered into possession under the contract, however, and purchased materials of the admitted value of \$277.14, and with them erected a dwelling on these lots, which she occupied. For some reason not explained, defendant Husted, about November, 1894, caused the building to be removed to the lots of defendant Flannagan. The removal took place on Sunday. Within 30 days thereafter plaintiff caused to be filed and recorded a material man's lien upon the Flannagan lots, alleging that it furnished lumber and other building material to be used in the construction of the building in question; that the lots sought to be charged with the lien are lots belonging to defendant Flannagan; that defendant Husted, about November, 1894, entered into a contract with plaintiff, under which said materials were furnished; that she agreed to pay therefor their reasonable market value; that said materials were used in constructing said building upon the lots of said Flannagan with his knowledge and consent; that said contract has been fully performed, and said building or structure finished, etc. This action was brought to enforce the lien upon defendant Flannagan's lots. Defendants answered, denying the allegations of the complaint. The cause was tried by the court, without a jury, and judgment given for defendants. The appeal is from the judgment, and from the order denying a new trial.

The court found against all the allegations of plaintiff's complaint except it found that defendant Flannagan owned the lots to which the building was removed, but it found also that "it was not built or located thereon permanently, but was merely, by an arrangement between the defendants Flannagan and

Husted, temporarily placed and allowed temporarily to remain upon the said lots, with the understanding that it might be removed at any time by the defendant Mary Husted." This finding as to the understanding between the defendants is warranted by the evidence. The court finds, as alleged in the lien and complaint, that the building was placed on the Flannagan lots about November 25, 1894, and that plaintiff filed its claim of lien in due form within 30 days thereafter; but the court finds "that the statements and affirmations of said lien were false in fact; that the plaintiff then had no claim or demand justly due or enforceable against said defendants, or either of them, with or without offsets, and the said materials were not furnished by the persons stated in said claim of lien or at all." The evidence sustains this finding. It seems to me the case lies in a nutshell, and that there is no demand upon us to follow plaintiff's counsel in his excursion through the reported cases of this character, and into the wide domain of general law to which his learned brief invites us.

The undisputed facts upon which the case rests are: That defendant Husted went into possession of certain lots, then owned by plaintiff, under a contract of purchase; that she built and paid for the house in controversy on these lots (whether the house was attached to the soil, and became a part of the freehold, is very doubtful from the evidence; indeed, the evidence would warrant a finding that it was not so attached, but the fact, in my view, is unimportant); that she removed the house, and no permission was given her by plaintiff to do so, and no right was given her by the terms of her contract to remove the house; that, in placing the house upon Flannagan's lots, it was only as a temporary resting place; that Flannagan knew nothing about defendant Husted previously, nor of her contract with plaintiff, nor where the house came from that found its way to his lots. Flannagan testified: "Somewhere about November, about the first, Mr. Hague came to me; wanted to know if I would allow a poor woman to move her house on my lots for a short time. I told him, 'Yes.' I believe he said she would only want it to stay there a short time, or that she might buy my lots; and under these circumstances I let him move it there,—told him he could. I did not know who the lady was. That is all I know about it. It was moved on the lots on Sunday. Mr. McKinzie [business agent of plaintiff] came to the store on Monday morning, and asked me about it. That was the first I knew he or the bank had any connection with it. I did not know Mrs. Husted at all until after the house was on the lots; never had any talk with her at all." It was not disputed that defendant Husted bought and paid for the materials in the house, and caused it to be moved. The evidence also showed that the house, after removal to Flannagan's lots, "rested on mudsills on top of the ground."

The facts necessary to be alleged in the claim of lien, and that were alleged,—to wit, that plaintiff "has furnished lumber and other building material to be used in the construction of that building or structure," etc.; and that "Mrs. Mary F. Husted is the name of the person who," etc., "as agent of such owner at Fresno, in the state of California, entered into a contract with this claimant under and by which said materials were furnished, and the following is a statement of the terms, time given, and conditions of said contract," etc.; and "that said contract has been fully performed on the part of claimant,"—are all found to be untrue, and it is only by some presumption of law that the allegations of the claim can be said to be true in any sense. They were not true in fact, and the court properly so found. Their truth, and the truth that a contract for furnishing the materials was made by defendant Husted with plaintiff, all rest, by implication, upon the original contract of sale of the plaintiff's lots to defendant Husted. To put it in plain phrase: It is claimed that, because defendant Husted made a contract to purchase plaintiff's lots, therefore, when she built a house thereon at her own expense, it was to be implied that the plaintiff furnished the material; that she was then acting as the agent of Flannagan, who owned the lots to which the house was long afterwards removed, but who did not know her, and had never seen her, and never heard of any contract between her and plaintiff as to the purchase of plaintiff's lots; that, as such agent of Flannagan, she entered into a contract with plaintiff under which the materials were furnished; and that plaintiff performed its part of the contract by furnishing the materials, and paying for them. All this is to be implied as true, against the actual facts to the contrary, in order to sustain the lien and the action.

By section 1183, Code Civ. Proc., material men are given a lien for materials used in the construction of any building "upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished, whether at the instance of the owner or of any other person acting by his authority." The lien here given is upon the property upon which labor is bestowed (in this case the house in question). By section 1185 of the same Code it is provided that "the land upon which any building * * * is constructed, together with a convenient space about the same, * * * is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building * * * to be constructed." By section 1192 of the same Code it is provided that "every building * * * mentioned in section 1183 of this Code, * * * constructed upon any lands with the knowledge and consent of the owner, * * * shall be

held to have been constructed at the instance of such owner, * * * and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner * * * shall within three days after he shall have obtained knowledge of the construction * * * give notice that he will not be responsible by posting notice in writing," etc.

The building had been completed for some time before removal (how long does not appear), and was occupied at the time of removal, and the furniture remained in it during removal. When it was constructed, there was no intention to remove it to the Flannagan lots. I cannot conceive how plaintiff can have a lien on Flannagan's lots for materials it never furnished nor paid for, nor authorized to be furnished, nor agreed to be responsible for, which materials were used in the construction and completion of a house erected on its own land by a stranger to Flannagan, and without any authority whatever from him, and without his knowledge. The evidence justifies the finding of the court that the building was removed to his lot, not to remain, but to rest there temporarily, as an accommodation to a woman he had not then seen or known. The evidence shows that, when the bank manager tracked the house to the Flannagan lots on Monday morning (the house was moved on the previous Sunday), Flannagan told the manager that he knew nothing about where the house came from, but supposed it belonged to the poor woman whose house he had been requested to allow to be put on his lots; that he did not know who she was, nor that the bank had anything to do with it, or had any interest in it. Waiving the question whether a lien could attach at all upon lots to which a completed building has been removed bodily, and waiving other questions raised in the briefs,—for example, whether the house was constructed on his lots,—I do not think Flannagan was called upon, under the circumstances, to post written notice upon this building within three days after it was removed to his lots in order to relieve himself from responsibility. It became no part of the realty. By agreement, it was to remain but a few days. He could not have successfully resisted defendant Husted's right to remove it. It was personal property when it got to his place, and while resting there, whatever it might be regarded while on plaintiff's lots. The alleged lien cannot be sustained upon Flannagan's lots. Whether there is a lien upon the building need not be considered, for none is claimed. It seems to me plaintiff has wholly mistaken its remedy.

Appellant claims that, under any circumstances, defendant Flannagan is liable for money had and received. In an appropriate action sustained by competent proof, if it exists, possibly he may be so liable. Flannagan makes no claim to the house. It is not alleged or shown that he has wrongfully con-

verted it. So far as we know, it may have been since removed from his lots by defendant Husted. No demand has been made upon him for a return of the house to its former situs, nor for its possession, nor for its value. He has not been shown to have had any such knowledge, as to the removal of the house to his lots, as would make him a co-trespasser in the removal. The pleadings in the case present no issue upon which defendant Flannagan can be made to surrender the property, or, failing to do so, to pay its value. The judgment of the court and its order overruling plaintiff's motion for a new trial should be affirmed, and it is so recommended.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the court and its order overruling plaintiff's motion for a new trial are affirmed.

117 Cal. 332

ILLINOIS TRUST & SAVINGS BANK v.
PACIFIC RY. CO. (L. A. 146.)

(Supreme Court of California. June 17, 1897.)

CORPORATIONS—ACTS ULTRA VIRES—BONDS—HY-
POTHECATION — RATIFICATION —
AGENCY—PARTIES.

1. The C. Co. made a deed purporting to convey all its franchises and other property to the P. Co., which company had, in anticipation of such transfer, made provision for an issue of its bonds secured by mortgage to plaintiff as trustee, covering all the property it owned, or might thereafter acquire, specifically including that to be acquired from the C. Co., and also made a supplemental agreement with plaintiff, providing, among other things, for the payment of said bonds in gold. The C. Co. thereafter executed a deed in favor of plaintiff and the P. Co., reciting the above-mentioned transactions, and granting and confirming in plaintiff, in trust for the uses and purposes specified in said mortgage, all the right, title, and interest of the C. Co. in the property aforesaid, to be held by the trustee for the benefit of the holders of the bonds of the P. Co. to the extent that it purported to pledge the property for the payment of the bonds. Default occurred in the payment of interest, and the bonds, by reason thereof, became due. Held, that the P. Co. could not assert that said deed of confirmation was ultra vires of the C. Co.

2. Where the several holders of the bonds of a corporation are secured by a mortgage to a trustee, an action for the enforcement of the security is properly brought by such trustee.

3. Bonds issued by a corporation having authority to borrow money and issue evidences of indebtedness are not invalidated by the want of power to make the mortgage by which they were in terms secured.

4. The holders of bonds issued by a corporation for a purpose not within its charter powers, who did nothing to promote such purpose beyond parting with their property on the faith of such obligations, and who do not found their right of recovery on such illegal contract, are not affected by its illegality.

5. Under Const. art. 12, § 11, providing that no corporation shall issue stock or bonds, except for money, labor, or property, a corporation has the right to pledge its bonds as collateral security for money or property procured by it.

6. In an action for the enforcement of the mortgage security for certain bonds of a corporation, it appeared that the president, as the financial manager of the company, had been author-

ized to negotiate the bonds; that he raised large sums by pledge thereof, which were expended by the company for the purposes which had induced the issue of the bonds; that said transactions extended over a period of more than a year; and that the company had failed to repudiate liability to the holders of such bonds until after action brought thereon. *Held*, that the company had acquiesced in and thus ratified the president's assumption that his agency to negotiate the bonds extended to the hypothecation of them.

7. A corporation whose by-laws provide that all bonds, contracts, and other instruments on its behalf shall be executed by the president, and "also be signed by the secretary," may, by acquiescence therein, become liable on notes signed in its name by the president alone.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Illinois Trust & Savings Bank against the Pacific Railway Company and others. There were findings and a judgment in favor of plaintiff, and from an order overruling a motion for new trial defendant Pacific Railway Company appeals. Affirmed.

S. C. Hubbell (Bickell & Trask and J. S. Chapman, of counsel), for appellant. Edwin Walker, W. P. Gardiner, and Allen, Conrey & Miller, for respondent.

BRITT, C. Foreclosure of mortgage on lines of street railway and appurtenant property in the city of Los Angeles, alleged to have been given as security for an issue of bonds of the Pacific Railway Company. The defendants in the action are numerous, but only the company named prosecutes the present appeal, taken from an order denying its motion for new trial. There was a former appeal from the judgment by certain other defendants. 115 Cal. 285, 47 Pac. 60. The questions there raised, however, have little or no affinity with those made here. These relate mainly to the personal liability of the Pacific Railway Company to pay said bonds. The court below made findings on which followed certain provisions of the judgment to the effect that the bonds were the lawful obligations of said company, and that, if the available proceeds of sale of the incumbered property, which was subject to the lien of a prior mortgage for a large sum, should be insufficient to discharge the sum found due on the bonds, then that said company pay the amount of the deficiency. To those findings appellant directed its motion for new trial.

The Los Angeles Cable Railway Company, one of the defendants, a corporation organized under the laws of this state, was in the year 1889 the owner of the street-railway property aforesaid, and had incurred large indebtedness—both floating and bonded—in the acquisition and construction of the same. There were bonds of said Cable Railway Company outstanding to the amount of \$836,000, secured by a mortgage on the said property, dated September 15, 1887, to Alvord and

Brown, trustees. About the month of August, 1889, the railway system of the said Cable Railway Company being then nearly completed, the holders of a majority of the capital stock of that company, residing at the city of Chicago, Ill., associated themselves in the incorporation of the appellant, Pacific Railway Company, under the laws of the state of Illinois; its object, as stated in its articles, being to build, extend, purchase, acquire, maintain, operate, sell, etc., street cars and street railways in the city of Los Angeles, Cal., and elsewhere. The purpose of the promoters of the new company was to substitute the same in the ownership of the property, rights, and interests of the said Cable Railway Company, and thus carry on the enterprises initiated by the latter, and assume also its liabilities. Accordingly nearly all of the stock in the Cable Railway Company was transferred by the holders thereof to the new Pacific Railway Company in exchange for shares of the latter, and on October 9, 1889, the Cable Railway Company made a deed purporting to convey all its franchises and other property to the Pacific Railway Company. On August 24, 1889, the last-named corporation made formal provision for an issue of its bonds to the amount of \$2,500,000, secured by mortgage to the plaintiff here as trustee, bearing date on said August 24, 1889, which mortgage in terms covered all the property the Pacific Railway Company owned, or might thereafter acquire, specifically including that to be acquired from the said Cable Railway Company. These bonds, which are the occasion of the present controversy, were 2,500 in number, each for the sum of \$1,000, and were payable to bearer in lawful money of the United States at the office of the trustee in the city of Chicago, on January 1, 1920, with interest payable semiannually. Each contained a provision that the principal might become due in case of six months' default in payment of interest, according to the conditions of the mortgage, which allowed the trustee, in such case, upon the request of the holders of a majority of the bonds outstanding, to declare the principal thereof at once due and payable. The Pacific Railway Company endeavored to exchange part of this issue for the bonds of the Cable Railway Company issued previously and secured by the mortgage to Alvord and Brown. Eight hundred and thirty-six of the new bonds were set apart in the hands of the trustee for that purpose, but the measure failed; the holders of the Cable Railway Company's bonds declining the proposal. The remaining 1,664 bonds were certified by the trustee as secured by said mortgage of August 24, 1889, and were delivered to appellant for disposition. All were duly attested by the signatures of the president and secretary of the company and the impress of its corporate seal.

On May 1, 1890, the Pacific Railway Company received possession of the lines of street

railway and other property described in the deed of the Cable Railway Company, and thereafter controlled and operated the same. On June 25, 1890, and after the negotiation of a large part of the bond issue, the Pacific Railway Company made a so-called supplemental agreement with plaintiff, purporting to provide, among other things, that engraved bonds might be substituted for the entire issue of August 24, 1889 (which had been printed by the lithographic process), and that such engraved bonds should be payable in gold coin, and, at the option of the holder, either in Chicago or New York, and that all provisions of the mortgage made to secure the lithographed bonds should stand for the security of the engraved bonds. Holders of the former description of bonds were to be allowed to exchange them for the latter. The form of trustee's certificate indorsed on the engraved bonds differed from that on the lithographed bonds, in that it stated the substance of said so-called supplemental agreement; but there was no change in the terms of the bonds themselves, the verbiage of the engraved bonds being the same as that of the lithographed. There was some replacement of lithographed with engraved bonds, but precisely how many were so replaced is not clear. Afterwards the Los Angeles Cable Railway Company executed a deed dated July 18, 1890, in favor of the plaintiff and of the Pacific Railway Company, both of whom expressly signified assent thereto. In such deed most of the proceedings we have described were recited,—that the said Cable Railway Company had by deed dated October 9, 1889, conveyed all its effects, real and personal, to the Pacific Railway Company; that the latter had by measures legally taken provided for an issue of bonds in the sum of \$2,500,000, and to secure the same executed to plaintiff the mortgage of August 24, 1889; and that such mortgage had been supplemented by the agreement of June 25, 1890, to pay the bonds in gold coin, etc. The deed then in terms granted and confirmed to the plaintiff in trust, for the uses and purposes specified in the said mortgage of August 24, 1889, all the right, title, and interest of the Cable Railway Company in the property aforesaid, to be held by the trustee for the benefit and security of the holders of the bonds of the Pacific Railway Company, and the Cable Railway Company adopted as its own the said mortgage of the Pacific Railway Company to the extent that that instrument purported to pledge the property for the payment of the bonds. This confirmatory deed of the Cable Railway Company was approved by the board of directors of that company, and the vote of all its stock. A majority of said directors were officers or employees of the Pacific Railway Company, however, and 24,975 of the total 25,000 shares of such capital stock were held and controlled by the plaintiff, Illinois Trust & Savings Bank, to whom they had been hypothecated by the Pacific Railway Company as part of the security for the bonds.

There are questions in the case relating to the manner of disposition of the bonds, and the authority of the officers of the Pacific Railway Company in that behalf. Some account of its internal organization and procedure is therefore proper. One C. B. Holmes was the president of both the said Cable Railway Company and the Pacific Railway Company, and he was, as the evidence shows, the "financial manager" of the Pacific Railway Company from the beginning. It was provided in the by-laws of the latter company that its affairs should be managed by a board of five directors, who might appoint a general manager to have direct charge of the business transactions of the company; that the board might incur indebtedness by resolution, and secure payment of the same by mortgage or trust deed of the property of the company, or any part thereof, the terms and amount of such indebtedness to be entered on the minutes of the board, and notes or other obligations given therefor, executed in such manner as the board might prescribe; that all bonds, contracts, or other instruments required to be made on behalf of the company should be executed by the president and "also be signed by the secretary"; that the president should not execute any such bond, contract, or other instrument without previous authority from the board. The resolution of the board of directors adopted preliminary to the mortgage and bonds of 1889 recited that the company had in contemplation the purchase of the street-railway system then owned by the Cable Railway Company, and had therefore acquired the major part of the capital stock of that company; that the plan for such purchase involved the advancement of funds by the Pacific Railway Company to meet maturing obligations of the Cable Railway Company, and to complete its undertakings, and that it was to the interest of the Pacific Railway Company that such advances be made. It was then declared that the Pacific Railway Company would furnish funds for those purposes to the Cable Railway Company, the amounts and objects of such advances to meet the approval of the board of directors of the Pacific Railway Company; and to that end it was resolved that the president and secretary of the Pacific Railway Company were authorized and directed to execute, seal, and negotiate in its corporate name \$2,500,000 of first mortgage bonds, and as security for payment thereof execute to the plaintiff here a mortgage, etc. There was evidence tending to show that of the 1,604 bonds available, 513 were sold, 1,119 were pledged as collateral for other obligations amounting to \$980,000, and 82 were not disposed of at all. So far as shown by the evidence, the various pledgees of bonds received them from C. B. Holmes, president of the Pacific Railway Company, as collateral security for promissory notes executed to them, respectively, by him in the name of the company; the nominal amount of bonds pledged being each instance some-

what greater than the note secured. On January 24, 1890, the board of directors of the Pacific Railway Company adopted a resolution requesting the trustee to deliver to the president "the remaining \$500,000 of bonds held by said trustee for the purpose of negotiating the same, and obtaining money for the use of the company." There was evidence that all the moneys received from the hypothecation of the bonds (and it seems also the proceeds of those sold) were used and expended by the Pacific Railway Company for its corporate purposes, and mainly, if not wholly, for the purposes indicated in the resolutions of the board of directors providing for the bond issue, viz. paying the debts contracted by the Cable Railway Company in constructing its roads, and to complete and equip the same. Default occurred in the payment of interest on the bonds, and, when this had continued for a period of six months, the trustee, being thereunto instructed by the holders of a majority of the bonds outstanding, declared the bonds to be immediately due according to their terms, and gave written notice of such action to the Pacific Railway Company, and demanded payment. Thereafter this action was instituted. The court below found and adjudged that there is due to plaintiff, as trustee for the benefit of the holders of the bonds of the Pacific Railway Company, the sum of \$1,360,000 principal (not \$1,323,353.75, supposed in appellant's brief. The latter sum was the amount found to be due on the prior mortgage of the Cable Railway Company to Alvord and Brown), and a further sum of \$317,101 for accrued interest.

1. It was the opinion of the superior court, expressed in its findings, that the deed made in October, 1889, by the Cable Railway Company, of all its property, franchises, etc., to the Pacific Railway Company, and also the supplementary agreement between the Pacific Railway Company and the trustee and bondholders, dated June 25, 1890, were void, and of no effect. We need not inquire into the grounds or correctness of that conclusion, for that it was correct is virtually assumed by both parties to the appeal. But that court held that the tripartite agreement of date July 18, 1890, whereby the Cable Railway Company adopted the mortgage executed to plaintiff by the Pacific Railway Company, and undertook that its property should stand charged for the payment of the bonds in question, was effectual, and created a valid lien on the property subordinate to the lien of the prior mortgage to Alvord and Brown. This result is combated by the appellant, though it can hardly be that the decision in that particular operated to appellant's detriment, except in so far as it tended to sustain the right of plaintiff to sue as trustee for the benefit of the bondholders. The objections are, in brief, that the deed was ultra vires of the Cable Railway Company, and that the plaintiff controlled the Cable Company's stock, and the Pacific Railway Company, its board of directors,

Clearly, these matters are of no concern to appellant. If by any means it coerced the Cable Railway Company into the hypothecation of the latter's property to secure appellant's bonds, that is no ground upon which appellant can defeat such security. The judgment, from which the Cable Company has not appealed, is conclusive upon that company that its deed and contract of July 18, 1890, was not ultra vires, but was valid and operative, and the appellant is in no position to contest such result; nor would it be even if it had not expressly assented to that contract. *Baines v. Babcock*, 95 Cal. 581, pl. 5, 27 Pac. 674, and 30 Pac. 776; *Campbell v. Mining Co.*, 51 Fed. 1; 5 *Thomp. Corp.* §§ 6023, 6030, and cases cited. These considerations suffice also to answer the further objection that plaintiff has no standing to sue, and that the right of action, if any exists, is in the several holders of the bonds. Since there is mortgage security for the bonds, the action must be directed to enforcement of the security (*Code Civ. Proc.* § 726), and is properly brought by the plaintiff as mortgagee in trust.

2. But it is said that the bonds themselves were issued in contravention of law, and are void in the hands of the holders. This is asserted, as we understand appellant's contention, because of the connection between the issue of bonds and the attempted acquisition by the Pacific Railway Company of the property and franchises of the Cable Railway Company on which it was supposed, when the bonds were authorized, that they would be secured. The argument necessarily assumes, though it is not precisely so stated, that whoever bought a bond thereby promoted an illegal enterprise, and must lose his money. We dissent from this view. Granting that it was ultra vires of the Pacific Railway Company to mortgage the property of the Cable Railway Company, it was still intra vires for it to borrow money and issue evidences of indebtedness. This is not denied. Consequently its bonds were not invalidated by the want of power to make the mortgage by which they were in terms secured. *Railroad Co. v. Lewis*, 33 Pa. St. 33. If, then, there was any taint of illegality in the sale or pledge of the bonds, it must have lain in the purpose to which the proceeds were designed by the Pacific Railway Company,—paying the debts of the Cable Railway Company, completing and extending its scheme of street transit. There was nothing criminal or against good morals in the effort of the Pacific Railway Company to acquire the entire plant and franchises of the Cable Railway Company. At the most, it was an attempt at something beyond the charter powers of the companies, and forbidden by considerations of public policy; but that was a vice which infected only the contract of the two corporations. The issue and disposition of bonds to third persons constituted a series of transactions each resting on a new consideration, and connected only indirectly with the contract

between the corporations. Admitting, as urged by appellant, that the holders had notice of the purposes of the Pacific Railway Company, yet they did nothing to promote those purposes beyond parting with their property on the faith of its obligations. They do not found their right of recovery on the illegal contract between the companies; and, in our opinion, they are not affected by it. *Taylor v. Mining Co.*, 79 Cal. 285, 21 Pac. 753; *Armstrong v. Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450; *Melbourne v. Society* (Sup.) 43 N. Y. Supp. 1026; *Curtis v. Leavitt*, 15 N. Y. 94, 296; *Association v. Mason*, 44 Minn. 318, 46 N. W. 558; *House v. Soder*, 36 Tex. 629.

3. By the constitution of Illinois it is provided that no railroad corporation shall issue stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created. The constitution of this state (article 12, § 11) contains a similar provision, omitting the clause as to application of the money, labor, or property. Upon these provisions appellant contends that it had no power to pledge its own bonds as collateral security. When the bonds were so pledged, and money or other property was actually received in consequence of such use of them, it seems to us that in a just and natural sense the bonds were issued "for" such money or property. They served the purpose designed by the company,—procured value for it. The cases upon the subject uphold the right to pledge as included in the right to sell. *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759; *Leo v. Railway Co.*, 17 Fed. 273; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428 (decided in view of a constitutional provision substantially the same as that of California in this particular); *Duncomb v. Railroad Co.*, 84 N. Y. 190. Some of these cases recognize the right of the corporation to pledge its bonds to secure a precedent debt. Appellant relies somewhat on *Brewster v. Hartley*, 37 Cal. 15, where it was held that certificates of stock issued by a corporation in pledge to secure its debt are illegally issued. An examination of the grounds upon which the decision went in that case shows, we think, that the question here presented is widely different. It seems unnecessary to enlarge upon the points of diversity. See, besides the cases cited above, 1 *Mor. Corp.* §§ 349, 350; *Pfister v. Railway Co.*, 83 Wis. 86, 53 N. W. 27.

4. But now it is claimed that Holmes had no authority to borrow money in the company's name, and pledge the bonds for repayment thereof; that it had no knowledge of his proceedings in that behalf, and is not bound thereby; this aside from the question of the corporate power of the company to make that use of the bonds. It is plain enough that the president had precedent authority to negotiate the bonds. The language of the resolution providing for their issue, "that the president and secretary are hereby

authorized and directed to execute, seal, and negotiate," etc., is to be taken distributively. Both the president and secretary were to sign the bonds, and, in that sense, execute them. Such was the provision of the by-laws. But the company committed the negotiation of them to the president. This is apparent from the evidence that he was at all times the financial manager of the company, and was allowed to control the disposition of the bonds, and from the resolution adopted by the board of directors January 24, 1890, requesting the trustee to deliver to the president "the remaining \$500,000 of bonds for the purpose of negotiating the same and obtaining money for the use of the company." Whether the authority to negotiate the bonds carried with it the power to pledge need not be inquired, though it seems that under proper circumstances an agency to negotiate securities includes the right to pledge them. See the cases collected in 15 *Am. & Eng. Enc. Law*, p. 478, note 4. In the present case the subsequent conduct of the Pacific Railway Company defined the scope of the president's authority in that particular, and its objection to his power to pledge the bonds comes too late. For the purposes which were the inducing cause of the issue of bonds, the company expended the large sums raised by pledge thereof. The practice of the president to pledge the bonds extended over a period of more than a year. There is no proof that the company had not actual notice of his transactions, and it is scarcely credible that it had not; but this is immaterial. It can hardly be that a company situated as this was, relying chiefly, if not solely, on the avails of the bonds to carry through the enterprise on which it had embarked, having committed the negotiation of the bonds to the president, and expending the funds raised by him to promote its corporate objects, can be heard to say that it did not know the manner in which he was disposing of the bonds, and so enjoy the benefit, but evade the concomitant liability, of that disposition. Such knowledge is imputed. *Underhill v. Improvement Co.*, 93 Cal. 300, 28 Pac. 1049; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333; *Consolidated Co. v. Wood*, 113 Cal. 483, 45 Pac. 809; 5 *Thomp. Corp.* §§ 5293, 5308; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695. Besides, the holders of such bonds as collateral have the same right as outright purchasers to press for a sale of the mortgaged property. *Jones, Corp. Bonds*, § 394. Here they did so press, and at their instance mainly the trustee declared the principal of all bonds outstanding to be due, and notified such declaration in writing to appellant, together with demand for payment. It does not appear that appellant made objection that any bonds had been improperly placed by the president, then or ever at all until more than a year later, when, on September 6, 1892, its answer to the amended complaint was filed; and then the

objection, if such it may be called, consisted only in denials for want of information and belief that any bonds had been issued, and the like. This failure to repudiate liability to the holders of pledged bonds within a reasonable time after it was thus imperatively asserted is further ground for the conclusion we have reached that the company acquiesced in and so ratified the president's assumption that his agency to negotiate the bonds extended to the hypothecation of them. *Gold-Mtn. Co. v. Nat. Bank*, 96 U. S. 640; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 381, 9 Sup. Ct. 770. In some instances bonds were pledged for liabilities of the Cable Railway Company, there being a novation of the Pacific Railway Company in the stead of the Cable Company. We do not understand appellant to lay much stress on this circumstance, and, in our opinion, it does not affect the case. It was part of the plan of the Pacific Railway Company to take up the obligations of the Cable Company, and in the process of accepting the bonds as security the creditors of the Cable Company gave up their demands against it, and so parted with value, which, so far as appears, was the equivalent of cash.

It is said that the notes given by Holmes, signed in the name of the Pacific Railway Company by him as president, were executed in contravention of the by-laws. But this is not important if our views regarding the effect of the approval of his action by the conduct of the company are correct. A corporation whose internal polity requires its contracts to be executed in a certain manner may, by acquiescence, become liable upon contracts made by its agents in some other manner. *Argenti v. San Francisco*, 16 Cal. 256; *Underhill v. Improvement Co.*, 93 Cal. 300, 28 Pac. 1049; 2 Mor. Corp. 633, 675.

5. It is contended that the evidence fails to sustain the decision as to the amount of appellant's liability,—\$1,360,000, besides interest; and it is to be admitted that the datum from which the court found that to be the precise sum due is not apparent. But as there was evidence that 513 bonds were sold, establishing a liability on these of \$513,000, and that 1,119 were pledged as collateral security for indebtedness amounting to \$980,000, and these sums together considerably exceed the amount of the finding, the appellant has not suffered injury in this behalf. The evidence concerning the total number of bonds disposed of was not as definite as it should have been, but it was received without objection, and made a *prima facie* case. Since appellant had received the custody of the bonds from the trustee, it would seem that the falsity of plaintiff's showing as to the number outstanding might easily have been proved, if false it was.

Not much is said in argument concerning the engraved bonds which were issued in lieu of lithographed bonds of corresponding numbers. On the face of them they did not differ

in terms from the lithographed bonds, and the judgment in no way discriminates between the obligation of the two classes of instruments. We think, therefore, the engraved are to be regarded as mere duplicates or reissues of the lithographed bonds for which they were exchanged. 5 *Thomp. Corp.* § 6231. Questions of pleading discussed by counsel, as well as some minor matters, are not important to be considered in view of the conclusions we have stated on the merits of the case. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(117 Cal. 318)

WITTER v. BACHMAN et al. (L. A. 207.)

(Supreme Court of California, June 17, 1897.)

STREET IMPROVEMENTS—ACTION FOR ASSESSMENT—EVIDENCE—OPENING DEFAULT.

1. An amendment of complaint in matter of substance opens default.

2. It being made a prerequisite to a right of action for assessment for street improvement that the superintendent of streets record the return of the warrant and sign the record (Act March 18, 1885, § 10), the return of the warrant, showing on its face that this was not done, will prevent recovery, notwithstanding section 12 makes the assessment, warrant, diagram, certificate, and affidavit of demand and nonpayment "prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent * * * and city council, * * * and like evidence of the right of plaintiff to recover."

3. Admission in evidence, without objection, of a warrant, does not prove what is not shown thereby, but is alleged in the complaint, and is necessary to recovery,—that the superintendent of streets recorded the return of the warrant and signed the record.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by W. G. Witter against S. Bachman and others. Judgment for defendants. Plaintiff appeals. Affirmed.

G. F. Witter, Jr., for appellant. Venable & Goodchild, for respondents.

CHIPMAN, C. This is an action to foreclose a contractor's lien for certain work done upon the sidewalks in front of certain lots in the city of San Luis Obispo. Plaintiff filed a complaint, and caused summons to issue, which was served upon defendant Sallie Zederman only. Plaintiff caused default to be entered against her by the clerk for not answering, whereupon her counsel moved to set aside the default. The court granted the motion. Plaintiff prepared a bill of exceptions to bring up this alleged error of the court. Much of his brief is devoted to a discussion of the law as to when a defendant may have a default judgment set aside, which has been entered against him. But plaintiff, shortly

after this order was made, filed an amended complaint, introducing an additional defendant (W. W. Tinker), and alleging some new matter to which the defendants Zederman and Tinker answered, and plaintiff went to trial on this amended complaint and answer. Besides, there was no judgment entered upon the default, and none asked for. The amended complaint constituted a new complaint, which superseded all other pleadings in the case. By amending his complaint in matter of substance, as was done here, it had the effect to open the default. *Thompson v. Johnson*, 60 Cal. 292. The action set forth in the amended complaint was to recover the contract price of certain work mentioned in the original complaint, and to foreclose the lien thereof. Defendants had judgment. This appeal is from the judgment, and from the order denying plaintiff's motion for a new trial.

The case arises under the several acts so frequently before this court. St. 1885, p. 147; St. 1889, p. 157; St. 1891, p. 196. No question is presented as to the sufficiency of the complaint. Plaintiff offered in evidence the assessment, diagram, warrant, certificate, and affidavit of demand and nonpayment. The warrant was duly signed by the superintendent of streets, and countersigned by the president of the board of trustees, and recorded. Evidence was offered of the ownership of the lots in question, and also that a deposit had been made to provide for the payment of the assessment in controversy, and plaintiff rested. It was shown by defendants that the street superintendent did not in fact make the entries in the assessment roll, but he authorized them to be entered, and he afterwards signed the record. This was sufficient to make the entries his own. The defendants were then permitted to prove, against plaintiff's objection, that defendant Zederman asked permission, through one Dickerson, from the district attorney, to construct the sidewalks in front of her lots (the lots in question); that she made a contract with said Dickerson August 15, 1892, to do the work for her, and he did it. Defendants were also permitted, against plaintiff's objection, to introduce the minutes of the board where the council awarded the contract to plaintiff's assignor (one Pollard, the contractor) to show that the council granted permission to defendant Zederman to construct the sidewalks in front of her lots. Defendants then had read from the minutes the resolution of intention, and the contract with said Pollard to do the work. The resolution included the work in question, was introduced August 17, 1891, and passed on September 7, 1891, and ordered published for two days successively. The contract was introduced by defendant, and bears date September 24, 1892, and recites that it is made pursuant to proceedings of the board on September 5, 1892, awarding the contract, which latter proceedings do not appear in the record. In the body of the contract is to be found the resolu-

tion of intention, and various proceedings of the board by way of recitals, and among these is a resolution of the board, in which occurs the following: (1) "That sidewalks be constructed on Osos street of said city in accordance with the resolution of intention passed on September 7, 1891 (excepting, however, such places where, in the meantime, sidewalks may have been constructed)," etc. This resolution was passed October 19, 1891. The court found the facts as alleged in the complaint, except that it found (1) that on August 15, 1892, upon the application of defendant Zederman, the then owner of the lots in question, the board granted her permission to construct the sidewalks in front of said lots under private contract with one Dickerson; that the work was done by him and was substantially completed before the contract was let to Pollard; (2) that Pollard did no work and furnished no material upon the lots sought to be charged with the lien; (3) that the record of the return upon the warrant and assessment was not signed by the superintendent of streets; and that, while the contract was left with him, it was not recorded or marked as filed or recorded by him, or at all.

Plaintiff offers no evidence to show that the work for which he claims pay was done by him, except the assessment, diagram, warrant, certificate and affidavit of demand and nonpayment, which he alleges made a prima facie case, and he further claims that, when recorded in the office of superintendent of streets, they constituted a lien; that it was error to prove by parol the permission to defendant Zederman to do the work on her own lots; that three-fourths of the owners were not shown to have entered into a written contract nor made written application within 10 days after the first posting and publication of the notice of award, nor did they elect to take the work at any price; that no contract with said Zederman was shown; that the board acquired jurisdiction of the matter; and that defendants' only remedy was by appeal to the council. There is no brief on file for respondents, and we are left without any assistance from them. The certified copy of what purported to be the assessment, diagram, warrant, certificate, and affidavit of demand and nonpayment was introduced without objection. The assessment shows items against the lots in question amounting to \$145.73. There is no evidence to justify the finding of the court that the council granted permission to defendant Zederman to construct the sidewalks in front of her lots. There is no evidence to sustain the finding that this defendant completed the work before the contract was let to Pollard, the contractor, although there is evidence tending to show that she did the work and that the contractor did no part of it. The evidence justifies the finding that the record of the return upon the warrant was not signed by the superintendent of streets, and there is evidence to justify the finding that, although the contract of Pollard was left with

the superintendent, it was not recorded or marked filed or recorded by him, or at all. Section 10 of the act of 1885 requires that the warrant shall be returned to the superintendent, with a return indorsed thereon by the contractor, verified by oath, stating the nature and character of the demand, etc. "Thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded, at full length in a book to be kept for that purpose in his office, and shall sign the record." The indorsement upon the return is as follows: "Returned this 15th day of July, 1893, and return recorded. Supt. of Public Streets." The transcript nowhere shows that the contract was recorded, although defendants introduced and read from the minutes of the council what appears to be the contract between Pollard and the street superintendent, which was recognized by all parties as the contract and which was the basis of the claim. If the decision of the case were to rest wholly on the failure of the plaintiff to show that the superintendent failed to record the contract, I should hesitate to hold this alone as fatal to plaintiff's lien, inasmuch as it appears affirmatively and by defendants' evidence that all parties knew of the contract, and it was in fact spread at length upon the minutes, but the superintendent of streets failed to sign the record of the return. The title of his office is there, but the name of the officer is wanting, and there is the name of no deputy or other person acting for him. Among the prerequisites to the existence of a valid right of action in any case is this, to wit: That "the superintendent of streets shall record the return * * * and sign the record." This was not done, and the omission is fatal to plaintiff's cause of action. *Himmelman v. Danos*, 35 Cal. 441; *Dougherty v. Hitchcock*, Id. 518.

Plaintiff insists that he made a prima facie case when he introduced the assessment, warrant, diagram, certificate, and affidavit of demand and nonpayment, citing *Jennings v. Le Roy*, 63 Cal. 397; *Jennings v. Le Breton*, 80 Cal. 13, 21 Pac. 1127; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 800; *Perline v. Erzgraber*, 102 Cal. 235, 36 Pac. 585. The act makes these "prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council, * * * and like evidence of the right of the plaintiff to recover." I do not understand that these are prima facie evidence of the correctness of any step necessary to be taken subsequently. Section 10 of the act, as we have seen, requires the warrant to be returned, and the return to be recorded, and the record signed by the superintendent. None of the cases cited by plaintiff presented facts as exist here. There was nothing in those cases to show any defect in this prima facie evidence. But here the return of the warrant is self-impeached by showing on its

face the fatal defect, and the only question that can arise is whether this court will take notice of it, in view of the fact that defendant did not object to the evidence. It was alleged in plaintiff's complaint that the superintendent duly recorded the return of the warrant in the margin of the record of the said warrant and assessment, and also the original contract referred to therein, at full length, in a book kept by him for that purpose in his office, and signed said record. I think this essential averment should have been proved. The admission in evidence of the warrant without objection cannot be held to prove a fact not shown on its face, and the facts essential, as above alleged, were not shown in the warrant or elsewhere. The most this court is authorized to do is to accept the warrant as evidence of what appears on its face.

Plaintiff makes several assignments of error based upon objections to testimony which have already been stated. It is unnecessary to consider these; for unless plaintiff, by his evidence, presented at least a prima facie case, the errors of the trial court, if any, when corrected, would not enable plaintiff to maintain his action. He did not present such prima facie case. It fell short in at least one vital particular. The judgment and order denying motion for new trial should be affirmed, and it is so recommended.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying motion for new trial are affirmed.

117 Cal. 364

CHASE v. PUTNAM. (S. F. 566.)

(Supreme Court of California. June 18, 1897.)

TRESPASSING ANIMALS — DISTRAINT — LIEN FOR DAMAGES — HOW LOST.

Act March 27, 1872, provides that animals found damage feasant on land in specified counties may be taken by the occupant of the premises, and kept at the owner's expense for 10 days, and that if the latter fails to claim his property within said time, and pay damages and costs, the distrainer must notify the constable, who, after 10 days' notice, shall sell the property at public auction. *Held*, that a distrainer who purchases and claims title under a sale which is void for want of the required notice loses his statutory lien.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Claim and delivery by Eli R. Chase against George A. Putnam. From a judgment for defendant, plaintiff appeals. Reversed.

W. D. Tinning, for appellant. C. Y. Brown and R. H. Latimer, for respondent.

SEARLS, C. Action in claim and delivery to recover three horses or their value. Defendant set up two defenses to the action: (1) Denial of most of the material allegations of the complaint. (2) That the three horses,

with four others owned by plaintiff, were found damage feasant upon his premises; were impounded, notice given to plaintiff, damages assessed, property sold by constable, and purchased by defendant, substantially as provided by statute of March 27, 1872, entitled "An act to protect agriculture and to prevent the trespassing of animals upon private property." The cause was tried by the court, without a jury. The court found in part as follows: (1) Plaintiff was and is the owner of the property, which is of the value of \$90. (2) That defendant was on or about July 20, 1895, the occupant of certain described real property in Contra Costa county, and on July 20, 1895, found said horses, with others, upon his land, having done and doing damage, and took up and safely kept said horses until taken from him by the sheriff in this action. (3) Defendant notified plaintiff July 20, 1895, of such detention, and the reason thereof. (4) Plaintiff is indebted to defendant for damage done and keeping said horses in the sum of \$29, which plaintiff refused to pay, or to choose disinterested persons to determine the amount of damages, or to pay any damages. (5) A justice of the peace of the proper township appointed two persons to assess the charges and damages, and they assessed them. (6) Defendant notified a constable of the proper township, who sold the horses in suit at public auction, but "without giving ten days' notice of said sale by posting said notices in three public places in said township." (7) The allegations of the complaint are true, except as above specified, and the allegations of the answer are not true, except as above specified. As conclusions of law, the court found in substance: (1) Defendant has a valid lien on the horses for \$29. (2) That the sale of the horses was void. (3) Plaintiff is entitled to possession of the horses on the payment of \$29, and upon the payment of such sum within 15 days he shall have judgment for possession, etc., and, if such possession cannot be had, for \$90, the value thereof. (4) If plaintiff does not pay \$29 within the fifteen days, defendant is entitled to judgment for the return of the horses, "or the value thereof, as stated in said complaint (answer), in the sum of forty-five dollars." Plaintiff having refused to pay the \$29 within the 15 days, judgment was entered in favor of defendant for possession of the three horses, and, in case a return thereof cannot be had, for \$45 and for costs. Plaintiff appealed from the judgment within 60 days from and after its rendition, and supports his appeal by a bill of exceptions.

Among the private wrongs which at common law might be redressed by the mere act of the party injured was that occasioned by animals of another, taken damage feasant. When impounded, they were held by the distrainer as security to compel satisfaction. He might not work, use, or sell the distrained beast, and could only hold it until the owner made satisfaction, or contested his right there-

to by a replevin. As was said by Blackstone (book 3, p. 14): "This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, it is no remedy at all to the distrainer." To obviate the imperfections of such a remedy, in most, if not all, the states of our Union, statutes have been enacted defining the circumstances under which animals may be distrained damage feasant, and the steps to be taken by the restrainer in satisfaction of his damage. Our statute of March 27, 1872 (St. 1872, p. 563), which applies to a few counties of the state, among which is Contra Costa, empowers the owner or occupant of any land or possessory claim, finding any horse, mare, mule, etc., upon such land or possessory claim, "having done and doing any damage," to take up and safely keep such animal at the expense of the owner for 10 days, and he shall be allowed 20 cents per day for keeping each horse. If the owner is known and resides in or near the township, he must be forthwith personally notified. If the owner, within 10 days, proves property, pays costs, charges, and damages, the property is to be delivered up. If he fails so to do, the distrainer must forthwith notify a constable of the township, who shall sell the property at public auction after 10 days' notice, by posting in three public places, and pay the proceeds over to a justice of the peace, etc. If the parties disagree as to the charges and damages, each party may choose a disinterested person, and they may choose a third person, who shall determine the amount thereof. Should the owner not come forward, then the justice of the peace may appoint two persons, and they may choose a third to settle the amount. The overplus of any sale after payment of costs and charges is to be paid over to the owner. The owner may redeem before sale or within 12 months thereafter, etc. George A. Putnam, the defendant and respondent, seized, held, and had the horses in question sold under the statute specified, and became the purchaser thereof. The court below held the sale void for want of proper notice. There were other irregularities which might be mentioned, but, as they only tend to accentuate the finding that the sale was void, we need not dwell upon them.

The legal proposition upon which the case turns is this: After an attempted enforcement of defendant's lien under the statute by a sale of the property, which was void, and a purchase by him under such void sale, can he still retain possession by virtue of his lien? Generally, a party pursuing a remedy *ex parte*, which may result in depriving another of his property must pursue strictly the authority the law gives him. *Newsom v. Hart*, 14 Mich. 233. "Where a lien is given by statute, it repudiates everything like an equitable lien. * * * In other words, a lien which is the creature of statute can be

enforced only in the manner prescribed by the statute." *Overt. Liens*, p. 28. In Tennessee it was held that a purely legal lien must be enforced within the period fixed by law, and, upon failure to sell the property within such prescribed time, the lien was lost. *Harrison v. Wade*, 3 Cold. 505. *Trumpler v. Bemery*, 39 Cal. 490, enunciates a like doctrine, and in many of its features strongly resembles the case at bar. *Curran v. Shattuck*, 24 Cal. 427, and *Bensley v. Water Co.*, 13 Cal. 307, are authority to the effect that a strict compliance with statutory provisions is essential in such cases. "The sale of any property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien thereof." *Civ. Code*, § 2910.

In his answer, defendant counts, not upon his lien, but upon his ownership of the property acquired through the sale by the constable and purchase by him. The several steps averred to have been taken were but the prerequisites provided by statute, through the performance of which the title is averred to have passed to defendant. We are of opinion the attempted sale of the property, and the subsequent claim of title thereto by defendant, were inconsistent with the continued existence of his lien thereon, and amounted to a conversion of the chattels, and extinguished the lien. The statute which creates the lien does not undertake to keep it alive indefinitely. The distrainer may hold the property for 10 days, and then he must, if it is not redeemed, forthwith notify the constable, who, after 10 days' notice, shall sell, etc. If the theory of respondent be correct, that the lien continues after an attempted, but futile, sale, then it may continue to exist after any number of such sales, and the distrainer could continue indefinitely to maintain his lien and possession of the property. This was one of the evils attendant upon the common-law lien in such cases, which the statute sought to avoid. It gives to the distrainer a speedy and summary remedy for the injury which he has sustained, but, in availing himself of its advantages, it is incumbent upon him to comply strictly with the requirements of the law, and when, by failure so to do, his sale is void, and he thereafter claims title under such void sale, we think he must be deemed to have waived or lost his lien. *Lehmann v. Schmidt*, 87 Cal. 15, 23 Pac. 161; *Sutton v. Stephan*, 101 Cal. 545, 36 Pac. 106; *Maynard v. Anderson*, 54 N. Y. 641; *Jones, Liens*, § 1019. There is a broad distinction between cases of liens of the character we are considering and those depending upon contract, which was pointed out in *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595. Assuming, then, without deciding, that the statute in question, authorizing a sale as therein provided, does not trench upon the constitutional rights of the owner of property, we are of opinion that the

lien of the defendant on the horses had ceased to exist before the date of suit brought herein; and, as the court below found that plaintiff is the owner of the property, we recommend that the judgment be reversed, and the court below be directed to enter judgment in favor of the plaintiff for the return of the three horses, or, in case a return thereof cannot be had, for the value thereof as found by the court, viz. the sum of \$90, and for costs of suit.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to enter judgment in favor of the plaintiff for the return of the three horses, or, in case a return thereof cannot be had, for the value thereof as found by the court, viz. the sum of \$90, and for costs of suit.

117 Cal. 356

BARBER v. MULFORD et al. (L. A. 131.)
(Supreme Court of California. June 18, 1897.)

MANDAMUS—PARTIES—COMPLAINT—WAIVER OF
OBJECTIONS—APPEAL—REVIEW—MATTERS NOT
APPARENT OF RECORD—LIMITATIONS—FAILURE
TO PLEAD—JUDGMENT—RES JUDICATA—INTEREST.

1. Where the president and secretary of a school board refused to issue a warrant for payment of a claim allowed by the board, as required by statute, it was not improper to join the school district, by its corporate name, as a party defendant to mandamus proceedings against such officers to compel the issuance of the warrant.

2. Nor was it improper to make such officers parties defendant, they having respectively ministerial duties to perform in affording the relief claimed by plaintiff.

3. Where a complaint contains averments from which a material fact may justly, if not necessarily, be inferred, if greater explicitness is required, defendants must demur specially for uncertainty.

4. On appeal the court cannot consider an assignment based on the denial of a motion to strike part of a complaint, where the motion and order are merely printed in the transcript, and are not embodied in a bill of exceptions.

5. Limitations must be pleaded, and advantage of the statute cannot be taken on appeal for the first time.

6. A judgment for defendant in an action against a school district for services is not a bar to mandamus proceedings by plaintiff therein against such district and officers of the school board to compel the issuance of a proper warrant, after the claim for services was allowed by the board, where it does not appear that the issues which go to the merits of such proceedings were raised and determined in the prior suit.

7. In mandamus to a school district and officers of the school board to compel the issuance of a warrant in payment of a claim allowed by the board, it is error to include interest.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Mandamus proceedings by Clarence L. Barber against H. S. Mulford and another, respectively president and secretary of the board of education of the city of San Diego, Cal.,

and such board, to compel the issuance to plaintiff of a warrant in payment of a claim for services allowed by the board. From a judgment awarding a peremptory writ, defendant board appeals. Modified and affirmed.

Sweet, Sloane & Kirby, for appellant. Wm. H. Fuller, for respondent.

BRITT, C. Mandamus. Defendant Mulford is the president, and defendant De Burn is the secretary, of the board of education of the city of San Diego. Such board is created by the charter of said city, and is charged, under the law, with control of the affairs of the San Diego school district, which district itself, by its corporate name, is also a party defendant here. On April 27, 1891, plaintiff presented to said board of education a bill for certain services rendered at the request of the latter. Thereupon a motion was carried and entered on the minutes of the board "that the bill, amounting to \$510, be paid"; and accordingly a warrant was drawn for that sum on the treasurer of the city of San Diego, the custodian of the city school funds designated by the terms of the charter (St. 1889, p. 715). Payment was refused, it would seem for the reason that by the general law, to which the charter provisions are subject, the county treasury is the proper repository of such funds, as was subsequently established by the decision in *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558. There the money is subject to the requisition of the county school superintendent drawn upon the county auditor on the order of the board of education. Pol. Code, § 1543. In 1893, after *Kennedy v. Miller* was decided, plaintiff informed the board that said warrant had not been paid, and requested that an appropriate order be drawn in its stead on the county school superintendent, which request was refused. By the rules and practice of the board, it is the duty of the president and secretary to sign and deliver such orders for bills which the board has allowed and ordered paid. In April, 1894, plaintiff brought an action against the San Diego school district, alleging in his complaint the facts on which his aforesaid claim was founded, its allowance by the board on April 27, 1891, a subsequent refusal to pay the same, and praying judgment for the amount thereof. Judgment was rendered against him in that action on December 4, 1894, and on the same day he instituted the present proceeding, in which, after trial, the court below awarded a peremptory writ of mandate, requiring the board of education and the members thereof to issue in plaintiff's favor an order on the county school superintendent for a proper requisition in the sum of \$510, with interest thereon from April 27, 1891. The appeal is by the board of education only. No question is made as to the legality of the plaintiff's demand audited by the board, or as to the propriety of the action of that body in allowing the same.

1. It is contended that there is a misjoinder of defendants, in that the school district is made a party, and that the president and secretary are proceeded against together with the board of education. A school district is a corporation organized for educational purposes (*Estate of Bulmer*, 59 Cal. 131), and, as such, is subject to this writ to enforce the performance of an act which the law specially enjoins, etc. (Code Civ. Proc. § 1085). While with us the more general practice in mandamus has been to proceed against the officials only who, as representatives of a body politic, have refused performance of some duty owed to the plaintiff or relator, yet there seems no good reason why their principal, the legal entity which is commonly the real party to be affected by the writ, may not be joined as a defendant in the proceeding. Though seldom a necessary party, it can hardly, in a case like the present, be called an improper one. *Merrill, Mand.* § 237; *Tied. Mun. Corp.* § 367; *Wren v. City of Indianapolis*, 96 Ind. 212-216; *Glencoe v. People*, 78 Ill. 386; *Hitchcock v. City of Galveston*, 48 Fed. 640; *City of Louisville v. Kean*, 18 B. Mon. 9. And, since the president and secretary of the board of education had respectively ministerial duties to perform in affording the relief claimed by plaintiff, there was no impropriety in making them parties. *Peck v. Supervisors*, 90 Cal. 384, 27 Pac. 301; *Merrill, Mand.* § 235.

2. The complaint or affidavit stated facts sufficient to show that the board of education owed a duty to plaintiff. The allowance by it of his bill on April 27, 1891, was not the total of its official obligation. Following upon that was the duty to provide for payment, viz. to draw or cause to be drawn an order on the county superintendent. Pol. Code, § 1543, subd. 2. As to the contention that the complaint fails to allege funds subject to the disposition of the board adequate to pay plaintiff's claim, we find that it does contain averments from which the present sufficiency of such funds may be justly, if not necessarily, inferred; and, if greater explicitness was required, defendants should have demurred specially for uncertainty. *Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410.

There is printed in the transcript a notice of motion to strike out part of the complaint, also an order of the court refusing the same, and error is assigned thereon. These proceedings are not part of the judgment roll, and are not embodied in any bill of exceptions. This court can therefore take no notice of them. *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92.

3. There was a plea of the provision of the statute of limitations barring in two years an action upon a contract, obligation, or liability not founded upon an instrument in writing. Code Civ. Proc. § 339, subd. 1. Respondent argues that his proceeding rests upon the resolution of the board ordering that his bill be paid; that this was a written instrument, and hence not within said section 339; but

in our opinion, if the statute of limitations relates at all to a proceeding of this nature, its particular provision applicable is that which bars in three years an action upon a liability created by statute. Code Civ. Proc. § 338. It is not disputed that the plaintiff's bill for services, when audited by the board, was a legal charge against the funds of the district. It was consequently a duty imposed by statute on the board to draw an order on the proper officer for the payment thereof. It is to obtain performance of this official function, and not the establishment of any contractual right against the district, which is the purpose of the present proceeding. Accordingly, since plaintiff did not apply for the writ until after the lapse of more than three years from the time his claim was allowed, we are disposed to think the objection now taken on this ground might have been formidable if appellant had pleaded it. There was such a plea on behalf of the president and secretary, but it was not asserted either by demurrer or answer that said section 338 reaches the case of the board of education, and the objection cannot be first raised on appeal.

4. It is claimed that plaintiff is estopped in this proceeding by reason of the action brought by him against the school district and the judgment adverse to him. The complaint is the only paper in that case shown in the present record. From that the object of the action seems to have been the recovery of judgment on plaintiff's original account. Here the purpose is to enforce performance of official duty, treating said account as an audited demand against the district. *Alden v. Alameda Co.*, 43 Cal. 270. While it is possible that issues might have been raised and determined in that case which go to the merits of this, it is certainly not made apparent that such was the fact, and the defense based on the former action and judgment must be overruled. *Greer v. Tripp*, 56 Cal. 200, 212.

5. It was error to include interest in the mandate of the writ. If it be said that interest should be allowed for damages as in ordinary cases of breach of contract, the reply is that mandamus does not lie to enforce the obligation of contracts, but only the performance of an act which the law specially enjoins; in this instance the issuance to plaintiff of an order for the amount of his audited claim, no more nor less. The judgment should be modified by omitting therefrom the direction for the allowance of interest, and, thus modified, it should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by omitting therefrom the direction for the allowance of interest, and, thus modified, is affirmed.

117 Cal. 254

FRANK v. PENNIE. (S. F. 575.)

(Supreme Court of California. June 16, 1897.)

MONEY RECEIVED—DEFENSES—DECLARATIONS IN PARTY'S INTEREST—REVIEW ON APPEAL—SUFFICIENCY OF OBJECTIONS.

1. In an action to recover money alleged to have been deposited with defendant's intestate upon his promise to repay on demand, defendant may show, under the general issue, that the claim is for a gambling debt.

2. In such action it is incompetent to prove by intestate's clerk the contents of a lost book in which witness entered, at intestate's dictation, memoranda of amounts lost by the latter to plaintiff at poker; such memoranda being declarations in intestate's interest, the effect of which would be to avoid the debt.

3. Error in admitting declarations of a party in his own interest will not be considered on appeal where the only objection made in the court below was that the question put to the witness was leading.

4. Nor where the objection was merely general.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Charles Frank against J. C. Pennie, administrator of Joseph Spanler, deceased. There was a judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

J. D. Sullivan and Herbert Choyinski, for appellant. J. J. Maccabe and R. F. Mogan, for respondent.

HENSHAW, J. Appeal from the order denying plaintiff a new trial. Plaintiff sued defendant, administrator of the estate of Joseph Spanler, deceased, to recover certain sums of money which he alleges were deposited by himself and by his assignors with Spanler upon the latter's promise to repay upon demand. The defendant made denial, and upon the trial was allowed to introduce evidence showing that the debts were gambling debts, for moneys lost to plaintiff and his assignors at the game of poker. The court found in accordance with the evidence introduced by the defense, and rendered judgment accordingly.

It was permissible to introduce evidence of the nature of the transaction between the parties under the general issue. Plaintiff averred and defendant denied that money had been deposited with or lent to Spanler under his promise to repay. In showing that no money was in fact deposited, it was competent to prove that the claim was for a gaming debt.

Spanler conducted a cigar store, in the rooms at the rear of which games of poker were played. His former clerk was allowed to testify that he kept Spanler's books; that one of them was called the "Poker Book," and contained statements of Spanler's losses to the other players; Spanler would give him memoranda of the names of the players and the amounts lost, and he would transfer the memoranda to the book. The loss of the book was proved, and then the witness was allowed

to testify to its contents, plaintiff reserving the following objection: "Q. Do you remember how much appeared to be due on his books to Mr. Linville, on account of poker games, from Joseph Spanier? Mr. Sullivan: I object, as leading. The Court: That is a proper question. (Plaintiff excepts.) A. \$900. Q. How much was due to Mr. Barnett? (Same objection. Same ruling. Exception.) A. About \$500." Under proper objection, the evidence was inadmissible. The book was not a tradesman's book of original entry, which, after certain formal proofs, is admissible in evidence. It contained merely declarations of Spanier in his own interest made to, and set down by, his clerk. They were clearly declarations in his interest, since their effect, if admissible as evidence, would be to enable Spanier to avoid the payment of a debt. But plaintiff's objection does not present the point. The question was objected to only as being leading. This objection was properly overruled. Appellant will not here be allowed to enlarge his grounds of objection, and urge new ones not presented in the first instance to the trial judge. *Clarke v. Huber*, 25 Cal. 593; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271; *Howland v. Railway Co.*, 110 Cal. 513, 42 Pac. 983. Again, during the examination of the same witness he is questioned as follows: "By Mr. Smith: Q. Did Mr. Spanier ever declare or say to you what he owed these people money for? Mr. Sullivan: We object to that. Mr. Smith: It is a declaration against interest. The Court: The objection is overruled. Mr. Sullivan: Note an exception. A. Yes, sir; poker debts." This evidence, also, under proper objection, should have been excluded. Like that just considered, it is hearsay evidence of the declaration of a party in his own interest, not against it. But no ground of objection was presented to the trial court, and its ruling is not, therefore, open to review. The order appealed from is affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

117 Cal. 361

MINTZER v. SCHILLING et al. (L. A. 296.)
(Supreme Court of California. June 18, 1897.)

STATUTES—LOCAL AND SPECIAL LAWS—MUNICIPAL CORPORATIONS—DISINCORPORATION—PROCEEDINGS—SUBMISSION TO VOTE OF ELECTORS—PETITION—NOTICE OF ELECTION—SUFFICIENCY.

1. Act March 26, 1895, providing that a municipal corporation "of the sixth class" may disincorporate after proceedings had as required by the act, and prescribing such proceedings, is not in conflict with Const. art. 4, § 25, subd. 33, prohibiting local or special laws "when a general law can be made applicable," because the act might have been made to apply to all classes of such corporations.

2. Act March 26, 1895, provides that the legislative body of a municipal corporation shall, "upon receiving a petition therefor" signed by a designated number of electors, submit to the electors the question whether such corporation shall disincorporate, etc. *Held*, that such peti-

tion need not pray directly for disincorporation, but it is sufficient if it pray for a submission of the question of disincorporation.

3. Such act provides that the question shall be submitted at a special election, and such legislative body shall give notice thereof by publication in a newspaper. *Held*, that where such body made provision for such an election, and directed the city clerk to give notice thereof in a designated paper, a notice of such election, over the clerk's official signature, published in such paper, was sufficient.

4. Where the election was directed to be held on July 27, 1896, and notice was published in five weekly issues of a newspaper, commencing June 27 and ending July 25, 1896, it complied with the provision requiring notice to be given by publication in a newspaper "for a period of 30 days prior to such election."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Mandamus proceeding by W. H. Mintzer against William Schilling and others to require defendants, as members of the board of trustees of the city of Long Beach, Cal., to canvass the returns of a special election at which there was submitted to the electors the question whether such city should disincorporate. From a judgment awarding a peremptory writ of mandamus, defendants appeal. Affirmed.

W. T. Kendrick and A. C. Lawson, for appellants. Mulford & Pollard and Henry Bleeker, for respondent.

BRITT, C. The town, or, as it is called officially, the city, of Long Beach, in Los Angeles county, is a municipal corporation of the sixth class, in which class are included all cities, having less than 3,000 inhabitants, organized under the act of March 13, 1893, "to provide for the organization, incorporation and government of municipal corporations." Defendants compose the board of trustees of said town, which board is the legislative body of the corporation. Among the provisions of "An act to provide for the disincorporation of municipal corporations of the sixth class," approved March 26, 1895 (St. 1895, p. 115), are the following: "A municipal corporation of the sixth class may disincorporate after proceedings had as required in this act. The council, the board of trustees, or other legislative body of such corporation shall, upon receiving a petition therefor, signed by not less than one-fourth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation the question whether such municipal corporation shall disincorporate. Such question shall be submitted at a special election to be held for that purpose, and such legislative body shall give notice thereof by publication in a newspaper * * * for a period of thirty days prior to such election." In June, 1896, a petition signed by the requisite number of electors was presented to said board of trustees, praying that body "to call an election in said city for the purpose of the disincorporation of

said city as provided for in an act," etc.; designating the said statute of 1895. In compliance with such petition the said board, by resolution passed June 25, 1896, made appropriate provision for such election, and directed that the same be held on July 27, 1896, and that the city clerk give notice thereof by publication in a specified weekly newspaper. Accordingly the clerk published such notice over his official signature, reciting therein that it was given pursuant to said resolution of the board of trustees directing the same. The notice was published in five weekly issues of the designated newspaper, commencing on June 27th and ending July 25th. The election was held July 27th, and a majority of the votes cast were in favor of disincorporation. The board of trustees, however, refused to canvass the returns as required by the statute, and the present proceeding is in mandamus to compel them to do so. The court below awarded the writ as prayed by plaintiff.

The chief contention of appellants is that the act of March 26, 1895, conflicts with the constitutional provision against special legislation. It is said that the act might have been made to apply to all classes of municipal corporations as well as to the sixth only, and hence that it violates the clause of the constitution prohibiting the passage of local or special laws " * * * in all other cases where a general law can be made applicable." Article 4, § 25, subd. 33. It seems to us that the question is not now open to debate. It is very apparent that a mode of disincorporation intimately affects the organization of a municipality. The method provided by this statute is strictly an organic, as distinguished from a functional, process, if we may use those terms in this connection; and it is settled that, in matters pertaining to the organization of municipal corporations, the legislature may make different provisions for the different classes thereof. *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Los Angeles v. Teed*, 112 Cal. 319, 328, 44 Pac. 580. See, also, *Hellman v. Shoulters*, 114 Cal. 136, 137, 44 Pac. 915, and 45 Pac. 1057; *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270. We think the statute was within the power of the legislature to enact.

It seems to be the contention of appellants that a petition under the act must pray directly and specifically for disincorporation, in order to authorize any action by the board of trustees, and not merely for a submission of the question of disincorporation to the vote of the electors. But the provision of the statute is for a submission of that question "upon receiving a petition therefor." The petition here and the allegation thereof in the plaintiff's complaint were sufficient in that respect. The notice of election published by the clerk was good. It showed on its face that it was given by authority of the board of trustees, and it was not necessary that

the members of the board should themselves sign the same, as supposed by appellants. Also, it was published for the requisite period. The publication began June 27th, and the election was held on July 27th. Notice of 30 days, within the meaning of the statute, was thus given. *Derby v. City of Modesto*, 104 Cal. 515, 38 Pac. 900; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715. Some other points are raised, but they are not sufficiently important to require special notice. The court properly granted the writ, and the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

117 Cal. 248

HEYDENFELDT v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 687.)

(Supreme Court of California. June 18, 1897.)
PROBATE COURT—ORDER OF DISTRIBUTION—REVERSAL—RESTITUTION OF PROPERTY.

The superior court, in a probate proceeding, may order a restitution to executors of property delivered under a decree of distribution which was reversed on appeal to the supreme court.

Department 2.

Proceeding by Elizabeth A. Heydenfeldt against the superior court of the city and county of San Francisco, J. V. Coffey, judge, under a writ of review to have a certain order declared void. Order affirmed.

Knight & Heggerty and Geo. D. Collins, for petitioner. T. M. Osmond, for respondent.

TEMPLE, J. This is a proceeding under a writ of review to have a certain order declared void. The court had made the decree of distribution in the estate of Solomon Heydenfeldt, deceased, and, under that decree, certain property belonging to the estate was distributed to the petitioner, and, in pursuance of the decree, was given into her possession by the executors. Subsequently the decree was reversed by this court on appeal. 39 Pac. 788. After filing the remittitur, the executors presented to the probate court a petition setting forth the above facts, and asking for an order requiring the petitioner herein to restore the property so received by her to the executors. To the citation she interposed an answer, in which she denied that she had no title to the property or right of possession other than as devisee and legatee of Solomon Heydenfeldt, deceased, and averred that she was herself the owner of all the property involved in the proceeding. This answer was, on motion, stricken out as sham and frivolous, and the court proceeded, after the hearing, to make the order here complained of.

It will not be contended that the court ex-

ceeded its jurisdiction in striking out the answer as sham and frivolous, and, although I see no reason to doubt that it properly exercised its jurisdiction, that question does not arise here. As the answer did not deny that Mrs. Heydenfeldt received the property from the executors, as property of the estate distributed to her, it stated no defense. But the real question is: Has the supreme court, in a probate proceeding, the power to make such an order? The question is not that which was involved in *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118. There the person in possession of property claimed for an estate was in a position to aver a title adverse to the estate. The petitioner here could not do that, unless she denied that she received the property under the decree, which she does not do, and did not attempt to do.

But if, in any case, an order for restitution may be made of property delivered under a decree of distribution which was reversed, then this writ must be denied. It is claimed that the court had no power to make an order under any circumstances; that it is a court of limited and special jurisdiction, and could do nothing not expressly or impliedly authorized by the statute. It was ruled in *Re Burton*, 98 Cal. 459, 29 Pac. 36, that the jurisdiction of probate matters was conferred upon the superior courts by the constitution as a part of the jurisdiction of the superior court, and that it is the same court when doing probate work that it is when trying any other action. It is only a special proceeding in the superior court. In *Burris v. Kennedy*, 108 Cal. 381, 41 Pac. 458, it was said that we have no probate court in this state, and, although an administration of an estate may be a special proceeding, the court is not, while sitting in probate, a statutory tribunal, and does not derive its power from the statute. And, further: "It is true, the court, although deriving its power from the constitution, is controlled in the mode of its action by the Code; and so it is to the same extent when foreclosing a mortgage, or trying an action on a promissory note. In both cases it is pursuing a mode prescribed by a statute, but in neither does it derive its power from the statute." It was decided in *Reynolds v. Harris*, 14 Cal. 668, and that case has been many times approved and followed, that the power to afford a remedy for an injury of this kind done by its officers, or by reason of its process or judgment, is inherent in the court. I think it has always been held that this power belongs to every court of record. There can be no doubt but the superior court possesses this power. I see no reason for holding that this power is limited to that class of cases which, in the constitution, are called "adversary actions." The ground for exercising the power at all is that an injury has been done by the court itself or its officers, and the court proceeds to right the wrong, when it can, without an action. The facts upon which the right to the relief depend are

within the knowledge of the court. It is not necessary, therefore, to frame an issue, and take evidence upon that subject. I do not see how the fact that, when a special statutory proceeding is pending in a court of general jurisdiction, it is, as to that proceeding, a court of limited jurisdiction, can affect this question, even if it were conceded that the present is a case of that character. The court derives its authority to entertain either proceeding from the same source, and the injury results in each case from the judgment or process of the court. There is as much occasion for the exercise of the power in the one case as in the other, and I know of no principle upon which it can be conceded in one case, and denied in the other. The order is affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

117 Cal. 352

In re LIGGET. (Sac. 203.)

(Supreme Court of California. June 18, 1897.)

HOMESTEAD—WHAT CONSTITUTES—FINDINGS.

1. A portion of a lot owned by a debtor, and inclosed by a fence, with a rented house thereon, and not used in connection with his homestead, but adjacent to the lots upon which he resides with his family, cannot, by filing a declaration of homestead be made a part of the homestead, under Civ. Code, § 1231, providing that "the homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated."

2. On petition for a homestead, findings that both the portion of the property not set apart and that set apart are suitable for a homestead are not inconsistent.

3. In view of Code Civ. Proc. § 1465, under whose provisions a court may, on petition of an insolvent, set apart a homestead, no more property should be set apart than authorized by law, though there be no written opposition to such a petition.

4. The appearance of an assignee, and his opposition to the granting of a petition of an insolvent, as to a part of the property sought as a homestead, creates an issue justifying findings.

5. The petitioner for a homestead is not prejudiced by the making and filing of findings, whether necessary or not.

6. The petitioner for a homestead cannot complain that findings are made, when made at his request.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

B. F. Ligget, insolvent, petitions for a homestead. From an order refusing to set aside to him a portion of the property claimed, he appeals. Affirmed.

R. Clark and F. B. Baker, for appellant. Hurst & Hurst and L. T. Hatfield, for respondent.

HAYNES, C. B. F. Ligget, having been adjudged an insolvent debtor upon the petition of his creditors, filed a petition in the superior court asking to have set apart as a homestead lots 1, 2, 3, 4, 9, and 10 of block 2, range D, of the town of Davisville, in Yolo county. The

assignee appeared, and contested the petition, as to a portion of the property sought to be set apart. Findings were filed by the court, from which it appears that prior to the proceedings in insolvency the wife of petitioner caused a declaration of homestead to be filed upon all of said property; that at the time of making and filing said declaration of homestead, and at the time of the hearing of said petition, the said petitioner, with his wife and family, resided on lot 3, upon which their dwelling house was situated; that all of lots Nos. 2, 3, 4, 9, and 10, and a strip across the rear end of lot No. 1 of 20 feet, more or less, were used in connection with, and as a part of, said homestead, but that no part of said lot No. 1, except the said strip, was ever used in connection with, or as a part of, said homestead; that at the time of the said making and filing of the said declaration of homestead there was, and now is, upon the front part of said lot 1, a dwelling house and appurtenances thereto, and that said lot 1, except said strip across the rear end thereof, is separated from the remainder of said premises by a fence, and had been rented by said petitioner at a monthly rental of about eight dollars, but had not been rented since the filing of said homestead declaration; and that petitioner had never used said portion of said lot 1, except to rent it. The court further found that said lot 1 is suitable for a homestead, as is also the remainder of the said premises, including the said strip off the rear end of said lot 1. The court thereupon made an order setting apart to the petitioner all of said property except that portion of lot 1 which was inclosed with the dwelling upon it, and which had been theretofore occupied by a tenant; and the petitioner appeals from so much of said order as refused to set apart to him as a homestead the whole of lot 1, with the other property.

Appellant seems to rely upon the fact that his wife included the whole of the property in her declaration of homestead, and that, therefore, the homestead so declared upon must be set apart under the statute. In this the appellant is mistaken. Section 1237 of the Civil Code provides, "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated selected as in this title provided." In *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145, a declaration of homestead had been filed upon a lot upon which there was but one dwelling house, and afterwards a second dwelling was erected upon a portion of the same lot. It was held that the homestead covered and included both dwellings, the court holding that the erection of the additional dwelling did not vitiate or affect the homestead as an entirety; that a homestead once duly established cannot be defeated or vitiated except by conveyance, incumbrance, or abandonment in the manner provided by sections 1242 and 1243 of the Civil Code. But the court said (page 229, 82 Cal., and page 1147,

22 Pac.) that "if at the time of filing the declaration for record the two houses now standing upon his lot had been standing as they now do, and occupied as they now are, only the one occupied as the dwelling of the plaintiff, with that portion of the lot used in connection therewith, would have been impressed with the homestead character. As to the other house, and the land used in connection with it, the attempt to dedicate it as a homestead would have been inoperative. *Tiernan v. His Creditors*, 62 Cal. 286; *Maloney v. Hefer*, 75 Cal. 424, 17 Pac. 539; *In re Allen*, 78 Cal. 294, 20 Pac. 679." It is clear, therefore, that the filing of the declaration of homestead by Mrs. Liggett did not operate to include the dwelling on lot 1, and that portion of the lot inclosed therewith, in the homestead. Nor does the Code permit the court to include it with the other lots, upon which the petitioner resides, in the homestead set apart by the court. Nor are the findings that lot 1, with the dwelling thereon, was suitable for a homestead, and that the portion set apart was also suitable as a homestead, inconsistent.

Appellant further contends that no written opposition to his petition was filed; that, therefore, no issue was made, and the court should have set aside the whole of the property petitioned for. Under the insolvent act of 1895 it is made the duty of the court to set apart a homestead for the benefit of the insolvent "in the manner provided in section 1465 of the Code of Civil Procedure." That section authorized the court, on its own motion, or on petition therefor, to set apart a homestead for the use of the surviving husband or wife, etc., but the homestead set apart under that provision of the Code of Civil Procedure could not exceed the homestead provided for in section 1237 of the Civil Code. It might be set apart by the court on its own motion, or upon the petition of the insolvent. Neither the insolvent act nor the Code of Civil Procedure provided for any written opposition, and, whether any one opposed the application or not, it was the duty of the court to ascertain the facts in relation to the character and occupation of the property; and the court was not authorized to set apart any property which under the law did not constitute a part of the homestead occupied by the petitioner simply because the application was not opposed.

It is further said by appellant that there can be no findings where no issues are tendered, and that findings are useless unless they are within the issues. The assignee, however, appeared and opposed the granting of the petition so far as it included lot 1 and the dwelling thereon, so that there was in fact an issue to be passed upon; and the findings recite that the court, at the request of the petitioner, prepared and filed findings of fact and conclusions of law. Whether necessary or not, the making and filing of findings could not prejudice the petitioner. Nor

could he complain of any action of the court of that character taken at his request. No other questions are presented. The order and decree of the court appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and decree of the court appealed from are affirmed.

117 Cal. 324

FRACE v. BROWN. (Sac. 172.)

(Supreme Court of California. June 17, 1897.)
INDORSEMENT OF NOTE—CONSIDERATION—BURDEN
OF PROOF.

Where a complaint by the payee against an indorser avers that the loan for which the note was given was in fact made to defendant, and the answer denies such averment and alleges want of consideration, the burden is on plaintiff to prove consideration.

Commissioners' decision. Department 2. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by J. M. Frace against J. S. Brown. There was judgment for defendant. A new trial was denied, and plaintiff appeals. Affirmed.

W. Rigby (George C. Sargent, of counsel), for appellant. Geo. A. Lamont, for respondent.

CHIPMAN, C. This is an action upon a promissory note dated December 15, 1888, due 30 days after date, executed and delivered by one A. A. Bonney to defendant, and by him indorsed to plaintiff on February 5, 1889. Plaintiff alleges that the note was indorsed by defendant after the same had been dishonored by nonpayment, and for a good and sufficient consideration; that at that time defendant waived all presentation of the note to said Bonney for payment, and also notice of nonpayment. This alleged waiver is founded upon certain facts set forth in the complaint, the substance of which is that plaintiff loaned the money, for which the note was given, to defendant, to assist the maker of the note, who, it is alleged, was defendant's partner in business, and by defendant's direction plaintiff paid the money (\$2,000) to Bonney, who then resided at Dallas, Or., where the note was executed. The alleged agreement between plaintiff and defendant appears to have been made at the town of Rio Vista, Solano county, where they then resided. The complaint is verified. Defendant denies specifically the allegations of plaintiff's complaint, and sets out that the money was in fact loaned by plaintiff to Bonney, and was sent to him by plaintiff; that defendant's connection with the loan was only that he had told plaintiff to whom he could loan the money, and suggested Bonney; that, after the loan was made, Bon-

ney did not send the note promptly, and plaintiff requested defendant to write Bonney; that defendant did so, and shortly afterwards the note came to defendant, and was drawn payable to his order; and that thereupon, and without any consideration, defendant indorsed the note to plaintiff. The note bore date about the time the money was received by Bonney. The case was tried by the court, and judgment given for defendant. The appeal is from the judgment, and from the order denying plaintiff's motion for a new trial. I find in the transcript the opinion of the trial judge, in which he says: "The testimony of the two principal witnesses, Frace [plaintiff] and Brown [defendant], was diametrically opposed to each other. From Frace's statement, if it be true, he would certainly be entitled to recover the amount sued for; and it is certain Brown received no benefit from the transaction whatever, and he tells an entirely different story as to the transaction, and as to the loaning of the money to Bonney, and it is a story that is reasonable, while there is nothing unreasonable about the Frace story. But the court must determine between the parties." And the learned judge thereupon, in view of all the circumstances and facts, ordered judgment for defendant.

Appellant makes the point that the defense set up admits the execution and indorsement of the note, and pleads lack of consideration, and defendant must prove it by a clear preponderance of evidence; citing *Allin v. Williams*, 97 Cal. 407, 32 Pac. 441, and *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733. The case here is clearly distinguishable from those cited. In the case cited in 97 Cal., 32 Pac., the defendant was trustee of a fund which he loaned upon a promissory note under circumstances such as justified the court in holding that he dealt with the fund for his own profit. He had indorsed the note, and the action was to enforce his liability as an indorser. The court said: "An indorser may show, as between himself and his immediate indorsee, that the indorsement was made merely for the purpose of transferring the note from a nominal holder to the true owner, as from an agent to his principal, or that the circumstances under which the indorsement was made were such as would render it inequitable to enforce an indorser's liability against him. *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733. But in any such case the burden of establishing such a defense to the apparent liability attendant upon his indorsement rests upon the indorser." Appellant, recognizing the rule of this court that the findings of the court below will not be disturbed where there is a substantial conflict in the evidence, proceeds to show, from this point of view, by a very full and lengthy analysis of the evidence, that there was no substantial conflict. The court finds the facts in much detail, the substance of which lies in small compass, so far as the real issues here are concerned. It finds that the money was

loaned to Bonney, and not to defendant; that the note was made payable to defendant or order, and that without any consideration, and simply to transfer the title of the note to plaintiff, he (defendant) indorsed and delivered the note to plaintiff; and that there was at no time any agreement between plaintiff and defendant that the latter should indorse the said note, or in any way become responsible, as surety or security, for the money loaned to Bonney. I have read with some care the testimony contained in the transcript, and have examined the cases cited by plaintiff's counsel where this court, it is claimed, relaxed the rule as to findings based upon conflicting testimony. The very able argument of counsel as to the relative strength of the plaintiff's and defendant's case on the evidence adduced would have been appropriate at the trial, and no doubt was presented there as here, but it seems to me it tends rather to emphasize the fact of the sharp conflict in the evidence than to show a want of conflict. Appellant states the rule, as laid down by Mr. Hayne in his work upon *New Trials* (pages 865, 866), to be, "A motion for a new trial on the ground of insufficiency of the evidence is addressed to the discretion of the court below, and that the ruling thereon will not be disturbed except for an abuse of discretion." The ruling of the court in this case does not seem to me to show abuse of discretion. "It is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law; and this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion." *Reay v. Butler*, 95 Cal. 216, 30 Pac. 208. See, also, *Dobinson v. McDonald*, 92 Cal. 38, 27 Pac. 1098. The trial judge had the witnesses before him, and possessed an advantage not accorded us here. I cannot say that his conclusions were wrong.

Appellant makes no point except that the findings are not supported by the evidence. I think he has failed to establish his contention.

The plaintiff's point that the defense of defendant is not established by a clear preponderance of evidence would have more force if plaintiff had not himself set up facts the denial of which presents substantially the defense set up by defendant. If plaintiff had been content with simply charging defendant as indorser, and left defendant to plead want of consideration, he would have had a stronger case here; but he undertook to set out the facts relating to the alleged loan to defendant, and making of the note by Bonney, and the indorsement subsequently.

Respondent makes the point that no sufficient demand was made on the maker of the note, or notice of nonpayment to the indorser. Appellant replies that the point is made for the first time here, and besides has no merit. It is not necessary to decide this point, for,

if not well taken, it would not change the result, and, if well taken, it would only add another reason for our conclusion. I find no error in the judgment, nor in the order denying plaintiff's motion for a new trial, and it is recommended that the judgment and order of the lower court be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order of the lower court are affirmed.

(5 Cal. Unrep. 731)

MECHANICS' INSTITUTE v. FIRTH et al.
(S. F. 588.)¹

(Supreme Court of California. June 23, 1897.)

ACTION ON TREASURER'S BOND.

In an emergency to meet a pay roll of \$1,878, a corporation's treasurer obtained \$600 of its funds from one of its officers, and paid it to the secretary, the disbursing agent, receiving his receipt therefor, and its president paid \$600 of his own money direct to the same agent. Subsequently the board of directors, upon the account of the pay roll, ordered warrants drawn for a check of \$600 to repay the president, and one of \$1,278 for cash, which warrants were presented by the secretary, and were honored by the treasurer, as he was in duty bound to do. In the books the treasurer charged himself with the \$600 received from the officer, and credited himself with the amount disbursed on the pay roll. He did not charge himself with the money received from the president, which did not come into his hands, but credited himself with the check of \$600, to repay the president, and the check of \$1,278. Held not to show any shortage on the part of the treasurer.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Suit by Mechanics' Institute, a corporation, against J. K. Firth and others. From a judgment for defendants, plaintiff appeals. Affirmed.

T. M. Osmont and Eli T. Sheppard, for appellant. E. F. Preston and W. F. Gibson, for respondents.

HENSHAW, J. These appeals are from the judgment, and from the order denying plaintiff a new trial. Defendant Firth was the treasurer of the corporation plaintiff. The defendants Fretwell and Kerr are his bondsmen. Plaintiff sued to recover the sum of \$600, alleged to have been misappropriated. The facts disclosed upon the trial were as follows: The moneys of the plaintiff corporation were deposited in a bank, and were paid out by treasurer's checks upon presentation to him by the secretary of warrants ordered drawn by the board of directors. J. H. Culver was the secretary of the plaintiff, and its business or executive manager. In January, 1893, the plaintiff corporation was engaged in preparing for the twenty-seventh industrial exposition of the institute. Repairs were in progress at the Mechanics' Pavilion. Upon Saturday, Janu-

¹ Rehearing denied.

ary 7, 1893, it became necessary to pay the workmen. The pay roll amounted to \$1,878.20, the payment of about \$1,200 of which was urgent. No warrants had been ordered drawn by the directors to meet this payment, and it was after banking hours when the secretary, Culver, communicated with the treasurer, asking him to procure what money he could, and bring it to the pavillon. The Mechanics' Institute Library was owned and conducted by plaintiff corporation, and its moneys were a part of plaintiff's funds. The treasurer went to the librarian, and obtained from him the sum of \$600, giving him his receipt therefor. This money he carried to the Mechanics' Pavilion, delivered it to the proper agent of the corporation, and took Culver's receipt therefor. There is no question but that this sum was properly disbursed upon account of the pay roll. The president of the institute was Irwin C. Stump. In the emergency he also had been called upon to furnish money, and he, too, delivered to the agent of the corporation a like sum of \$600, which was properly disbursed. This money, however, did not pass into nor through the hands of the treasurer. When the board of directors subsequently met, they ordered two warrants drawn upon their treasurer upon account of the pay roll,—the one for \$600, to repay Stump, the other for \$1,278.20. These demands were presented by Culver to the treasurer, and he, in obedience to them, as was his duty, drew his treasurer's check for \$600 for Stump, and a check for \$1,278.20 payable to cash. These two checks he delivered to Culver, taking his receipts therefor. Stump in due time received his money, and no question arises upon this point. The treasurer charged himself upon his books with the \$600 obtained by him from the librarian, by crediting it as a cash payment into the library fund, and credited himself with its disbursement upon account of the pay roll, for which disbursement he held as a voucher the receipt of the secretary, Culver. He also charged the institute with the disbursement of the \$600 evidenced by the Stump check, and of the \$1,278.20 evidenced by his check, payable to cash, and taken by Culver, whose receipts for both of these amounts, as well as the warrants ordering him to pay them, form his vouchers therefor. He did not, however, charge himself with the receipt of the Stump \$600.

The very obvious result of these transactions is that, having a pay roll of \$1,878.20 to meet, the institute paid \$600 of the sum out of its own funds, to wit, out of the moneys received from the librarian, thus leaving to be met by it the sum of \$1,278.20. When, however, it came to order its warrants drawn, it ordered for the full amount of \$1,878.20. Thus, in fact, it disbursed upon account of the pay roll the sum of \$2,478.20. Leaving aside for the moment the question of bookkeeping, and tracing the money through the vouchers, it is equally apparent that the treasurer shows that he has properly expended and accounted

for the \$600 obtained from the librarian, and he also shows by vouchers whose genuineness is uncontested that the \$600 Stump check and the check to cash for \$1,278.20 passed from his hands under order of the board of directors, and into the hands of the secretary, Culver. In short, the treasurer's books show that every dollar by him received was paid out upon the order of the board of directors, saving in one instance of the \$600 obtained from the librarian, the account of which was properly entered in his books, and the disposition of which is beyond question. But it is said that in failing to charge himself with the receipt of the Stump \$600, and in charging its disbursement to the institute, he forced a balance in his favor to that amount. But, in fact, he never did receive the money. It never passed into the treasury of the corporation, and he was not chargeable with it. To illustrate: If the institute at the time of this transaction had possessed funds in the sum of \$3,000, and if Stump upon that day had paid all of the pay roll, and if it was the treasurer's duty to charge himself with the Stump payment, as though it had been moneys received by him, the result would be that to the credit of the institute would be shown funds to the amount of \$4,878.20 against which would be the single disbursement by payment to Stump of \$1,878.20, leaving actual cash on hand the sum of \$1,121.80, with the books showing \$3,000 on hand, and the treasurer liable for the difference. The truth of the matter seems to be that the directors, instead of ordering the \$1,278.20 warrant drawn, should have ordered a warrant drawn for \$678.20; but, having ordered it for the greater amount, it was the unquestioned duty of the treasurer to honor it as he did, and there is no doubt but that the check passed into the hands of the secretary, Culver, and by him was cashed. For this deficiency, then, it would seem clear that he, and not the treasurer, is accountable. Indeed, this was the view first taken by all parties, for, upon an examination of the books at the close of the term, it was determined that Culver was responsible for \$600, and a demand was made upon him for that amount, and he paid it to the plaintiff. Twenty-two months after, with a new board of directors and another examination of the books, the examiner reached the conclusion that the treasurer was responsible for the shortage, and, by vote of the board of directors, the \$600 was restored to Culver, a demand for that sum made upon the ex-treasurer, and, upon his refusal to accede to it, this action was commenced. It may also be added that plaintiff's experts do not pretend to trace the \$600 as money, but merely find that it was the duty of the treasurer to pay out moneys only upon warrants, and that there appears upon his books one item of \$600 paid out not upon a warrant. This, however, is the item of \$600 moneys obtained from the librarian, the history of which the treasurer's books, his voucher from Cul-

ver, and the parol testimony of its disbursement to the workmen, fully show, and, in so showing, entirely exonerate the treasurer from any charge of misappropriation.

The findings and judgment of the court were in consonance with this review of the evidence, and the judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

STATE v. McCANN et al.

(Supreme Court of Washington. June 22, 1897.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. It is error to charge that it was incumbent upon defendants, charged with murder, to have endeavored to "escape" from the deceased, to justify the taking of life in self-defense.

2. Where instructions requested are pertinent, they should be given, rather than others of a more general nature, substituted by the court.

On rehearing. Reversed.

For former opinion, see 47 Pac. 443.

SCOTT, C. J. On December 22d last an opinion was rendered by us whereby the judgment of conviction had in this case in the lower court was affirmed. 47 Pac. 443. Thereafter a petition for a rehearing was filed, to which the court directed an answer by the state, and a rehearing was subsequently granted, and the cause assigned for argument at the last term. Upon such reargument and further consideration of the case, a majority of the court have come to the conclusion that the former decision ought not to stand. It will not be necessary to reconsider the entire case, as we are satisfied with the views indicated in the former opinion in the discussion of most of the questions, and a number of them will not be likely to arise upon a retrial of the cause. Some will be eliminated in consequence of the acquittal of Michael McCann. We have been led to grant a retrial upon the further consideration of the case as to one question only, and that is the instruction set forth given by the court to the jury upon the subject of self-defense, wherein the court charged the jury that: "To justify the taking of life in self-defense, it must appear from the evidence that the defendant or defendants not only really and in good faith endeavored to decline any further struggle, and to escape from their assailant before the fatal shot was fired," etc. The objectionable part of this instruction is the clause wherein the court told the jury that it was incumbent upon the defendants to endeavor to escape from the deceased. We were not entirely satisfied with this instruction upon the former hearing. It must be conceded that the meaning which would ordinarily be attached to the word "escape," as here used, would be to "get away," to "flee"; and in that sense we were of the opinion that it would have been erroneous. But we were also of the opinion that it had not been excepted to upon that ground,

and that from what did appear relating to the exception taken thereto, and of its having been followed by the two other instructions set forth, mentioning the matter of withdrawing, etc., it was probable that it was not understood in the sense that the defendants were called upon to run away when the deceased appeared with the rifle. Upon further consideration of the question, a majority of the court have come to the conclusion, in considering the exceptions which were taken to the instructions requested by the defendants, and which were refused by the court, as well as the exceptions to the instructions which were given upon this phase of the case, that said instruction should be deemed excepted to in the particular mentioned; and, as the jury may have understood therefrom that it was incumbent upon the defendants to flee when Cicero appeared with the gun, it may have been prejudicial to them.

We desire to add a word also with respect to another feature of the case, and that was the request for an instruction with reference to the guilt of James McCann. We can see no reason why more particular instructions should not have been given upon this subject, as requested, although we found no error in the premises considering the instructions that were given thereon. Where instructions requested are pertinent and clear, it is desirable that they should be given, rather than to have others of a more general nature substituted by the court. Reversed, and remanded for a new trial.

ANDERS and REAVIS, JJ., concur.

KIMBLE v. KIMBLE et al.

(Supreme Court of Washington. May 6, 1897.)

HUSBAND AND WIFE—SEPARATE MAINTENANCE—COMMUNITY PROPERTY.

1. A wife, who without cause has been abandoned by her husband, who possesses the means to contribute to her support, may maintain an action for maintenance, uncoupled with or independent of an action for divorce.

2. An abandoned wife who has supported herself, and has not asked her husband for maintenance, for 25 years, may maintain an action for maintenance against him.

3. A woman living in adultery with a husband, where she knew of her grantor's marriage, acquires no interest in deeds by him of the community property.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Rebecca Kimble against David E. Kimble and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Million & Houser, for appellants. Sinclair & Smith, for respondent.

DUNBAR, J. The question lying at the threshold of this case is a jurisdictional one, viz.: Can a wife, who without cause has been abandoned by her husband, who possesses the means to contribute to her support, maintain an action for maintenance, uncoupled

with or independent of an action for divorce? On this proposition the authorities are concededly conflicting. In some states the courts refuse to entertain jurisdiction of such a case, on the ground that alimony was at the common law only an incident to a divorce proceeding, and that an independent right thereto was not acknowledged, and that the right, if it exists at all, is a creature of statute, and the statute, which provides, as does our statute, for a decree for alimony as ancillary only to the divorce proceeding, must be construed as excluding the idea of an independent maintenance, on the theory expressed in the maxim that the expression of one excludes the others. Such view is held by the courts of Arkansas, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New York, Pennsylvania, and Wisconsin. Other courts have taken the view that courts of equity, exercising their plenary powers, would grant alimony, as an independent remedy, in a case where divorce was not sought. Decisions to this effect have been made in Alabama, Georgia, Iowa, Kansas, Kentucky, Maryland, Mississippi, New Jersey, Ohio, South Carolina, Texas, Virginia, California, and West Virginia. In still other states the right has been maintained, but by statutes providing for an independent action; and in such cases the adjudications are, of course, without value in determining the weight of authority on the general proposition involved. Mr. Bishop, in his excellent work on Marriage, Divorce, and Separation (section 1393), indulges in the following caustic criticism of the courts which have assumed jurisdiction of the independent action: "In spite of the fact that the law consists of reason, and that reason is constantly detecting and pointing out judicial blunders, by means whereof cases wrongly decided and false doctrines are overruled, it is no novel thing for a bench of judges to accept some thoughtless utterance of a predecessor as though it were reason, and decide cases upon it, without a particle of examination to see whether it is just or false. Indeed, through this sort of abnegation of the office of thinking, our law has been made to linger, and it now remains, in the shadows of the Dark Ages, instead of walking onward with the other sciences towards the light of a better future." In spite of this criticism, however, we are inclined to think that the better reasoning is advanced by the courts criticised; and, as this is a question of conflict of authority, we feel justified in deciding in accordance with the principles of equity and reason as they appeal to us. It might be that a blind adherence to the letter of the old English decisions would prevent the exercise of jurisdiction, although the English decisions themselves are conflicting, and different views are expressed by eminent English jurists on this question. In England there was a division of responsibility and jurisdiction in divorce and alimony cases,

which is now, under our system of jurisprudence, consolidated and exercised in a simple manner by the courts of equity. For instance, in England the spiritual or ecclesiastical courts had jurisdiction to grant divorces, but where such divorces had been decreed by the ecclesiastical courts, either a *mensa et thoro* or a *vinculo matrimonii*, the courts of chancery exercised the jurisdiction of granting alimony; and the history of litigation on this subject cannot be read without forcing the conclusion that the courts were constantly seeking pretexts to grant separate maintenance. For instance, if an agreement for maintenance had been entered into, the courts would compel the performance of the agreement on the part of the husband, where he refused to carry out his contract. The old writ of *supplicavit* was resorted to. This proceeding was prosecuted by the wife whose treatment by her husband made it dangerous for her to live with him. Upon this fact appearing, the court would award her a right to live separate, and compel the husband to furnish her with a separate maintenance. If it were necessary to find authority at the common law for assuming jurisdiction in a case of this kind, it can be found in the execution of this writ; for, whatever technical term might be applied to the writ, the effect was to grant a separate maintenance to a wife who could not live with her husband. It is true that in this instance she could not live with her husband because his conduct endangered the safety of her person. The particular reason, however, that necessitated the separate domicile, is not important. The practical and controlling fact was that she could not live with him. This fact is just as controlling when she is prevented from living with him by the husband's abandonment of her and his refusal to live with her. The practical effect on the wife is exactly the same, her necessities are the same, and it seems to us that no reasonable distinction can be drawn in the application of the remedy. Another expediency which was adopted by the courts was to concede to the abandoned wife the right to use the credit of her husband. She was relegated to this indirect, unsatisfactory, and, in many instances, inadequate, remedy. She was allowed to purchase necessities of traders, who in turn could maintain an action against the husband for their value. So that the question of separate maintenance was, after all, litigated, burdened, and complicated with the rights of third parties, involving questions of collusion, and other vexatious questions which must necessarily arise in a case of this kind, to say nothing of the improbability of the wife's being able to purchase on the credit of a husband who had abandoned her. The ordinary merchant would hesitate to dispose of his goods with the chance of making his collections, if made at all, through the agency of a delayed and expensive litigation. It would seem to be

much more in consonance with a straightforward policy to settle the question of maintenance by direct suit between the parties interested, and where all the rights involved could be settled in one action, than to adopt a circuitous and indirect method of reaching the same result, and a method which would be liable at least to involve a multiplicity of vexatious suits. It is conceded that the husband is morally and legally obligated to maintain his wife. If this is a duty which is imposed upon the husband by law, it becomes the right of the wife to receive the benefits flowing from the performance of the duty, and she suffers a wrong when that duty is not performed. And, if it is true that equity provides a remedy for all wrongs, a court of equity ought not to make the announcement that it would compel an abandoned wife, who is without fault, to seek a divorce from her husband before she can enforce the performance of a duty which the law imposes upon her husband, and obtain a right which the law guarantees to her, viz. the right to live. Nor do we think the best interests of society would be subserved by such a construction. It would encourage applications for divorce, and necessarily increase them. Again, it would be a lever in the hands of husbands who abandon their wives without cause, who desire to be released from the bonds of matrimony, but are unable to procure a decree, to compel their wives to seek a divorce, the benefits of which would accrue to them. In addition to this, there is a question of conscience involved. Many women will be found who are conscientiously opposed to divorces. The members of religious societies which embrace great numbers of our citizens are opposed on religious and conscientious principles to divorces. And when we enter the domain of the affections, strange as it may seem, we find that affection frequently survives neglect, brutal treatment, and abandonment. In such a case the wife does not desire a divorce from her husband. That is the one thing she shrinks from. She believes that the alienation of the affections of her husband is temporary, and hopes in time to win him back to a resumption of the marriage relations. But in the meantime she must live. Whatever may have been the difficulties in the way of the English courts in respect to this kind of an action, by reason of the legal existence of the wife being merged in the husband, those difficulties do not exist in this state, where the wife is by law especially emancipated from the control of her husband, where she is allowed to sue and be sued, and where her legal existence is as distinct and potent as that of her husband, and especially where her interests in community property are equal to his. Nor do we think there is any force in the contention that the statute has excluded the idea of a suit for separate maintenance because it has provided for temporary and permanent alimony in

connection with divorce proceedings. The statute, which simply seeks to control alimony in a divorce proceeding, does not, in our judgment, imply that maintenance cannot be decreed in any other case.

As to the merits of the case, the court, among others, makes the following findings, to wit: "(1) That on the 25th day of December, 1847, in Scotland county, in the state of Missouri, the plaintiff, Rebecca Kimble, and the defendant David E. Kimble intermarried, and ever since have been and now are husband and wife; that from said 25th day of December, 1847, up to about the month of June, 1863, they lived continuously together, except as follows, as such husband and wife, in the states of Missouri and Iowa; that while so living together as husband and wife there were born to them seven children; that about the year 1861 the defendant D. E. Kimble, without just cause, and without the consent and against the will of this plaintiff, * * * deserted and abandoned this plaintiff and their said family, and joined the defendant Minerva Kimble in the state of Illinois; that subsequent thereto this plaintiff pursued said D. E. Kimble, and discovered said D. E. Kimble and Minerva Kimble living together in open adultery at or near the town of Quincy, in said state; that thereupon said D. E. Kimble, upon the entreaty of this plaintiff, returned to the state of Missouri, and thereafter lived with this plaintiff as her husband, and father of his children, up to and until the year 1863, when said D. E. Kimble, this plaintiff, and their said family removed to the state of Iowa; that about the month of June, 1863, in the state of Iowa, the defendant D. E. Kimble, against the will and without the consent of the plaintiff, and without just cause, deserted and abandoned his said wife and family, leaving them destitute and dependent on the charity of others; that after said desertion was committed he joined defendant Minerva Kimble, who at all times herein mentioned well knew that the defendant D. E. Kimble and the plaintiff were and are husband and wife. (2) That ever since said desertion, and now, the defendant has wholly failed, neglected, and refused to contribute anything to the support of said wife and family, but said family at all times thereafter were educated, supported, and maintained by the sole labor and effort of said plaintiff. (3) That the plaintiff is a weak and infirm woman of seventy years of age, and for the past fifteen years has been physically incompetent to provide for her own support, but has been living on the charity of children and friends, * * * and said David E. Kimble still neglects and refuses to contribute anything whatever to her support. (4) That by reason of her poverty said plaintiff has at all times herein mentioned been deprived of any and all means of transportation to this state for the purpose of enforcing her rights herein, and never at any time herein mentioned has she been enabled to procure

means to pay her expenses in coming to said state of Washington." The court, in substance, further finds that David Kimble, in company with Minerva Kimble, came from the state of Illinois, and settled in the county of Skagit, in the state of Washington, where they have been since, and now are, living together, claiming to be husband and wife. Finds that the defendant David Kimble has acquired the lands in controversy, and that he has deeded the same to Minerva Kimble, and that he did the same for the purpose of cheating the plaintiff, and that Minerva Kimble at the time of the transfer of said real estate knew that the defendant David Kimble had no right to convey the same. The eighteenth finding of fact is as follows: "That about the year 1876 this plaintiff was informed that defendant D. E. Kimble, her said husband, and the defendant Minerva Kimble were together in the state of Washington, and until the 11th day of May, 1893, plaintiff has not taken steps to assert her claims as wife of D. E. Kimble in the state of Washington. But the court finds that at no time herein mentioned, until the trial of this case, has plaintiff been possessed of the means wherewith to procure transportation to this state for the purpose of asserting her said claim, or for any other purpose whatever; that she was during all of said time unable to do so by reason of her poverty, living during all of said times dependent on the charity of friends for her support." The court, as conclusions of law, finds that the plaintiff and D. E. Kimble have been since the 25th day of December, 1847, and now are, husband and wife; that the lands acquired are the property of the community consisting of defendant D. E. Kimble and the plaintiff; that all deeds, conveyances, and instruments purporting to convey any of said lands to the defendant Minerva Kimble by said D. E. Kimble are without consideration, fraudulent, and void, and should be so declared; that the said defendant D. E. Kimble had no right or authority to convey the same; that the plaintiff is entitled to maintenance and support from her said husband, and that \$180 per year, as long as she lives, should be decreed to her, as such reasonable sum, for her support and maintenance; that in order to maintain this action it was necessary for her to employ counsel; the court finds \$150 as a reasonable attorney's fee to be allowed her for the purposes hereinbefore said. The judgment follows in accordance with the findings. The findings of fact are fully justified by the testimony, and, we think, sustain the conclusions reached by the court. The separate answers of the two defendants David Kimble and Minerva Kimble raise substantially the same issues. There is no principle of estoppel which can be applied to this case. So far as the question of maintenance is concerned, the action is based on the responsibility of the husband growing out of the marriage relation. We think the marriage between the plaintiff and defendant David Kim-

ble was sufficiently proven, and the marriage relation, once established, continues until it is dissolved either by death or decree of a competent judicial tribunal. The wife being faultless at the time of the abandonment, any indiscretions which she may have been guilty of afterwards will not relieve the husband of this responsibility; and he certainly cannot seize upon the fact that she has not asked him for a maintenance for a quarter of a century, during which time she has, unaided by him, supported herself and children, as a pretext for avoiding his responsibilities in the future. The court might well have stopped with the proof of marriage and abandonment, without considering any circumstances which intervened between the time of the abandonment and the bringing of this action.

Nor do we think, on the other proposition, viz. the right to have the deeds set aside, that, under the circumstances of this case, there is any room for the application of the doctrine of estoppel, laches, or stale demands; nor has the statute of limitations run, even had it been properly pleaded. Marriage has been proven, and, never having been annulled, the property accumulated was community property, and the community was the plaintiff and defendant David Kimble. David could not belong to two communities,—one composed of himself and Rebecca, and the other composed of himself and Minerva. Our community property laws are not so promiscuous as this. Of course, any relations which he entered into with Minerva are absolutely illegal. Minerva cannot invoke the doctrine of estoppel, for the evidence shows that she was aware of the marriage relations existing between David and Rebecca, notwithstanding her assertion that she had been informed by counsel that no such relations existed. The deeds from David to Minerva, being deeds to community real estate, were illegal under the statute, being conveyances of the husband not joined in by the wife. The testimony shows, in addition thereto, that the conveyances were fraudulent, being made for the purpose of transferring the community property from the true wife to the pretended one; and defendant Minerva being a party to the fraud, and the court finding in accordance with the testimony that the wife prosecuted her action to set aside these deeds as soon as she could after she had knowledge of the conveyances, we think the court properly overruled the defendants' demurrers on all the points urged. If defendant Minerva Kimble has any claims against the community for advances made to it, such claims can be determined in a proper case, but they are not proper subjects of investigation in this case. The allowance of \$180 per year, under the circumstances of this case, we think an exceedingly modest one, and the attorney's fee is reasonable. The judgment will in all things be affirmed.

ANDERS and REAVIS, JJ., concur.

BISBEE v. CAREY et al.

(Supreme Court of Washington. June 22, 1897.)

MORTGAGES — FORECLOSURE — PARTIES — ESTOPPEL BY DEED.

1. In foreclosure of a purchase-money mortgage, a prior judgment creditor of the mortgagor, which bought the land at execution sale under its judgment, and claims its title is paramount, is a proper party defendant.

2. A purchase-money mortgage recited that the mortgagors were indebted to the mortgagee in the sum specified, "being for a loan thereof, made by" the mortgagee. In foreclosure it appeared that a bank purchased the land on a judgment rendered prior to such mortgage against the mortgagors, and its cashier testified that he relied on the facts shown in the record in purchasing the land; but on cross-examination he said he never saw the record, and only saw an abstract of title sent him by his attorneys. He did not testify that the abstract contained such recital. *Held*, that the mortgagee was not estopped by the recital from claiming that his mortgage was given for purchase money.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Robert E. Bisbee against George W. Carey and Lucy M. Carey, his wife, C. J. Brown & Co. (a corporation), and the First National Bank of North Yakima, to foreclose a mortgage. From a decree in favor of plaintiff, the defendant bank appeals. Affirmed.

Crow & Williams, for appellant. Danson & Huneke, for respondent.

DUNBAR, J. This action was instituted by the plaintiff and respondent, Bisbee, against defendants George W. Carey, Lucy M. Carey, C. J. Brown & Co. (a corporation), and the First National Bank of North Yakima, appellant, to foreclose a mortgage deed on real estate. The complaint is the ordinary one in foreclosure, and, among other things, avers that on July 22, 1892, the respondent owned the real estate in the mortgage deed described, and on said date sold and conveyed the same by warranty deed to the said George W. Carey for \$1,200; that said deed was delivered August 10, 1892; that at the time of the delivery, and as a part of the same transaction, Carey and wife executed and delivered to the plaintiff the bond and mortgage deed upon which this action is based, to secure the payment of said \$1,200, being purchase money. The allegation in regard to the appellant is that it has some claim, lien, or interest in or to the real estate subsequent and subject to the plaintiff's lien. The answer of the appellant is comprised of certain denials of the allegations in said complaint, and alleges affirmatively that the appellant on June 20, 1891, obtained in the superior court of Yakima county a judgment against the said defendant George W. Carey, and that a transcript of said judgment was on the 28th day of May, 1892, filed for record in the office of the county auditor of Spokane county, Wash., and was duly recorded; that respondent conveyed and delivered to the defendant Carey, by warranty deed, the real estate in dispute, on

July 28, 1892; that on July 8, 1893, appellant caused an execution to issue out of the superior court of the state of Washington for Yakima county to the sheriff of Spokane county, and that under said execution said real estate was sold to the appellant on the 13th day of August, 1893, for \$1,400, and that said sale was afterwards duly confirmed; that appellant, in purchasing said property, relied upon the records of Spokane county, Wash., which showed the judgment to be a first lien on said real estate, and also relied upon certain recitals and covenants contained in plaintiff's pretended mortgage, the covenants being as follows: "Said parties of the first part are justly indebted to the party of the second part in the principal sum of \$1,200, lawful money of the United States of America, being for a loan thereof made by said party of the second part to said parties of the first part." Appellant's answer also alleged that the appellant's claim and title in and to said real estate was adverse and paramount to respondent's mortgage, asserted that this was not a proper action in which to litigate said title, and that the appellant was not a proper party thereto, and moved the court to dismiss it from this action for that reason. This motion was denied. All of the defendants except the appellant failed to appear in the action, and were defaulted.

The material findings of the court were, in substance, that the appellant was the owner in fee simple of the lots in controversy on the 22d day of July, 1892, and on said day executed a warranty deed conveying said described real estate to defendant George W. Carey for and in consideration of the sum of \$1,200, which said deed was delivered to Carey on the 10th day of August, 1892; that at the time of delivering said deed, and as a part of the transaction thereof, and as evidence of the purchase money therefor, said defendants George W. Carey and Lucy M. Carey on said August 10, 1892, executed and delivered to plaintiff the mortgage in question; that the said deed and mortgage were duly recorded on the 10th day of August, 1892, in the auditor's office of Spokane county.

To these findings of fact the appellant made and filed written exceptions. The testimony in this case is brief, and we have examined it with care, and from such examination are convinced that the findings of the court were fully justified, and such conclusion decides adversely to the appellant's interest the most of his assignments; the first assignment being that the court erred in not dismissing the action for the reason that the appellant's claim was an adverse and paramount title, and could not be litigated in this foreclosure suit. We think, under the findings of the court in this case, that the execution of the deed and of the mortgage was contemporaneous, and that, under all the authorities the defendant was a proper party to this action. 2 Jones, Mortg. (4th Ed.) § 1364; *California Safe-Deposit & Trust Co. v. Cheney Electric Light,*

Telephone & Power Co., 12 Wash. 138, 40 Pac. 732; Investment Co. v. Gilbert, 13 Wash. 684, 43 Pac. 941, and 45 Pac. 43.

The only real question in this case is whether the respondent was estopped by the recital in the mortgage that the \$1,200 was a loan made by the said party of the second part to the said parties of the first part. It may be conceded under the authorities that the parties are bound by recitals in deeds, but with this qualification; that the party pleading the recital must show that he acted upon the strength and faith of such recital to his detriment; and it is well settled that the representation of the party to be estopped must have been really acted upon, otherwise no estoppel arises. Bigelow, Estop. (5th Ed.) pp. 566, 570; 7 Am. & Eng. Enc. Law (1st Ed.) p. 17, and cases cited; Ketchum v. Duncan, 96 U. S. 668. So the particular question here is, does the testimony show that the appellant relied upon the recitals of this deed in making purchase of these lots? It is alleged in appellant's answer that he did so rely, but the testimony, it seems to us, utterly fails to show any such reliance. Mr. Steinweg, the cashier of the bank, who testified that he acted for the bank in the matter all the way through, it is true, testified in general terms, in his direct examination, that he relied upon the facts shown in the record in making the purchase of the property, but on cross-examination testified that he never had seen the record, but only an abstract of the title, which had been sent to him by his attorneys. It is not probable, nor did Mr. Steinweg testify, that the abstract contained the recital which is urged here as an estoppel. In the absence of any testimony to the effect that the respondent acted upon this recital in the purchase of the land, we do not think there was any authority that would estop the respondent from showing the facts in the case. We are unable to discover any error in this cause, and it will therefore be affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

STATE v. McCAULEY. 1

(Supreme Court of Washington. May 21, 1897.)

PUBLIC OFFICERS—PROSECUTION—PROFIT OUT OF PUBLIC FUNDS—SUFFICIENCY OF EVIDENCE—SECONDARY EVIDENCE.

1. On a prosecution for making a profit out of public funds, it appeared that defendant's personal account with a bank was, from time to time, under the direction of the cashier, credited with sums which approximated an amount equivalent to interest at 5 per cent. on the average daily balance of his account as city treasurer; that the cashier would enter on deposit slips what purported to be a deposit of funds to defendant's personal account, and at the same time would make out a debit slip charging the expense account of the bank with the sums so credited, which were also entered to defendant's credit in his individual pass book; that these transactions

were known to defendant, who drew checks against such credits. Held sufficient to warrant a finding that defendant appropriated the interest on the city's funds.

2. It appearing that defendant's pass book was balanced from time to time with the bank books, and found to agree therewith, and that such book was thereafter returned to defendant, together with the checks drawn by him, it was proper to admit the bank books containing charges against defendant on account of checks and the testimony of the teller and bookkeeper in reference to the payment of such checks, though the checks themselves were not produced.

3. Secondary evidence in a criminal case may be admitted in case the original evidence is in possession of defendant, without giving him notice to produce.

Appeal from superior court, Pierce county. James W. McCauley was convicted of making a profit out of public funds, and appeals. Affirmed.

Taylor, Dennis & Luse and Johnson Nickens, for appellant. A. R. Titlow, for the State.

GORDON, J. Appellant appeals from a judgment of the superior court of Pierce county adjudging him guilty of the crime of unlawfully using public money in order to make a profit out of the same. The appellant was treasurer of the city of Tacoma, and, as such, came into possession of large sums of money. The information charges him with receiving and accepting interest upon a deposit of the city's money made by him in the Columbia National Bank of Tacoma. The information is similar to the one considered by this court in State v. Boggs, 47 Pac. 417, and, upon the authority of that case, we hold that the demurrer which was entered below was properly overruled.

Numerous errors are assigned by appellant, and from his brief we quote the following: "This case is almost identical with the case of the State against George W. Boggs, which has already been argued and decided in this court, and the assignment of errors is substantially the same." We are satisfied with the decision reached in that case, and deem it unnecessary and unprofitable to review it at this time. The only question argued in the brief in the present case is the sufficiency of the evidence to sustain a conviction. The information alleges that the offense was committed "on or about the 15th day of June, 1895, and between the 1st day of May, 1895, and the 1st of August, 1895." The proof shows that, in addition to his account with said bank as city treasurer, the appellant also had a personal account with the bank, and that from time to time his personal account was, under the direction of the cashier, credited with different sums, which sums approximated in amount a sum equivalent to interest at 5 per cent. per annum on the average daily balance of his account as treasurer. It appears from the evidence that the cashier from time to time would enter upon deposit slips, such as are commonly used by bankers, what purported to be a deposit of funds by appellant to his personal ac-

¹ Rehearing pending.

count, and at the same time would make out a debit slip charging the expense or profit and loss account of the bank with the amount so credited to the personal account of the appellant. These credit and debit slips were, with a single exception, all made out by the cashier in his own handwriting. In one instance, however, the slips were made by Andrus, the teller of the bank, under the express direction of the cashier, so that it appears from the evidence that the amounts so credited to the personal account of the appellant were charged to the expense or profit and loss account of the bank; and we think the proof was sufficient to warrant the jury in finding that, of the amount so credited to the personal account of appellant, no portion was represented by money or other funds actually deposited. The amounts so credited to him were all checked out by the appellant. These various amounts were also entered to the credit of appellant in his individual pass book, which the evidence shows was usually kept in the cashier's desk. This pass book was usually balanced once a month, at which time appellant's checks would be returned to him. Bearing upon the question of appellant's knowledge of the transactions already referred to, the teller of the bank testified as follows: " * * * Part of the time Mr. McCauley's private individual pass book was kept in Mr. Peters' desk (Mr. Peters was the cashier), and he would go to his desk, and Mr. Peters would take out the book, and make a credit entry in it, and Mr. McCauley would say, 'What month is that for?' and Mr. Peters would say a certain month. I don't remember what month he said to him. And then Mr. McCauley would say, 'Have you given me credit for such and such a month?' naming the month, and Mr. Peters would point to another credit entry, and say, 'That is for that month,' and usually Mr. Peters would hand the book to me or the bookkeeper with some debit and credit slips to make entries on the books to correspond with the entries on the pass book." Again, he testifies: "Sometimes he [Peters] would come in and put these slips on the spindle himself, and give the book to the bookkeeper, and I would always look at them to see if they were entered correctly." The books of the bank were made up from these debit and credit slips. The case went to the jury upon the evidence introduced by the state.

The appellant complains of different rulings made by the court upon the introduction of evidence, all of which have been examined, but only one of which we deem of sufficient importance to warrant particular notice. It is urged that the court erred in admitting the bank books and the testimony of the teller and bookkeeper in reference to the payment of appellant's checks, the checks themselves not being produced or shown by the evidence to have been destroyed. The evidence satisfac-

torily shows, however, that these checks were returned to the defendant, and went into his possession at the different times when his pass book was balanced. They were therefore traced into his possession, and the further contention of the appellant that "It was error on the part of the court to admit secondary evidence until a demand had been made upon the defendant, and he had refused, after reasonable notice, to produce such checks," cannot be sustained, for two reasons: (1) It was beyond the power of the court to enforce such a demand, for the simple reason that the defendant could not be compelled to furnish evidence against himself; and while, upon this question of giving notice to a defendant in a criminal case to produce papers or other exhibits, there are conflicting decisions, and it is probably true that a majority of the cases require that such notice be given, we are unwilling to adopt it as an invariable rule. As was said by the supreme court of Indiana in *McGinnis v. State*, 24 Ind. 500: "It is difficult to perceive what benefit could result, either to the state or the defendant, from the giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury, upon his refusal to produce it after notice." The rule is thus in 3 Rice, Ev. p. 45: "If the indictment itself alleges that the accused is the custodian of the document needed in evidence, or where the evidence in the case shows it to be in his possession, or in that of an accomplice, who refuses to produce it, on the ground of its criminating tendency, the state is not obliged to give notice to produce." (2) We think it was not indispensable to the introduction of the books that the checks should be produced. As already stated, the proof showed that appellant's pass book was balanced from time to time with the books of the bank, and found to agree with such bank books, and that thereafter the book was returned to appellant, together with the checks. This, we think, was competent proof for the purpose of showing that the charges made upon the books of the bank to the account of the appellant because of checks drawn by him on his account were proper and legal charges. It also was competent proof tending to show appellant's knowledge of the credits made to his personal account. The evidence in this case has been carefully considered by us, and we think it was abundantly sufficient to sustain the verdict of the jury and the judgment of the court entered upon it, and we do not think that there was any prejudicial error committed by the court in the reception of evidence or in its subsequent charge to the jury. It follows that the judgment of conviction must be affirmed.

SCOTT, C. J., and REAVIS, ANDERS, and DUNBAR, JJ., concur.

PRICE BAKING-POWDER CO. v. RINEAR,
Sheriff.

(Supreme Court of Washington. May 21, 1897.)

REPLEVIN—EVIDENCE—PLEADING—AMENDMENT—
HARMLESS ERROR.

1. In replevin for goods that had been delivered to an insolvent, and which were in possession of the sheriff under a levy of attachment, the plaintiff cannot introduce in evidence the affidavits for the writs of attachment.

2. A complaint seeking to rescind a contract for the sale of goods on the ground that the vendees falsely represented and held themselves out to be solvent, and in good financial condition, cannot, on trial, be so amended as to make admissible in evidence specific representations made by such vendees, as such an amendment would materially change the issue.

3. The refusal to allow an amendment to a complaint in replevin in relation to value is immaterial where, under the proof, the plaintiff would not have recovered had the amendment been made.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Replevin by Price Baking-Powder Company against Ezra D. Rinear, sheriff of Spokane county. From a judgment for defendant, plaintiff appeals. Affirmed.

John R. McBride, for appellant. Graves, Wolf & Graves, for respondent.

DUNBAR, J. This is an action brought by the appellant as plaintiff to recover certain merchandise sold by the appellant, Price Baking-Powder Company, to S. Katz & Co., of Spokane, Wash. The action is against the sheriff of Spokane county, the respondent here, the sheriff having the goods in his possession under a levy of certain writs of attachment on suits by third parties against Katz & Co. After the introduction of the plaintiff's testimony, the respondent moved the court to direct the jury to find a verdict for the defendant for various reasons, which was done, and a verdict was returned for the defendant in accordance with the direction of the court. During the trial the plaintiff sought to introduce in evidence affidavits for the writs of attachment that were issued against Katz & Co., which testimony was objected to by the respondent, and the objection sustained by the court. The exclusion of this testimony is one of the errors assigned by the appellant. We think these affidavits were properly rejected. They could in no way tend to prove the perpetration of fraud upon the appellant in this case, or an attempt to perpetrate a fraud upon it. The allegations of fraud were in reference to other persons, and in no manner connected with the subject-matter of this action. *McKay v. Russell*, 3 Wash. St. 378, 28 Pac. 908.

The complaint did not allege the value of the property replevied, and the representation in relation to the grounds for rescission were that S. Katz & Co. represented and held themselves out to be solvent, and in good financial condition. Under this allegation appellant attempted to introduce evidence of spe-

cific representations made by Katz & Co., which testimony was objected to by respondent, and the testimony was stricken upon his motion. The appellant afterwards asked leave to amend the complaint, alleging the value of the goods replevied, and also making the complaint conform to the proof in relation to specific representations. This motion was resisted, and was overruled by the court, and this is alleged as error. Whatever may be said of the ruling of the court in relation to the allegation concerning the value of the property, which allegation was sought to be inserted in the amended complaint, we are inclined to think that the motion to amend, so far as the specific representations were concerned, was properly overruled, and that there was no abuse of discretion by the lower court in refusing such amendment, as such an amendment would materially change the issues; and, if this be true, the refusal to allow the amendment in relation to value would not be material, for it would be impossible for the plaintiff to prevail under the proof in this case and the allegations in relation to representations; and, in any event, a close examination of all the testimony in this case convinces us that there was no testimony offered sustaining an allegation of fraud or representations of any kind which would sustain an action for the rescission of a contract. From the plaintiff's own testimony it does not appear that it was on account of representations made by Katz & Co. that these goods were sold by the appellant in this action, and, if any representations were made, there is no testimony tending to show that such representations came to the knowledge of the appellant company; and altogether, without further particularizing, we think the motion for verdict for the defense was properly sustained by the court. Judgment affirmed.

SCOTT, C. J., and ANDERS, GORDON,
and **REAVIS, JJ.,** concur.

NORTHWESTERN & PACIFIC HYPOTHEEK BANK v. GRIFFITHS.

(Supreme Court of Washington. May 26, 1897.)

APPEAL—SUPERSEDEAS BOND—ACTION TO RECOVER
LAND.

On appeal by defendant from a judgment for possession of land and rent thereof, he obtained a stay on supersedeas bond conditioned that, if he would "abide the order of the court on such appeal, and pay all rents and other damages accruing to the plaintiff during this appeal, not exceeding the amount of \$400, then this obligation shall be void." *Held* to substantially comply with Act March 8, 1893 (Sess. Laws 1893, p. 123, § 7), providing that such a bond shall be conditioned that appellant will satisfy the judgment appealed from if affirmed, and any judgment which the supreme court may render or order rendered, and (where such condition is applicable) "shall pay all rents of or damages to property accruing during the pendency of the appeal," out of possession of which any respondent shall be kept by reason of the appeal.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by the Northwestern & Pacific Hypotheek Bank, a corporation, against Douglass Griffiths, in which defendant appealed from a judgment in favor of plaintiff for possession of land and rent thereof, and gave a stay or supersedeas bond. Plaintiff files a motion for an order setting aside and holding void such bond, and for an order for a writ of restitution. Denied.

W. A. Lewis and Thomas C. Griffiths, for appellant. Blake & Post, for respondent.

GORDON, J. Respondent recovered judgment in the superior court of Spokane county for the possession of certain real premises and rent thereof. From this judgment the cause was appealed to this court, and, in addition to the necessary cost bond, appellant gave a further bond, intended to operate as a stay or supersedeas. The respondent moved against the last-named bond in the lower court, but its exceptions were overruled, and the bond held sufficient, both in form and substance. Thereupon respondent moved this court "for an order setting aside and holding void and of no force and effect the bond given by the appellant as a stay bond or a supersedeas bond, and for an order for a writ of restitution." The contention is that the bond in question was given under the provisions of section 568, 2 Hill's Code, regulating the procedure in actions of forcible entry and detainer. That section is as follows: "If either party feels aggrieved by the judgment he may appeal to the supreme court, as in other civil actions; provided, that if the defendant appealing desires a stay of proceedings pending such appeal, he shall execute and file a bond, with two or more sufficient sureties to be approved by the judge, conditioned to abide the order of the court on such appeal, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the appeal." And it is contended that that section was repealed by the act of March 8, 1893, and that the bond should have been conditioned in accordance with the provisions of section 7 of the latter act (Sess. Laws 1893, p. 123), which provides: "An appeal shall not stay proceedings on the judgment or order appealed from or on any part thereof, unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents or damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal." The bond under consideration contains the following condition: "Now, therefore, if the said Douglass Grif-

fiths will abide the order of the court on such appeal, and pay all rents and other damages accruing to the plaintiff during this appeal, not exceeding the amount of four hundred dollars, then this obligation shall be void," etc. We think there is no merit in the motion. Assuming that the act of 1893 impliedly repeals section 568, supra, and kindred sections, nevertheless we think that the bond here under consideration substantially embraces all of the conditions required by section 7 of the act of March 8, 1893, and meets all the requirements of that section. It follows that the motion must be denied.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

(17 Wash. 109)

STATE ex rel. BREWER v. CHAPMAN.
(Supreme Court of Washington. May 28, 1897.)

APPEAL AND ERROR—BOND.

Where one of the sureties on a second appeal bond is found to be disqualified, and another surety is substituted, the bond is a new one, within Laws 1893, p. 123, § 11, providing that, in case a second appeal bond be found insufficient, no new bond can be given in lieu thereof.

Appeal from superior court, Snohomish county; Frank T. Reid, Judge.

Action by the state of Washington, on the relation of F. P. Brewer, against N. J. Chapman. From a judgment in favor of defendant, plaintiff appealed, and defendant files a motion to dismiss. Granted.

Metcalfe & Jurey and Frank W. Clark, for appellant. Cooley & Horan, for respondent.

PER CURIAM. The respondent moves to dismiss the appeal, on the ground that no sufficient bond was given by the appellant within the time limited by law. It appears that the first appeal bond was filed on the 22d day of March, the day the notice of appeal was served. Exceptions were thereafter taken to the sufficiency of the sureties on this bond, and they were required to appear and justify. They failed to appear at the time and place specified, and counsel for appellant admitted their insufficiency. Thereafter, within five days from such time, a second appeal bond was given by the appellant, and the respondent excepted to the sufficiency of the sureties upon such bond, and notified them to attend on the 28th day of April, and justify. Upon the hearing, the court found the second bond insufficient, in that the Ohio Investment Company, a corporation appearing upon said bond as one of the sureties, had no authority to become a surety, and that the remaining sureties were insufficient. The relator excepted to this ruling, but applied for an order permitting an additional surety, whereupon the court entered an order permitting the appellant to give another surety in lieu of the Ohio Investment Company on said day, which was done, the other sureties

consenting, and to which order the respondent excepted. The statute (Laws 1893, p. 125, § 11) provides that, in case a second appeal bond be found insufficient, no new bond can be given in lieu thereof. The appellant contends that the substitution of the surety upon the bond previously filed was not the giving of a new bond, but we are unable to agree with this contention. The bond became another and different instrument by the substitution of a new surety, and the mere fact that such surety was permitted to sign the bond previously filed does not alter the proposition, for the bond was invalid until executed by the new surety. There is nothing in the record to show that the Ohio Investment Company had any authority to sign the bond originally as a surety, and the finding of the court in that particular must be sustained. The action of the court in permitting it to be amended was in effect allowing the appellant to give a third bond, which the statute prohibits. The motion to dismiss must be granted.

STROBACH v. STATE.

(Supreme Court of Washington. June 3, 1897.)

PUBLIC LANDS—COMPENSATION OF LAND AGENTS.

A state land agent appraising timber on land which would be timber land except for a rule of the land commission designating as prairie land all land the timber on which does not exceed a certain value is entitled to compensation as for appraising timber land where he was designedly kept in ignorance of the rule by the commission.—Act March 10, 1891, providing (section 4) that land agents shall, in timber land, appraise the value of the timber; (section 5) that the commission may reject lands not deemed desirable; (section 6) that agents shall receive a certain compensation for appraising and selecting timber lands accepted by the commission, and a less compensation for prairie lands; and (section 8) that the commission shall make the necessary rules to carry out the intent of the act.

Appeal from superior court, Thurston county: W. H. H. Kean, Judge.

Action by Richard Strobach against the state of Washington. Judgment for defendant, and plaintiff appeals. Reversed.

Hoyt & Root, for appellant. Thomas M. Vance, for the State.

GORDON, J. The plaintiff is a land agent of the state of Washington, appointed under the provisions of the act of March 10, 1891. His action was brought to recover compensation for services performed in selecting, viewing, and appraising public lands granted to the state under the act of congress of February 22, 1889. The cause was tried in the lower court, without a jury, and judgment entered for the defendant, from which the plaintiff has appealed. No statement of facts or bill of exceptions has been settled in the case, and it comes here upon the transcript alone.

Section 4 of the act under which plaintiff was commissioned requires that the agent shall "in timbered lands estimate the amount

and value of standing timber thereon, and the value of the land after the timber is removed."

Section 5 provides: "The state land commission may decline to list any lands reported by their several agents which may not by them be deemed desirable."

Sections 6 and 8 are as follows:

"Sec. 6. That each agent so appointed by the state land commission shall receive as his pay for selecting, viewing and appraising said lands, including the timber thereon, the sum of ten cents per acre for all timber lands, and two and one-half cents per acre for all prairie lands which may be selected by the state land commission, and certified and approved by the several U. S. district land offices."

"Sec. 8. The state land commission is directed to make all necessary rules and regulations for the carrying out of the true intent and spirit of this act."

The court found that the land commission adopted rules for the government of the commission in carrying out the true intent and spirit of the law; that, "under the classification of the commission, all lands containing timber of the value of two dollars or more per acre were timber lands; all lands containing timber of less value than two dollars per acre were prairie lands; * * * that the rule referred to * * * was unknown to plaintiff until after he had completed his services; that the commission deemed it wise to keep all land agents in ignorance of said rule; * * * that plaintiff classified all of said lands as timber lands, and so reported them to the state land commission; that the only evidence of these selections being prairie lands was in the fact that they fell within the classification established by the state land commission; * * * that said selected lands are thirty-five or forty miles from the nearest town or market; that there is no railroad nor logging road reaching them; that all of said lands had timber thereon, but the value of the timber was less than two dollars per acre."

The sole question for determination is whether plaintiff was entitled to compensation at the rate of 10 cents per acre for the lands so selected, which is the compensation fixed by the statute for the selection of timber lands, or at the rate of 2½ cents per acre, the latter rate being the compensation provided by statute for the selection of prairie lands. We think, upon the findings, the judgment should have been for the plaintiff. The statute plainly and unmistakably fixes his compensation, and he had a right to rely upon it. The rule adopted by the commission, under which all lands containing timber of the value of less than two dollars per acre were prairie lands, was an arbitrary rule; but, conceding the authority of the commission to adopt it, their subsequent action in designedly keeping the plaintiff in ignorance of it, as found by the court, was manifestly unfair to him. The statute fixed his compensation for selecting timber lands at 10 cents per acre, and also made it his duty to estimate the value of

each tract reported by him. He had a right to rely upon the statute, and, until advised of the rule adopted by the commission, was entitled to receive the compensation fixed by the statute for the services performed by him. The judgment will be reversed, and the cause remanded, with directions to the lower court to proceed to enter judgment for the appellant for the amount claimed in the complaint.

REAVIS and ANDERS, JJ., concur.

BOARMAN v. HINCKLEY.

(Supreme Court of Washington. June 8, 1897.)

NEW TRIAL—NOTICE—DISCRETION OF TRIAL COURT

1. The statutory requirement that notice of intention to move for new trial shall be filed within two days after verdict is substantially complied with by service of the motion itself, specifying the grounds relied on.

2. Granting of a new trial is within the sound discretion of the lower court.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by F. B. Boarmán against T. D. Hinckley. From an order granting a new trial after a verdict for defendant, said defendant appeals. Affirmed.

Fred H. Peterson, for appellant. Battle & Shipley, for respondent.

REAVIS, J. Action by plaintiff (respondent here) against defendant for damages for breach of contract. Verdict of jury for defendant. Within two days after rendition of the verdict the plaintiff filed and served on the defendant a motion for a new trial, specifying the grounds relied upon in the motion. The court, upon hearing the motion, granted a new trial, from which order the defendant appeals.

The first contention of appellant is that no notice of intention to move for a new trial was filed within two days after rendition of the verdict, as required by the statute; but the motion itself, specifying the grounds assigned for a new trial, was filed and served on the defendant within the time required by statute. The cases cited by appellant from California and Montana are inapplicable. In those cases either no notice or motion was filed within the time required by statute, or else the specifications of the reasons relied on for asking a new trial were not stated. The courts usually construe the form of a notice fairly. The motion for a new trial filed by plaintiff in this case fully advised the defendant of plaintiff's intention to move for a new trial, and specified the grounds. The motion itself here fulfills the function of the notice required by the statute. The power to grant a new trial by the court hearing the cause is one of discretion, and the statute making the order appealable has not changed the established principles controlling the granting or refusal of a new trial. Only abuse

of such discretion will be reviewed. We perceive no abuse of its discretion by the superior court in the order made, and its order is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

STATE ex rel. WARREN v. AYER, Judge.
(Supreme Court of Washington. June 8, 1897.)

COURTS — APPOINTMENT OF ADMINISTRATORS — SPECIAL LETTERS—CONFLICTING JURISDICTIONS — PROHIBITION—APPEAL—IRREGULARITY.

1. Where the court issues special letters of administration, and enters on the question of jurisdiction in considering the application for the appointment of a general administrator on an issue tendered by a general administrator appointed by another court since the special letters issued, and retains jurisdiction, the remedy, if any, of the defeated appointee is by appeal, and not by a writ of prohibition.

2. The fact that the showing made for the appointment of a special administrator is insufficient under the statute (2 Hill's Code, § 931), is but an irregularity, and does not affect the court's jurisdiction.

Application for a writ of prohibition on the relation of Samuel Warren, as administrator, etc., of James Burns, deceased, against Charles H. Ayer, judge of the superior court of Thurston county. Denied.

Murry & Scott, for relator. Daniel Gaby, for respondent.

SCOTT, C. J. This was an application for a writ of prohibition to restrain the respondent from proceeding with the administration of the estate of one James Burns, deceased, pending in said court, on the ground that the court had no jurisdiction thereof. Upon an ex parte showing to the effect that the superior court of Pierce county had first appointed the relator as administrator of the estate of said James Burns, and that said Burns was a resident of Pierce county at the time of his death, an alternative writ was issued, and the matter now comes up on the return of the respondent thereto. From this return it appears that one T. N. Ford, on the 23d day of March, 1896, made application in the superior court of Thurston county for special letters of administration, his petition therefor setting up all the facts essential to giving the superior court of Thurston county jurisdiction of said estate; that on said day Ford was appointed special administrator by said court, and that he qualified thereunder, and special letters were issued to him. On the next day said Ford made application for general letters of administration, and the hearing upon his petition therefor was set for the 6th day of April, and notice given. The relator appeared at said time, and objected to the jurisdiction of said court, claiming the jurisdiction of said estate to be in the superior court of Pierce county, and made an application, supported by affidavit, for a continuance to secure wit-

nesses. A continuance was granted, and thereafter the matter was tried, and on the 25th day of May, 1896, general letters of administration were issued by the respondent court to said Ford, and he duly qualified thereunder, and has since been proceeding in the discharge of his duties.

The relator contends that the superior court of Pierce county first passed upon the question of jurisdiction, and that such question could not be determined with reference to the time of making application for letters, but must be fixed with reference to the time of the adjudication of the court upon an application for general letters; and it is contended that the superior court of Pierce county was the first one to so decide upon the question of jurisdiction, and, it having decided that it had jurisdiction, the superior court of Thurston county was thereafter prevented from proceeding with the administration of said estate. In the case of a conflict of jurisdiction of this kind the difficulty of bringing the matters properly before the court upon an alternative writ of prohibition issued to one court, as in this instance, is apparent, as only the matters of record in that court could be returned in response to such writ, and only to the extent that the record of the proceedings of the other court had been made a part of the record in said respondent court could the same be brought up thereby. In this instance it appears that the relator applied to the superior court of Pierce county for letters of administration after the application had been made as aforesaid to the superior court of Thurston county, and we find nothing in the record to support the contention that said last court first passed upon the question of jurisdiction in considering the application for general letters, even if that were decisive. It does appear that a hearing was had in said superior court of Pierce county on the 3d day of April, 1896, at which hearing said T. N. Ford appeared, and exhibited his special letters of administration, and objected to the jurisdiction of said court, which objection was overruled, whereupon the cause was continued; and it does not appear at what time the relator was appointed general administrator. But we do not consider this point material, for it is conceded that special letters of administration were first issued by the superior court of Thurston county, and they could only have been issued properly by the court having jurisdiction of the estate. A sufficient petition therefor having been made, calling upon the court to determine the matter of its jurisdiction, and the court having granted the petition, it necessarily followed that the court determined that it had jurisdiction. If said court thereafter saw fit to again enter upon the question of jurisdiction in considering the application for the appointment of a general administrator, as it did do when the question of fact was tried, the relator's remedy, if he had any, was by an appeal therefrom; for it is evident that a writ of prohibition could not

bring that question of fact up for determination here, it being one to be tried upon the evidence. It is contended that the showing made for the appointment of the special administrator was insufficient, under section 931, vol. 2, of Hill's Code, but this, if true, was no more than an irregularity, and would not affect the question of the jurisdiction of the court. From the record before us it appears that the deceased was a resident of Thurston county at the time of his death, and therefore that the superior court of Thurston county had jurisdiction of the estate, and, the court having determined that it had jurisdiction upon the facts presented, the writ must be denied.

REAVIS and DUNBAR, JJ., concur. ANDERS, J., concurs in the result.

STATE ex rel. FAIRHAVEN LAND CO. et al. v. CHEETHAM, State Auditor.

(Supreme Court of Washington. June 9, 1897.)

STATE NORMAL SCHOOLS—CONTRACT FOR CONSTRUCTION—PAYMENT OF LABORERS—UNAUTHORIZED PROVISION.

A contract for the construction of a school building was made under Act March 7, 1895, § 3, relating to state normal schools, and making appropriation therefor. The contract provided that the contractor should show to the satisfaction of the trustees of the school that all debts due laborers and material men had been paid, before he was entitled to receive the final payment. Such a provision was not authorized by the appropriation act. *Held*, that there was no privity between the state and the laborers and material men, and hence the contractor could assign the whole of the contract consideration to such persons as he saw fit.

Application for mandamus, on the relation of the Fairhaven Land Company and others, to compel Neal Cheetham, state auditor, to issue certain warrants. Granted.

Kerr & McCord, Jesse A. Frye, and Fairchild & Bruce, for plaintiffs. Thomas M. Vance, Asst. Atty. Gen., Shank & Smith, Bausman, Kelleher & Emory, O. B. Barbo, and Chas. I. Roth, for defendant.

REAVIS, J. The plaintiffs each received orders from William B. Davey, drawn upon the board of trustees of the State Normal School at New Whatcom, directing the payment of the amount specified in each order out of the sum due him upon his contract for the construction of the State Normal School at New Whatcom. It appears from the contract between Davey and the board of trustees that 80 per cent. of the contract price should be paid to the contractor from time to time, as the work progressed, and upon approximate estimates of the architect of the board, and upon the order of the board, and that 20 per cent. should be retained by the trustees until the completion of the building and its acceptance by the board, and for a period of 30 days thereafter, at the option of the board;

that the contract was substantially performed by the contractor, and on the 21st of January, 1897, the board duly accepted the building; that the balance retained from the contractor by the board of trustees is \$6,654.86; that these acts of the board of trustees have been certified by them to the state auditor. The plaintiffs presented their respective orders to the state auditor, and demanded that warrants be issued respectively to them, according to the terms of the orders. The auditor declined to issue the warrants, and application was made by plaintiffs for mandamus to compel their issuance. An alternative writ went from this court, to which the auditor made return, substantially admitting the facts as stated above, but assigning as reasons for refusal to audit and issue warrants to plaintiffs that under the contract entered into between Davey, the contractor, and the board of trustees of the Normal School of New Whatcom, it was provided, among other things, "that the contractor should show to the satisfaction of the board of trustees that all just debts due all laborers and mechanics and material men and persons who shall supply the contractor with material or goods of any kind upon the work or in connection with the construction of the building have been paid"; and it was stated by the auditor that such claims have not been paid, and they are specified, together with the names of the claimants.

It is admitted that the contractor is insolvent. It is also urged by the auditor that a portion of the amount specified in Davey's orders is used in the payment by the contractor of personal debts, and not those for claims in connection with the construction of the Normal School building. The plaintiffs demur to the return of the auditor, because it does not state facts sufficient to relieve him from the duty to issue warrants upon the orders of Davey held by them. The cause is heard upon the demurrer. The provision of the contract between Davey and the board of trustees of the Normal School relative to the payment of claims due other persons than the plaintiffs in connection with the construction of the building does not establish any liability against the fund created by the legislature for the erection of the building. There is no provision in the act of the legislature authorizing such stipulation to be inserted in the contract. There can be no privity here between such claimants and the state. The contract was made under section 3 of the act relating to state normal schools, and making appropriation therefor, approved March 7, 1895. The orders for the issuance of the warrants made by Davey in favor of the respective plaintiffs were filed with the board of trustees of the Normal School, and each order was an assignment pro tanto of the amount due Davey from the fund appropriated by the legislature for the construction of the Normal School building; and it was the duty of the state auditor to issue warrants in favor of the holders of these orders when presented to him. Upon the completion of the

contract by Davey and the acceptance of the Normal School building by the board of trustees of New Whatcom, he was entitled to the sum then remaining due him from the state, and it is immaterial what he did with his money when it was paid to him. Having transferred his claim to others, the same amount is properly due to them.

Attention is also called in the auditor's return to an act of the legislature entitled "An act for the relief of W. B. Davey and other creditors of the State Normal School at New Whatcom, and making an appropriation therefor," approved March 16, 1897; and it is insisted that it is the duty of the auditor to equitably distribute this latter appropriation, together with the balance due Davey on his contract, among the class of claimants specified in the provision of the contract heretofore mentioned; but the appropriation of the last act of the legislature is something with which the plaintiffs are not concerned. They are entitled to issuance of warrants in their favor, and according to the dates of their respective orders for the amounts due them, if said amounts remain due to Davey, and unpaid on the contract. Plaintiffs' demurrer to the return will be sustained, and a peremptory writ of mandamus issued in conformity to this opinion.

SCOTT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

SHELDON v. PURDY. County Treasurer (BLAINE NAT. BANK, Intervener).

HARRIS et al. v. SAME.

(Supreme Court of Washington. June 16, 1897.)
SCHOOL BUILDINGS—BONDS—PAYMENT OF INTEREST—CONSTITUTIONAL LAW.

1 Hill's Code, §§ 815, 816 (embodying Const. art. 9, §§ 1-3), created a fund to be exclusively applied to the "current" use of the common schools. Section 817 provides for a county fund to be collected under the direct tax for the "support" of the common school. Section 818 provides that for furnishing additional facilities a school district may levy a special tax, but makes no provision for payment of interest on district bonds. Sections 2697-2701 authorize a school district to issue negotiable coupon bonds to purchase sites and to build school houses, and requires it to levy an annual tax to pay the interest on such bonds. Section 2702 provides that the county treasurer "must pay out of any moneys belonging to the school district" interest on any bonds issued by the district. Const. art. 7, § 5, provides that "every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." *Held*, that so far as section 2702 purports to command the treasurer to pay interest on bonds from moneys appropriated by the state for current expenses, or from those collected under a special tax levied by the county commissioners for the support of the common schools, it is unconstitutional, since the terms "support" and "current expenses" mean continuing, regular expenditures for the maintenance of the schools, and do not include the building of school houses.

Appeals from superior court, Whatcom county; John R. Winn, Judge.

Separate actions by O. L. Sheldon and N. W. Harris and others, co-partners as Harris & Co., against E. W. Purdy, for mandamus. The Blaine National Bank intervened in each case. From judgments in favor of the intervenor, and denying plaintiffs' applications for mandamus, plaintiffs appeal, and by agreement submit their cases together. Affirmed.

Ira Bronson, for appellant Sheldon. Burke, Shepard & McGilvra, for appellants Harris and others. Kerr & McCord and Black & Leaming, for respondent bank. Fairchild & Bruce, for respondent Purdy.

REAVIS, J. Plaintiff Sheldon made application for a writ of mandamus to compel defendant Purdy, as treasurer of Whatcom county, to pay coupons due upon bonds issued by school district No. 25, which coupons were for interest due on bonds November, 1893 and 1894. The affidavit for the writ stated that the treasurer had funds in his hands belonging to the school district sufficient to pay the coupons. The county treasurer answered that the plaintiff's bonds were an issue of \$10,000, made November 1, 1891, and that November 1, 1890, a prior issue of bonds, a part of the same series, and under the same vote of authorization, was made by the district, amounting to \$30,000, the interest upon which since November 1, 1893, is also in default; that the school district's money in his hands is in two funds, one of which is known as the general or apportionment fund, and is composed chiefly of moneys apportioned to said district by the county superintendent on the general school funds of the county by taxation in the county for general school purposes, which comprise also moneys received from the state of Washington from the permanent school fund, and the other of the funds is known as the special fund of the school district, and is composed and made up of the taxes collected from the special levy of taxes ordered by the directors, which was made for the purpose of, and in an amount at that time by the board deemed to be sufficient to pay and defray, all current expenses of the school district, including interest on bonds and outstanding warrants issued for current expenses, and that no levy or order was made for a tax to be applied exclusively for the payment of interest on any bonds of the district. The plaintiffs N. W. Harris & Co. were the owners of the \$30,000 issue of bonds mentioned in the treasurer's answer, and likewise presented interest coupons due on said bonds, amounting to \$1,050, to the county treasurer, and demanded payment of their interest, and applied to the superior court for a peremptory writ of mandamus compelling the county treasurer to pay their interest coupons. In each action the Blaine National Bank intervened, and alleged: That the \$40,000 series of bonds issued by the school district and held by the plaintiffs in both actions was issued by authority of a special election called by the school dis-

trict in pursuance of the statute to vote upon the proposition of allowing the district to borrow money and issue negotiable coupon bonds therefor to the amount of \$40,000; said money to be used for the following purposes: "First. In constructing a central school house or building on block No. seventeen in Warren's First addition to the town of Blaine, Whatcom county, Washington, and for providing the same with all necessary furniture and apparatus. Second. For purchasing lots Nos. four, five, and six in block No. seventeen of the original town site of Blaine, Whatcom county, Washington, at an agreed price of five hundred dollars per lot, as a school house site, and for the purpose of constructing on the said site a ward school house or building, and to provide the same with the necessary furniture and apparatus. Third. For purchasing lots Nos. two, three, and four in block No. two in Rostangh's First addition to the town of Blaine, Whatcom county, Washington, as a school site or sites, at an agreed price of five hundred dollars per lot, and for the purpose of building thereon a ward school house or building, and to provide the same with all necessary furniture and apparatus. Fourth. For the purpose of funding and redeeming the then outstanding indebtedness of the said school district; said bonds, if issued, to bear a rate of interest not to exceed ten per cent. per annum, payable semiannually, and to be payable in twenty years from date." That at the date of the issuance of the bonds there were outstanding a large amount of warrants issued by the school district for current expenses in support of the school, which warrants were, by the terms and conditions upon which the bonds were issued, to be funded, and to be paid by the proceeds of the sale of the bonds, and prior to the date of the issuance of the last series, the \$10,000, dated November 1, 1891, the district issued a large amount of warrants for moneys due for the purchase of school-house sites, and also for money due for labor performed in the construction of a school house. That the intervenor is the holder and owner of the warrants issued for the purchase of the school-house site to the amount of \$164.34, and of the warrants issued for the construction of the school house in the amount of \$127.90, and of the warrants which were to be funded and paid by the moneys received from the sale of the bonds, the amount of \$374.50. That the intervenor also owns and is in possession of the other warrants of the school district, issued for the current expenses incidental and necessary to the maintenance of the school, to the amount of \$339.03, and all of which warrants had been presented to the county treasurer, and payment was refused, and the treasurer indorsed thereon, "Presented for payment, and payment refused for want of funds." And that the warrants were registered by the treasurer. The two actions are heard together here. It is admitted that there is in the custody of the county treasurer, de-

fendant, a cash balance of \$1,320.59 in the general or apportionment fund of the school district, and in the special fund heretofore mentioned a cash balance of \$1,725.41, and that prior to the presentation to the county treasurer of the interest coupons referred to and held by them, and prior to the maturity of any interest coupons of the school district, there had been issued by the school district for the annual current expenses, including the money due from the district for the salary of teachers, fuel, and other current and necessary annual expenses for conducting the schools in the district, warrants to the amount of \$6,959.80, which warrants had been presented to the defendant Purdy as treasurer, and registered as outstanding warrants of the district, and each of said warrants indorsed, "Presented for payment, and not paid for want of funds;" and that the \$339.03 of the warrants held by the intervener were a part of the series of warrants last above mentioned.

Const. §§ 1-3, art. 9, created a common-school fund, which shall be exclusively applied to the support of common schools. The legislature embodied the constitutional provisions in sections 813, 816, 1 Hill's Code. Section 817 of that Code has provided additional support for schools by creating a county school fund, which is supplied by direct levy upon each county by the county commissioners, and into this fund also are paid fines for breach of penal laws of the state. Section 818 also provides that a special tax may be levied by the school district for furnishing additional school facilities, for the payment of teachers' wages, building school houses, repairing and furnishing apparatus, and limits the tax to five mills on the dollar, unless authorized by vote of the electors of the district at an election held for that purpose. It will be observed that section 818 does not make any provision for payment of interest due on school-district bonds. The above sections are all found under the title of "Public Education," in Hill's Code. Section 2697 (1 Hill's Code) contains the authority which enables school districts to borrow money and issue negotiable coupon bonds therefor. That section and the ones following, to and inclusive of section 2701, contain all the authority for the issuance of negotiable coupon bonds, as held by plaintiffs, by school districts, and the measure of the liability of the districts therefor, and the mode of the payment of both principal and interest of such bonds. Section 2701 prescribes the duty of directors to ascertain and levy annually the tax necessary to pay the interest on such bonds as it becomes due, with a further provision for levy of a tax to meet principal of the bonds. Section 2702 declares that the county treasurer must pay out of any moneys belonging to the school district the interest upon any bonds issued under this act by such school district, when the same becomes due, upon presentation at the

treasurer's office. Under this last section, plaintiffs maintain that interest due on school-district bonds is preferred to any other liability of the district, and must be paid when there are any funds belonging to the district in possession of the county treasurer. If it were not for these provisions, that the treasurer must pay out of any moneys belonging to the district interest upon any bonds issued under this act, there would be no controversy among the parties now before the court. The plaintiffs and the intervener are alike creditors of school district No. 25. The relation of debtor and creditor exists between them. There can be no reason found in their respective contracts why either creditor should be preferred to all the other creditors. But it is contended by plaintiffs that section 2702 establishes their preferential right to payment. We do not think a fair construction of the legislation mentioned before establishes such preference. The county treasurer has money in two funds,—one arising from the apportionment of the county superintendent, which includes the money appropriated by the state and paid into the common-school fund, and the other collected under a tax levied by the county commissioners under section 817, above mentioned. This fund, under the constitution, is devoted to the support of the public schools. That portion coming from the irreducible common-school fund is devoted to the payment of current expenses. The building of new school houses and the purchase of school-house sites do not come within any authorized signification of "current expenses." Neither do they come within any well-defined acceptance of "support of the common schools." Both the terms "support" and "current expenses," when applied to the common schools of this state, mean continuing regular expenditures for the maintenance of the schools. Building a new school house and purchasing a site, while at times necessary and proper, are unusual and extraordinary expenditures; and the legislature, in consonance with the constitution, has evidently had this in mind. Two methods have been provided for building school houses,—the first by a special tax levied by the district as provided in section 818, and the second as prescribed by section 2697,—the bond act. In both ways the school district, alone and locally, assumes the responsibility of the expenditure; and it may not divert taxes raised for other purposes by the county commissioners, and paid by a general tax of the county, and added by appropriations from the state to the payment of its special local debt. Section 5, art. 7, of the constitution, provides, "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." This is an elementary doctrine in taxation, and without the constitutional declaration it has been held almost uniformly that there could be

no diversion of moneys collected by taxation for a special purpose, and placed in a fund created for such purpose. Section 2702, 1 Hill's Code, evidently imposed the duty upon the county treasurer to pay, out of any moneys belonging to the school district in the special-interest fund for payment of interest upon bonds, any moneys in such fund, on presentation of interest bonds, and can go no further. Notwithstanding its express declaration, that section, in so far as it purports to command the treasurer to pay interest coupons from moneys raised by taxation for another purpose, is unconstitutional, and therefore void. The case of *Munson v. Mudgett*, 15 Wash. 321, 46 Pac. 256, is cited by counsel for plaintiffs as controlling in the decision of this case. That case, however, arose under section 2681 of the General Statutes, providing that interest coupons upon bonded indebtedness of counties should rank as warrants upon the general fund; and it was held that such coupons were payable in the order of their issuance or date, of equal rank with county warrants on the general fund, and we cannot rule that it is applicable here. The superior court denied both plaintiffs' applications for mandamus, and directed the payment of warrants held by interveners, and its judgment is affirmed.

SCOTT, C. J., and ANDERS and GORDON, JJ., concur.

PIONEER SAVINGS & LOAN CO. v. PROVIDENCE WASHINGTON INS. CO.

(Supreme Court of Washington. June 18, 1897.)

INSURANCE—BREACH OF CONDITIONS—CHANGE OF OWNERSHIP—RIGHTS OF MORTGAGEES.

1. Violation of a stipulation that the mortgagee shall notify the insurer of any change of ownership will not avoid the policy, where such change occurs between the date of the application and payment of the premium by said mortgagee and the delivery of the policy.

2. After a mortgagee had procured a policy containing a clause of forfeiture in case of any change of ownership not communicated to the insurer, it received a deed of the property from the mortgagor, with the express agreement that title should pass only on condition that it was approved by its attorneys, and that the pending foreclosure suit be dismissed and the mortgage satisfied, but the mortgagee did not in fact dismiss the suit or satisfy the mortgage till after a loss. *Held*, that it was still a mortgagee at the time the loss occurred, and was entitled to the insurance: the contract providing for payment of such loss as the mortgagee sustained, and as its interest appeared.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by the Pioneer Savings & Loan Company, formerly named the National Building, Loan & Protective Union, against the Providence Washington Insurance Company. From a judgment for defendant entered on a directed verdict, plaintiff appeals. Reversed.

Mark F. Mendenhall, for appellant. Graves, Wolf & Graves, for respondent.

REAVIS, J. Action at law to recover on a fire insurance policy. The plaintiff procured a policy of insurance from the defendant against loss by fire, in the amount of \$1,500, upon a store building in the town of Post Falls, Idaho. The policy ran directly to Celinda Newsom, and the contract of insurance was for the term of one year from the 30th of August, 1893, at noon, to the 30th of August, 1894, against all direct loss or damage by fire. The application for the insurance was made by the plaintiff as mortgagee of the property owned then by Celinda Newsom and her husband. It contained the stipulation, "Loss, if any, payable to the plaintiff named as mortgagee or trustee, per mortgage clause attached," which mortgage clause contained, among other things, the following provisions: "It is hereby agreed that this insurance, as to the interests of the above-named mortgagee or beneficiary in the trust deed only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by legal process, voluntary transfer, or conveyance of the premises: provided, that the mortgagee or beneficiary shall notify this company of any change of ownership or increase of hazard which shall come to the knowledge of said mortgagee or beneficiary, and shall have permission for such change of ownership or such increased hazard duly indorsed on this policy." On October 1, 1893, the buildings were totally destroyed by fire. Notice was given and tender of proof of loss made by the plaintiff to the defendant within reasonable time thereafter, and claim for payment of loss. Defendant denied all liability under its contract of insurance, and plaintiff began this action. At the trial of the cause, objection was interposed by defendant to the introduction of testimony because the complaint did not state facts sufficient to constitute a cause of action. The court sustained this objection, and, upon motion of defendant, directed the jury to return a verdict in favor of the defendant, and entered judgment thereon. Previous to the trial a general demurrer had been interposed by defendant to the complaint, and overruled by the court.

It will be observed that the question presented here is upon the sufficiency of the pleadings by the plaintiff. The complaint sets out the corporate capacity of the plaintiff and the defendant, and that Newsom and wife were the owners of the property covered by the policy of insurance, and as such owners executed and delivered a mortgage of \$1,800 to the plaintiff, for a valuable consideration, and that the mortgagors agreed to keep the premises insured against loss by

fire, and the policy to have a mortgage clause attached, with the loss, if any, payable to plaintiff, and that, in case of failure of the mortgagors to keep up the insurance, then the mortgagee to take out the insurance and pay the premiums, and the mortgage was to be security for the premiums paid; that, for a breach of the conditions of the mortgage, plaintiff commenced a foreclosure suit about the 2d day of August, 1893, in the district court of Kootenai county, Idaho, and immediately served the defendant with summons; that during the pendency of the foreclosure suit, about August 28, 1893, Newsom and wife made, executed, acknowledged, and delivered their deed, thereby intending to convey the mortgaged premises to plaintiff, and at the same time it was expressly understood between defendants Newsom and plaintiff that title should pass to plaintiff only on the condition that said title be approved by plaintiff's attorneys, and upon the further condition that the foreclosure suit be dismissed and the mortgage debt satisfied and discharged by plaintiff as against Newsom and wife; that about the 21st of September, 1893, plaintiff's attorneys, on behalf of the plaintiff, filed a motion in the Idaho court to dismiss the foreclosure suit, and the motion to dismiss the suit was heard and order of dismissal thereon entered by the court on the 6th of November, 1893; that, during the pendency of the foreclosure suit in accordance with the provisions of the mortgage, plaintiff, upon the — day of August, 1893, at Minneapolis, Minn., applied for and procured from defendant insurance on the premises, and paid the premium of \$67.50 therefor; and that defendant, by its agents duly authorized thereto, on August 30, 1893, at Spokane, Wash., made the policy of insurance in writing and insured the premises as the property of Celinda Newsom in the sum of \$1,500 against loss by fire. After the demurrer was overruled, defendant answered, in substance, denying information sufficient to form a belief as to the formal matters alleged in the complaint, and affirmatively alleging that at no time prior to the date of the fire did the plaintiff, or Newsom or wife, or any other party, notify defendant of any change of ownership which had come to the knowledge of either of the parties, nor did plaintiff obtain permission for such change of ownership, or obtain permission for the execution of the deed from Newsom and wife to plaintiff, or concerning the approval of the title of the mortgaged premises, or concerning the pendency or dismissal of the foreclosure suit, and that at the time of the fire, and when the policy of insurance was made, plaintiff was the owner in fee simple of the mortgaged premises. The answer further alleges that the policy described in the complaint contained the following covenant: "That said policy should be void if the interest of the insured be other than unconditional and sole ownership, or if the

subject of the ownership of the insurance be a building on ground not owned by the insured in fee simple, or if any change other than by the death of the insured should take place in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise." Plaintiff replied, denying the absolute sale by Newsom and wife to it on August 28th, and also alleging that plaintiff's officers could not notify the defendant of the settlement of the foreclosure suit, and that notice was given of the pendency of the foreclosure; alleging that by reason of the necessary lapse of time in procuring the abstract of title and in approving said title, and the time necessarily consumed by the transmission of the United States mails to and from the city of Minneapolis, plaintiff's officers could not and did not have any notice or knowledge of the foreclosure suit at the time of making application for the policy of insurance, or at the time of the fire; and the plaintiff also alleges that it notified defendant of the pendency of the foreclosure suit, and defendant issued the policy of insurance with full notice and knowledge of the suit. Besides the covenant above mentioned in defendant's answer relative to the ownership of the property, which was in the policy, there was also another stipulation as follows: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such insurance as shall be written upon, attached or appended hereto."

1. Plaintiff, under the terms of its mortgage, when the mortgagors had failed to procure insurance for the buildings on the mortgaged premises, applied to defendant, a Minnesota corporation in Minneapolis, for a fire insurance policy, as a mortgagee, and paid the premium at the time of \$67.50. The policy was forwarded to be countersigned at the agency of defendant at Spokane, Wash. The allegation of the complaint is that this application was made and the premium paid on the — day of August, 1893. We think it may reasonably be inferred that the premium was paid upon the application made at Minneapolis at least three days before the policy was delivered at Spokane. At the time the application was made, Newsom and wife, the mortgagors, were the owners of the premises insured. If, as maintained by the defendant, the presumption exists that plaintiff made a representation of the title in its application for insurance to defendant, then such statement of title was at that time true. In contemplation of both parties, the premises were mortgaged, and a mortgage foreclosure might be made and a change of title occur; and, in

such change of title, plaintiff, mortgagee, might become the owner. Indeed, the contract of insurance with the plaintiff, the mortgagee, provided that no change of title or possession, etc., should affect the contract. We believe the rule supported by the better authority is that the contract of insurance with a mortgagee by an insurance company is a separate, distinct contract from that of the owner of the property, and that it is in contemplation between the parties to the contract that a change of title may occur, and that a third person or the mortgagee may become the owner, and that the ordinary stipulation in insurance policies in such contracts, that the mortgagee shall notify the insurance company of a change of title, is one not a substantive part of the contract, for violation of which a forfeiture will lie, but is simply a subsequent breach of the contract, for which damages may lie if the insurance company is injured. Such being the rule, we would have no difficulty in adjudging the defendant liable for the loss, if, after the delivery of the policy, such change of title had occurred, although defendant was without notice of the same. But the change of title in the case at bar evidently occurred in the interval between the application and payment of premium at Minneapolis and the delivery of the policy to the plaintiff at Spokane. May on Insurance (volume 1 [3d Ed.] § 276c), discussing foreclosure, says: "If, however, the policy expressly provides that the commencement of foreclosure proceedings shall avoid it, the condition will be enforced. But where an application truly stated that no foreclosure proceedings had been begun, and the policy stipulated that the commencement of any foreclosure proceedings shall immediately render this policy void, and no such proceedings were begun after the policy was issued, but there were such begun between the date of the application and the date of the policy, it was held that the company was bound, and the policy was not forfeited. The insurer must stipulate for the intervening period, if he would cover it." This question has also been directly before the supreme court of Iowa in a case in which the facts are very similar to those in the one now under consideration here. In that case the application for insurance was made February 23d, and stated that no proceedings had been commenced to enforce a mortgage on the property, which statement was true at that time. The application also provided that no liability should attach until it should be approved by the company. It was approved and the policy issued March 3d. The policy provided that the commencement of foreclosure proceedings against the property should render it void. Foreclosure proceedings were in fact begun between the dates of the application and the issuance of the policy, and the court held that the policy was not void because of such foreclosure proceedings. The court said: "Upon the 3d of March it relied upon what

the insured said about the property on the 23d of February. The company knew that the condition of the property was liable to change in the interval, and employed no means to inform itself. We think it took its own risk in regard to such change. When it issued its policy on the 3d day of March, it seems to us that it undertook to insure the property as it then was. We do not think the policy can be understood as meaning that foreclosure proceedings commenced before that time would render the policy void. No one can read the provision against the commencement of foreclosure proceedings without being impressed that it was designed to provide merely for the future." *Day v. Insurance Co.*, 72 Iowa, 597, 34 N. W. 435. This court, in the case of *Dooly v. Insurance Co.*, 47 Pac. 507, held that a policy of insurance containing a stipulation similar to the one in the case at bar, that if the ownership was not sole, unconditional ownership in fee, it was void, and where at the time the policy was written and delivered the insured was not such owner, and where the insurance company had no knowledge of the title, and no false representations had been made by the insured, was not vitiated. In effect, it was decided that the insurance company must inquire or inform itself about the title, or else it will not be material. In the policy before us, as usual in fire insurance policies, there are numerous printed stipulations in large and small type, and that they are not always closely noticed by either the insurer or the insured is obvious from a reading of this policy. The stipulation that exists in the printed portion of this policy, "or if any change other than by the death of the insured should take place in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise," was not eliminated by the defendant or its agents when they delivered the policy, yet it is absolutely inconsistent with the contract which it specially made with the plaintiff as mortgagee, and which was attached to the policy, the latter contract stipulating that such changes should not vitiate the policy. This illustration is mentioned that it may be seen, when the strictness of a forfeiture is claimed by the insurance company because of a stipulation perhaps first noticed by the insured after loss, it will be closely scrutinized before forfeiture is declared. Nothing will be inferred in favor of the forfeiture.

2. But another phase of the contention for a forfeiture of the contract by the defendant may here be examined. It is true that the execution and delivery of a deed by grantor to grantee estops the grantor from afterwards setting up a conditional delivery, or qualifying it in any way. This rule has its reason, which is that in so important a matter as the conveyance of title to real estate the door for the introduction of parol testimony to contradict the delivery of a deed when once

made will not be opened. But this estoppel upon the grantor does not always conclude the grantee. The plaintiff here was the mortgagee. It did not agree to, and did not in fact, dismiss the foreclosure proceeding or satisfy the mortgage until after the loss occurred by fire. The rule is that a mortgagee taking a conveyance of the fee by a deed does not always and necessarily merge the mortgage in the title, but, on the contrary, if it is to the interest of the mortgagee to still maintain the mortgage, he may do so. It would be but an ordinary precaution, when a deed was tendered by the mortgagor, to examine the title before acceptance of the deed. There might be intervening incumbrances which would make it necessary to maintain the mortgage intact, and conclude a foreclosure, and derive title through a judicial sale, rather than to retain the ownership by deed from the mortgagor. Evidently here it was to the interest of the plaintiff to maintain its mortgage after the loss by fire occurred, and it did so for some time; and, if it were in any sense a mortgagee when the loss occurred, the liability of the defendant was at that date fixed, because its contract is to pay such loss as the mortgagee sustained and as its interest appeared. The defendant seems to have retained the \$67.50, and refused to pay the loss under its contract of insurance. In conformity to the views heretofore expressed, the judgment of the superior court is reversed, and the cause remanded for a new trial.

SCOTT, C. J., and DUNBAR, GORDON, and ANDERS, JJ., concur.

MOORE v. TERRY et al.

(Supreme Court of Washington. June 21, 1897.)

CHattel Mortgage—Lien.

Two partners executed a mortgage on all their furniture in an hotel, which was to cover all furniture thereafter put in by them. After a dissolution of the firm, the survivor placed certain of his furniture in the building, which was claimed by his assignee in insolvency. *Held*, that laborers in the hotel, whose claims were preferred under 1 Hill's Code, § 3122, and who had no actual knowledge of the mortgage, were entitled to the proceeds of the sale of such individual furniture as against the mortgagee.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Wallace H. Moore, as assignee of the insolvent estate of J. W. Dodge, against Edward L. Terry and another. From judgment for plaintiff, defendants appeal. Affirmed.

Carr & Preston, for appellants. Boyer & Guile, for respondent.

SCOTT, C. J. The appellants are the successors in interest of themselves and one Frye, who, with their wives, executed a lease of an hotel and certain furniture therein to Dodge

& Smith, as co-partners. The lease also contained a chattel mortgage, whereby said Dodge & Smith, to secure the payment of the rent, stipulated in the lease, mortgaged certain furniture which they had at the time in the building. It also contained a further provision that the mortgage should cover all furniture thereafter put in by them. Dodge & Smith conducted an hotel under the terms of the lease for some time thereafter, when the partnership existing between them was dissolved. Smith withdrew, and Dodge thereafter conducted the business. This was done with the knowledge and consent of the lessors, although no new express agreement was thereafter entered into between them, verbal or otherwise. Dodge continued to pay the same rent as the lease provided for. After operating the hotel for some time, he made an assignment for the benefit of his creditors. At that time he was owing a considerable amount for the rent of the building, and he was also indebted to divers persons for services rendered in conducting said hotel business, which were rendered within 60 days prior to the assignment, and are preferred claims under section 3122, vol. 1, of Hill's Code. After the dissolution of said co-partnership, Dodge placed certain furniture in the building, belonging to him individually, and the contest is as to whether the appellants are entitled to this furniture under their said mortgage, or whether it must be devoted to the payment of the other claims referred to. The case was tried upon an agreed statement of facts, and the lower court found in favor of the labor claimants. Under an arrangement between the parties, the furniture had been taken by the appellants at the agreed value of \$290. The amount due the appellants for rent and the aggregate amount of claims of the laborers each exceeds this sum.

There is a serious question as to whether the mortgage given by the partnership could be held to cover the individual goods of one of the partners, although placed in the building and used in the business as these were. But, even if it was sufficient as a basis for or to create a lien upon the property in question in favor of the appellants as against Dodge, we do not think the same rule should follow as against his creditors, particularly the preferred claimants. It is conceded that they had no actual knowledge of the mortgage, but only such constructive notice as was given by its being recorded as a chattel mortgage. It did not, in terms, cover the individual property of Dodge, and as against him could at most only have been regarded as an agreement for a lien, or as creating an equitable lien upon such property. The appellants contend that the assignee could have no greater rights than Dodge himself had in the premises, and that, if a lien could be maintained as against Dodge, it must be held good in this instance; and authorities are cited upon the proposition that an assignee can have no greater rights than the insolvent had. But,

under the holdings of this court, such a rule does not obtain here, for the assignee represented the creditors as well as the insolvent, and could assert such rights as the respective creditors could have asserted in case of a direct action. *Mansfield v. Bank*, 5 Wash. 665, 32 Pac. 789, 999. We are of the opinion that the decision of the lower court was right in finding that no lien under the mortgage could be had upon the property in question as against the claims of these laborers, and that is the only question necessary to pass upon here. Affirmed.

REAVIS, ANDERS, DUNBAR, and GORDON, JJ., concur.

GRAHAM v. McCOY et al.

(Supreme Court of Washington. June 21, 1897.)

On petition for rehearing. Former decision modified.

For opinion on appeal, see 48 Pac. 780.

REAVIS, J. On petition for rehearing in this cause our attention is directed to an error in the order for entry of judgment in the superior court given in the decision. The superior court was directed to enter judgment in favor of the defendants for the difference existing between the counterclaim of \$3,000 and the balance due on the mortgage. We had overlooked the fact that this is a suit by the assignee of the mortgage and contract of the mortgagee, and that the defendants can only plead damages for breach of the original contract as a defense against the claim of plaintiff. 2 Hill's Code, §§ 145, 813. The decision is therefore modified, and the superior court directed to allow defendants' counterclaim to offset plaintiff's demand, it not exceeding the amount of the counterclaim; but that no judgment beyond costs go against plaintiff in any event. We have examined the whole petition for rehearing, and are satisfied with the conclusions heretofore reached in the cause.

SCOTT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

NASON v. NORTHWESTERN MILLING & POWER CO. et al.

(Supreme Court of Washington. June 17, 1897.)

TRIAL—OFFER OF EVIDENCE—MECHANICS' LIENS—PRIORITY—LIS PENDENS—ACTIONS—MONTHLY PAYMENTS.

1. A statement of counsel that "I would like to have the record in" a case named, "in order to show" certain facts, is not such an offer of the record as to present a question on its exclusion.

2. On filing a mechanic's lien claim, it relates back to the date of the first work by the claimant, as against lis pendens filed before the lien claim in an action to foreclose a mortgage given after the commencement of work by the claimant, under Sess. Laws 1893, pp. 33, 34, §§ 4, 5, providing that mechanics' liens are preferred to

all incumbrances attaching after the commencement of work by the claimant, but that no such lien shall exist unless a claim is filed within a certain time after the completion of the work.

3. Laws 1893, c. 24, relating to mechanics' liens and providing (section 11) that no action shall be begun to enforce such a lien while a prior action "to foreclose another lien" is pending, but all lien claimants must intervene therein, applies only to prior actions to enforce mechanics' liens, and does not require a lien claimant to intervene in an action to foreclose a mortgage.

4. The mere fact that one performing lienable work under an entire contract is paid by the month does not prevent his lien from attaching from the date of the first work.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by P. T. Nason against the Northwestern Milling & Power Company and others to foreclose a mechanic's lien. There was a decree for plaintiff, and defendant the Amsterdamsch Trustee's Kantoor appeals. Affirmed.

Binkley, Taylor & McLaren, for appellant. James Dawson, for respondent.

GORDON, J. This action was commenced by respondent in the superior court for Spokane county to foreclose a lien for services rendered and labor performed as "architect, superintendent, and laborer" in and upon a certain large brick building, owned by the Northwestern Milling & Power Company, a corporation, between the 22d of April, 1895, and the 14th of March, 1896. Respondent's claim for lien was filed for record in the auditor's office on the 12th day of May, 1896. The Amsterdamsch Trustee's Kantoor, a corporation, was made a party to the proceeding, under the general allegation that it had or claimed to have some interest which respondent alleged was subsequent to and subject to his lien. The milling company made no appearance in the action. The appellant, on the 1st day of June, 1896, filed a general demurrer, which it appears to have abandoned; and thereafter, on the 10th day of June, it made answer, in which it affirmatively alleged that on the 2d day of June, 1896, in an action pending in the superior court of Spokane county, in which it was plaintiff, and the Northwestern Milling & Power Company, a corporation, was defendant (being cause No. 10,592 in that court), a decree was entered in its favor, foreclosing a mortgage made by the milling company upon the premises affected by and embraced within respondent's claim of lien, and that the action in which said decree was given and made was commenced by the filing of a complaint therein with the clerk of said superior court on the 20th day of March, 1890, and on the same day filing with the auditor a notice of the pendency of said action; that, in and by the decree aforesaid, all persons claiming through or under the defendants in that action subsequent to the filing of plaintiff's mortgage, or subsequent to the filing of the notice of lis pendens in said action, were barred and foreclosed of any right, estate, interest, or lien upon the

premises affected thereby. The answer did not disclose the date of the execution or record of appellant's mortgage, but, as already noticed, it alleged that the action to foreclose it was commenced, and notice of *lis pendens* filed, on the 20th of March, 1896, which was prior to the record of respondent's claim for lien. At the trial, after respondent had introduced his evidence, and rested, appellant's counsel entered the following motion: "I move that the action be dismissed, as it appears by the evidence and the admissions of plaintiff himself that he was employed by the month, and by the complaint it appears that he has been paid for at least two months of his employment. I would like to have the record in the case of *The Amsterdamsch Trustee's Kantoor vs. The N. W. Milling and Power Company*, in order to show our *lis pendens* was filed and our decree, unless Mr. Dawson [respondent's attorney] is willing to admit the *lis pendens* was filed on the 20th of March." Thereupon respondent's counsel objected, and the court sustained the objection; and, no further proof being offered by either party, the court made its findings, and entered decree in favor of the respondent, from which the mortgagee has appealed.

A single error is assigned, viz. "that the trial court erred in excluding the testimony offered on behalf of appellant." Included within the statement of facts which has been brought to this court are what purport to be copies of certain portions of the record in an action entitled "*The Amsterdamsch Trustee's Kantoor vs. The N. W. Milling & Power Company*"; the parts of records so referred to being the findings of fact, conclusions of law, and decree of the court in that action, and also the notice of *lis pendens* heretofore referred to. From such findings it appears that appellant's mortgage was executed on May 21, 1896, and recorded on the same day. Upon the record it is doubtful if appellant is entitled to be heard to urge that the court excluded any testimony offered by it. The statement of counsel that he "would like to have the record in the case of [naming it]" was made in connection with his motion to dismiss, and it seems to us not to have amounted to an offer of evidence, nor from the language employed could it be told what the "record" so offered contained. But aside from this, and assuming that the proper offer was made, we are of the opinion that the court did not err in excluding the findings of fact and the decree in the action referred to. Respondent was not a party to that action, and could only be affected thereby upon the theory that he acquired an interest in the premises subsequent to the filing of the notice of *lis pendens* therein; and it is the contention of appellant that the respondent acquired no interest in the mortgaged premises until he filed his claim of lien on May 12, 1896, and its entire case is based upon that assumption. The doctrine of *lis pendens* is that "a purchaser, assignee, or attaching creditor of mortgaged premises,

during the pendency of a suit to foreclose, is bound by the decree made against the party to the action from or through whom he derives title." *Wilts. Mortg. Forec.* § 130. And, if appellant's contention that a claimant under a mechanic's lien acquires no interest in the premises until he files his lien claim is correct, it would undoubtedly have been proper for the appellant to have shown that its notice of *lis pendens* was filed prior to respondent's notice of lien claim. Our statute on the subject of mechanics' liens provides (*Sess. Laws 1893*, pp. 33, 34): "Sec. 4. The liens created by this act are preferred to any lien, mortgage or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given by this act." Section 5 provides that "no lien created by this act shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor, or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated." The language of the statute admits of little difficulty in its construction. The lien which the act affords to the laborer is preferred to any mortgage attaching "subsequently to the time of the commencement of the performance of the labor," and the effect of the statute is such that, when a claim for lien is filed within the time designated by the act, the lien "relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time." *Trammell v. Mount* (Tex. Sup.) 4 S. W. 377; *Lookout Lumber Co. v. Marion, H. & B. Ry. Co.* (N. C.) 14 S. E. 35; *Monroe v. West*, 12 Iowa, 119; *Phil. Mech. Liens* (3d Ed.) § 228.

It is also urged that the evidence offered would (if admitted) have shown an action pending for the foreclosure of the mortgage when respondent began his action, and that, therefore, respondent was not entitled to begin an independent action for the foreclosure of his lien against the same premises; and section 11, c. 24, p. 36, *Laws 1893*, is cited in support of this contention. That section is as follows: "The liens provided by this act, for which claims have been filed, may be foreclosed and enforced by a civil action in the court having jurisdiction; in any action brought to foreclose a lien, all persons who, prior to the commencement of such action, have legally filed claims of liens against the same property, or any part thereof, shall be joined as parties, either plaintiff or defendant; and no person shall begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a

party plaintiff or defendant to such prior action, he may apply to the court to be joined as a party thereto, and his lien may be foreclosed in such action." To this contention there are two answers: (1) That the evidence offered does not show when the foreclosure action was begun. Neither the summons nor complaint in that action was offered in evidence, and the notice of lis pendens which appears to have been filed on March 20, 1896, was not in itself the best, or any, evidence of the commencement or existence of an action. (2) The statute relied upon (section 11, supra) does not relate to mortgage foreclosures, but only to "the liens provided by this act." The title of the act is "An act creating and providing for the enforcement of liens for labor and material," and we are not disposed to enlarge the terms of that section, or to extend it to cases not embraced within its express terms.

It is also urged that the respondent's claim for lien is based upon services rendered under an employment from month to month, and that all work done by him subsequent to the recording of appellant's mortgage was performed under contracts made by him after legal notice of appellant's rights, and his lien therefore is subordinate to appellant's mortgage. We think it is apparent from the record that the contract of employment was an entirety, and contemplated not only the drawing of plans, but superintending the construction of the building to completion; and the fact that, under it, compensation was to be made by the month, does not affect the contract. Phil. Mech. Liens, § 229, and authorities there cited. Decree affirmed.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

BISHOP v. AVERILL et al.

(Supreme Court of Washington. June 22, 1897.)

WITNESS—CROSS-EXAMINATION—BROKERS—RIGHT TO COMMISSION—INSTRUCTIONS—PREJUDICIAL ERROR.

1. Where defendant is called as a witness by plaintiff, it is an abuse of discretion to permit cross-examination going outside the testimony in chief, and bringing out by leading questions matters of defense.

2. Such error is prejudicial.

3. A contract of sale of a mine provided that the vendee should apply a certain percentage of the gross earnings on the price. The broker procuring the sale agreed to receive a certain percentage of the amounts so received for his commission, neither price nor commission to be paid except from such earnings. Before the price was fully paid, the vendor and vendee canceled the contract, and made another. *Held*, in an action by the broker for the balance due on his commission, that an instruction that he could not recover unless the jury found that the contract would have been completed, was erroneous, as ignoring the possibility that further payments would have been made out of which he would have been entitled to his percentage.

4. Such instruction is not harmless because of testimony that before the making of the new con-

tract the vendee had abandoned the old one, where it appears that down to the time of the new contract the mine was worked by him with a full force, and without cessation.

5. It is not essential to the broker's right to recovery that the new contract should have been made with fraudulent intent to deprive him of his rights under the former one.

6. It is also immaterial to his right to recover whether the agreement that his commission should be paid out of the amounts paid by the vendee was an assignment of part of the output of the mine or an agreement to pay from a particular fund.

7. A complaint will be liberally construed on appeal where there was no demurrer to it below.

Appeal from superior court, Spokane county; Wallace Mount, Judge.

Action by R. C. Bishop against G. W. Averill and another. Judgment on a verdict for defendants, and plaintiff appeals. Reversed.

Danson & Huneke, for appellant. Wm. T. Stoll, for respondents.

GORDON, J. This action was brought to recover the balance of a commission claimed by plaintiff for selling a certain mining property for defendants. The cause was tried before a jury, and the trial resulted in a verdict and judgment for the defendants. From the record it appears that in the spring of 1895 the defendants and one Banghart owned certain mining property in Montana known as the "Golden Cloud Mining Property," which they were desirous of selling, and for that purpose authorized the plaintiff and George Walker to sell the same for the purchase price of \$75,000, and in consideration of their doing so agreed to pay them \$10,000 as a commission for making the sale. Thereafter a purchaser was found by plaintiff and his associate, who entered into a written agreement with Banghart and the defendants of date April 8, 1895, under the terms of which, in consideration of \$1,000, an option was given the other party to the agreement until April 15, 1895, to purchase the property at a price of \$75,000, of which \$10,000 was required to be paid on or before April 15, 1895, and, if so paid, the purchaser was to be entitled to the immediate possession of the property, and everything connected therewith. As a part of the same transaction, deeds of conveyance were executed and deposited with the Thomas Cruse Savings Bank of Helena, Mont., to be delivered to the purchaser on payment of the balance of the purchase price, to wit, \$65,000. The agreement further provided that all payments were to be made through said bank. The purchaser was required to operate the mines continuously at his own expense until the purchase price was paid. It required the balance of the purchase price to be paid within three years after April 15, 1895. This balance was, under the terms of the agreement, to be paid "by deposits in the Thomas Cruse Savings Bank of Helena, Montana, to the credit of the said G. W. Averill, of thirty-five (35%) per cent. of the gross returns of the mines and mills hereinbefore described, until

the full balance is paid; that is to say, that the thirty-five (35%) per cent. of the gross returns shall aggregate the full sum of sixty-five thousand dollars within three years from the date of delivery of possession." The agreement further provided that: "Unless the said party of the second part shall elect to pay the said sixty-five thousand dollars in cash, there shall be no obligation on his part to pay the same, unless such payment is made by the deposit of thirty-five per cent. of the gross returns as above described." And also: "Nothing herein contained shall be considered as obligating said party of the second part to pay said balance of sixty-five thousand dollars, except as the same is to be paid by means of the said thirty-five per cent. of the said gross returns; and in case such balance of sixty-five thousand dollars is not paid within the said three years from the date of such delivery as aforesaid, either by such election and payment in cash or by the deposits of thirty-five per cent. of the gross returns as aforesaid, then and in that event the said party of the second part is, at the end of the said three years, to surrender the said property, and the whole thereof, to the said parties of the first part in as good condition as reasonable use and wear thereof will permit." The closing clause of the agreement was as follows: "It is further provided that the terms and provisions of the within and foregoing contract shall apply to the successors and assigns of the parties thereto in the same manner as to the parties themselves, and time shall be of the essence hereof." The party of the second part named in this agreement was Eugene M. Sanger, who was in fact acting for, and subsequently assigned all of his rights in and under the contract to, Abram T. Kerr, of the state of New York. Within the time fixed by the agreement, Kerr paid the sum of \$10,000, and entered into possession of the property in accordance with the terms of the contract. At about that time Banghart assigned all of his interest in the contract to the respondents in this action (defendants below), who assumed Banghart's liability to the plaintiff and Walker for the commission, and Walker assigned to the appellant all his right and share in such commission. After Kerr had paid the \$10,000, and gone into possession of the mining property, the defendant G. W. Averill, acting on behalf of himself and wife, entered into a written agreement with appellant as to the manner in which the \$10,000 commission was to be paid. The agreement refers to the contract of purchase, and recites that the said Bishop and Walker were to receive the sum of \$10,000 commission for their services in that behalf. Continuing, it provides: "Now, therefore, these presents witnesseth that it is understood and agreed by and between the said party of the first part and said party of the second part that upon each deposit in the said Thomas Cruse Savings Bank by said Kerr after the first day of June, 1895, of the 35% specified in said contract [referring to the con-

tract of purchase and sale above noticed] of the gross proceeds therein mentioned, the said Bishop shall be at once, and hereby is declared to be at once, entitled to 15.3% thereof; and the said Thomas Cruse Savings Bank, under and by virtue hereof, and upon a deposit of one of these agreements with it, is hereby authorized and directed to pay to the order of said Bishop said 15.3% of said sum so deposited by said Kerr under said agreement, this being intended to be an assignment and transfer by the said party of the first part to the said party of the second part of said 15.3% of said 35% as above set forth. It is further understood and agreed that if said Kerr, under the terms of said contract, shall see fit to pay up in any other manner the said balance of sixty-five thousand dollars, the purchase price of said property, that immediately upon the payment by him into said bank under the terms of said agreement, that the said party of the second part shall immediately thereon be entitled to said 15.3%, and the said Thomas Cruse Savings Bank is hereby directed and authorized to credit the same to the said party of the second part, and pay the same to his order, the same as above specified for the payment of said per cent. of the said 35%; and this agreement is to be binding and in full force and effect until the said sum of ten thousand dollars, and the whole thereof, has been paid to said party of the second part in the manner above set forth or otherwise; it being understood that said commission is not to be paid unless the same is deposited in said bank under said agreement by said Kerr or his assigns." Having gone into possession of the property, Kerr operated the mine continuously thereafter until June, 1896, during which time he expended about \$50,000 in improving the property and constructing roads and in the erection of a mill. He also, from month to month, until November, 1895, regularly deposited to the credit of defendant in the bank mentioned in the agreement 35% of the gross output of the mines. The deposits so made aggregated about \$4,000, and of the amount so deposited the appellant received his 15.3%, amounting to the sum of \$562.96, which is the entire sum received by him on account of his commission. From November, 1895, until June, 1896, although Kerr continuously worked the mine, and there was during such time an output amounting in gross to nearly \$17,000, he failed and neglected to make the deposit of 35% of such output to respondents' credit in the bank; but early in the month of June, and while still engaged in working the mine, Kerr, without the knowledge or consent of appellant herein, entered into an agreement with respondents, whereby, in consideration of the payment to them of \$20,000 in cash, the respondents executed a quitclaim deed to the premises in question, and also directed the delivery of the deed of conveyance theretofore held in escrow by the bank, and hereinbefore referred to. Thereafter the present suit was instituted by the ap-

pellant. His complaint sets out in full the various written agreements referred to herein, and in referring to the agreement between the defendants and Kerr last mentioned, which resulted in the execution and delivery of the quitclaim deed, the complaint contained the following allegation: "Ninth. That on, to wit, on or about the 8th day of June, 1896, the defendants, seeking to avoid further payment to the plaintiff, and to defraud him out of the remainder due him upon his said commission, proposed to and agreed with said Kerr to close and complete said payment by a cash payment instead of monthly installments, and then and there agreed with said Kerr to receive in full payment and satisfaction of the remainder due upon said purchase under said agreement the sum of twenty thousand dollars, in consideration of the same being paid in cash and to the defendant G. W. Averill in person, instead of the Thomas Cruse Savings Bank; and that said Kerr then and there paid to said G. W. Averill in person, and not to said Thomas Cruse Savings Bank, the sum of twenty thousand dollars as and for full payment of the balance then due upon said purchase price for said mining property; all of which was done without the knowledge or consent of the plaintiff, and for the purpose of avoiding further payment to him upon his said commission." The answer, in effect, was that prior to the execution of the conveyance last mentioned Kerr had forfeited his rights under the contract of purchase, and that the respondents had declared a forfeiture, and by reason thereof the property was revested in them, and that the contract of purchase brought about by appellant was never fulfilled or performed by Kerr, and thereafter respondents effected with Kerr a new agreement of purchase and sale in which appellant had no part.

The errors relied upon for a reversal relate to various rulings of the trial court upon the introduction of evidence at the trial, and to instructions given to the jury. It is necessary to notice only the most serious of the exceptions taken to the court's rulings upon the introduction of testimony. At the trial the respondent G. W. Averill was called as a witness for appellant, and questioned concerning the payment to him of the \$20,000 by Kerr in consideration of the agreement reached by the parties in British Columbia. Under the guise of cross-examination, his own counsel, over repeated objections by appellant, was permitted to go into the whole subject of the defense, and as a part of such so-called cross-examination respondents' counsel was permitted to frame questions that were leading, and grossly suggestive and self-serving. As a sample we notice the following: "Q. Isn't it also a fact that you served notice on Professor Kerr at Helena prior to this time, through your attorney, Mr. Stranahan, that he had forfeited all his rights under the contract by reason of his failure to deposit 35 per cent. of the gross proceeds in the Cruse Savings

Bank? Q. And at the time he came over here to negotiate with you on this matter, didn't he then admit to you that he had received your notice from your agent at Helena? Q. Didn't Professor Kerr admit to you, when he came down there to make this deal, that he and his company, Abram T. Kerr, had forfeited all their rights under that contract? Q. Now, doctor, didn't Professor Kerr also say to you that he found it necessary to abandon the contract and the property, and that he couldn't fulfill his bargain? Q. And then it was that you entered into negotiations for the new contract? Q. Under this agreement, by which he paid this \$20,000, you executed a new and independent deed, here in Spokane, didn't you?" We think it was an abuse of discretion upon the part of the trial court to have permitted these and some other questions of a similar character to be answered. Here was a witness who was a party to the action, and hostile to the side calling him. Correct practice and every consideration of right required the application of the strict rule to his examination. The general rule is that the cross-examination must be limited to matters disclosed upon the examination in chief; still when in such examination a general subject is unfolded, the cross-examination may develop and explore the various phases of that subject, but the cross-examination of the respondent which was here permitted went beyond all rules with which we are familiar, and enabled the defendant in the action, under the pretense of cross-examination, to improperly place his case before the jury in answer to questions which were leading, self-serving, and suggestive, and which it is at once apparent would have been inadmissible if directed to the witness upon an examination in chief. It was something more than harmless error in admitting testimony that was relevant and material out of its regular order.

As a part of his charge, the learned judge gave the following instructions: "If you find in the usual course of business the purchaser of this mine would have paid this \$65,000 into the Thomas Cruse Savings Bank, and this plaintiff [appellant] would have received his commission, but that he was prevented from so receiving said commission by these defendants entering into a new contract with the purchaser, then your verdict in this case must be for the plaintiff. But if you find from the evidence that this plaintiff would not have received his commission under the contract, that the contract would not have been completed by the purchaser of the mine, and that these defendants had no intention of cheating and defrauding plaintiff, and did not prevent him from receiving his commission in that way, then your verdict must be for the defendants." The charge closed with the following: "If you find from the evidence that this commission was to be paid out of the proceeds of the mine, and through the Cruse Savings Bank, and that the purchasers of the mine

were bound to pay the amount in that way, but that the defendants, by a subsequent agreement, made without the consent of the plaintiff, prevented the plaintiff from receiving the money which he would have received if this subsequent agreement had not been made, then your verdict must be for the plaintiff. But if you find from the evidence that they were not bound to pay the money in that way, but might return the property, and that they would not have paid the money, and that the subsequent agreement did not prevent plaintiff from receiving the money which he would have received, then your verdict must be for the defendants." In the instructions here set out, as well as in other parts of the charge, the trial court, in effect, told the jury that appellant could not recover unless they should find that in the usual course of business Kerr would have fully paid the balance of the purchase price (under the agreement of purchase) of \$65,000, and unless appellant would have received the full amount of his commission but for a subsequent contract between the respondents and Kerr. Of this part of the charge the appellant complains as follows: "The jury could not find for plaintiff unless they also find that he would have received all his commission. In other words, if the jury should find from the evidence that the purchaser would have faithfully performed the contract one year, two years, two and a half years, two years and eleven months, and would have paid twenty, thirty, forty, fifty, or more thousand dollars, and plaintiff would have received five, six, seven, eight, or nine thousand dollars, but that he would not have entirely performed it, nor paid the entire \$65,000, nor the plaintiff have received the entire \$10,000, then they must find for the defendants." We think this criticism is just, and the error of the charge apparent. Appellant correctly assumes that he had the right to have the contract continue in force throughout the full period of three years, and to receive 15.3 per cent. of respondents' share, whether it amounted to much or little. While apparently conceding that it was error to so charge, counsel for the respondents with much ingenuity suggests that at the most it was a mere harmless error, not requiring a reversal. He contends that the evidence is conclusive to show that the purchaser (Kerr) had thrown up the property (at the time of making the subsequent contract with respondents under which they conveyed the premises in consideration of \$20,000 paid to them), and intended to do nothing further with it under the original contract of purchase. On the contrary, we think there was evidence from which the jury might have arrived at a different conclusion. James E. Kerr, a witness for respondents, and the agent of the purchaser in the entire transaction, testified that at the time of making this last contract they had some 30 or 40 men employed at the mine, and "were running right along." He was asked if the last output in

May, 1896 (which immediately preceded the making of the contract last referred to), was not the best they had ever had, and in response said: "I think June was the best month. We only had two good months last year. Q. Do you remember what you had in June [being June, 1896]? A. I don't know; can't recollect; but I think about \$3,000; it might have been more. Q. You run this mill right along, didn't you? A. Yes, sir." And the respondent G. W. Averill admitted upon his examination that at the time he entered into the contract of sale for \$20,000 he knew that "they were running the property with thirty or forty men right along." Indeed, it was conceded throughout the trial that from the time when Kerr went into possession of the property, in April, 1895, until this last agreement was effected, he continued to operate the mines with the full crew of men, and to make valuable improvements thereon, and there was no cessation of the work.

As the cause must be retried, we deem it necessary to notice another phase of the charge, which was also duly excepted to. The court charged as follows: "The whole question here for you to determine is a question of fraud. Now, in order to constitute a fraud, there must have been a dishonest and corrupt purpose and intent on the part of the defendants to cheat the plaintiff. They must have accepted the alleged purchase price for the dishonest purpose of preventing the plaintiff from getting any of the money due on the original contract of sale. If, in the ordinary course of business which they were doing, they would not, in any event, have received the amount of money, or any other sum of money, than they did receive through the source under the contract it was bound to come, then any act of these defendants which did not prevent it from going through the bank would not amount to fraud. But if the money would have gone through the bank, and would have been paid by the purchaser in accordance with the contract, and these plaintiffs would have received their money, then I say these defendants, by any new arrangement made between them and the purchaser without the consent of the plaintiffs, would not be released from paying the full amount of the commission. If these plaintiffs were not prevented, by the subsequent agreement and sale of the property, from receiving money which they would have received under the contract, then they cannot recover. But if they were prevented from receiving money which they would have received if this last contract had not been entered into, then they are entitled to a verdict at your hands. If they were not prevented, then they are not entitled to a verdict." By this and similar instructions the jury were told that, unless the respondents made the subsequent contract of sale and final settlement with Kerr with the dishonest and corrupt purpose of preventing the appellant from getting what was his due on the original con-

tract, and intended to cheat him out of such sum, the appellant would not be entitled to recover. We think the trial court labored under a misconception of the law, and the effect of this instruction was to weight the cause of the appellant with a burden which the law did not impose upon it. This is a legal action, and it is the effect of the defendants' acts, rather than the motive which impelled them, that concerns the plaintiff in the present cause, and too much weight was attached to the motives of the defendants.

Respondents urge that the complaint in this action is insufficient. An examination of the record discloses that no demurrer was taken in the lower court, and, while it is the right of a party to challenge the sufficiency of a complaint in this court, the rule is that, "in the absence of a demurrer, the complaint, after judgment, should receive a very liberal construction." *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731. But we are entirely satisfied that the complaint in the present cause states a good cause of action. The main objection urged against it is that the contract between respondents and the appellant operated as a complete assignment to appellant of an interest in respondents' share of the output of the mine. Also that it appears from the complaint that Kerr had knowledge of this assignment, hence did not act innocently in taking the subsequent conveyance from respondents. We think it can make little difference whether the contract between the parties to the record be regarded as an assignment or an agreement to pay from a particular fund; in either event it gave the appellant an interest in the contract between Kerr and respondents which entitled him to recognition, and he was entitled to receive his share during the lifetime of the contract without interruption from respondents. "The rule is clear and well settled, and founded in absolute justice, that no party to a contract can either prevent performance by another of any of its conditions, or, on the other hand, disable himself from complying with any condition, and derive any benefit or escape any liability thereby." *Dill v. Pope*, 29 Kan. 289. For the errors noticed, the judgment must be reversed, and a new trial awarded.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

PERKINS v. NORTH END BANK OF SEATTLE et al.

(Supreme Court of Washington. May 28, 1897.)

SUBROGATION — WITNESSES — SELF-INCRIMINATING EVIDENCE — INSTRUCTION TO WITNESS.

1. A city and the sureties of its defaulting treasurer made a settlement whereby they were to pay a certain sum, and the city was to assign to them a claim against an insolvent bank for money deposited therein by such treasurer. *Held* that, where the sureties performed such contract, and the city failed to perform, they were entitled to be subrogated to its rights, though, after such

settlement, it discovered additional embezzlements, in the absence of an allegation of fraud or mutual mistake as a ground for reopening the settlement.

2. Where a question propounded to a witness on its face could not be answered affirmatively without the crimination of the witness, it was the duty of the court to caution the witness that he might avail himself of the privilege, and not answer.

Appeal from superior court, King county; R. Osborn, Judge.

Action by C. G. Perkins, trustee, against the North End Bank of Seattle and the city of Seattle to recover money deposited in such bank by the defaulting treasurer of said city, it being alleged that defendant city had agreed to assign the claim therefor to plaintiff's assignors, who were the sureties on such treasurer's bond, and had made with the city a settlement and compromise of their liability on account of such embezzlement. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Donworth & Howe and Jenner & Legg, for appellant bank. John K. Brown and F. B. Tipton, for appellant city. Struve, Allen, Hughes & McMicken and Stratton, Lewis & Gilman, for respondent.

REAVIS, J. Adolph Krug was, in 1892, elected city treasurer of Seattle and qualified by giving a bond to the city in the penal sum of \$100,000, with Gilman, Kilbourne, Fuhrman, Sander, Ostrander, McTeigh, and Edmiston as sureties. In October, 1893, it was ascertained that Krug was short in his accounts, and had embezzled large sums of the funds of the city coming into his possession as treasurer. An investigation by the city authorities followed, and shortly thereafter suit was commenced against Krug and his sureties upon his official bond to recover the amount embezzled, and thereupon negotiations were commenced between the city and the sureties for a settlement of the deficit. The city authorities discovered some portion of the funds of the city had been deposited by Krug in solvent banks doing business in the city; that the sum of \$25,978.58 had been deposited by him in the North End Bank of Seattle, defendant, which, at the time of the discovery of the defalcation, had become insolvent, and had closed its doors. Other portions of the city funds had been invested in city, county, and school warrants, and upon loans to different private individuals, whose notes and other obligations Krug held as security for the loans made. Other portions of the funds were found in the office of the city treasurer in the form of checks and drafts given by different individuals in payment of taxes, which checks and drafts, upon presentation, had not been honored. Shortly after the defalcation was discovered, the city, by ordinance, selected from these securities such as were considered good, and declared them to be the property of the city. The negotiations with the sureties continued for about three weeks. The city presented to the sureties

the statement of what it claimed to be the amount of Krug's defalcation, prepared by its officers, which the sureties accepted as the correct amount. After further negotiation the sureties finally submitted a proposition to the city to pay in full the amount of Krug's defalcation as claimed by the city. In this proposal of the sureties the city was to receive and accept in lieu of cash, in addition to the securities already received and accepted by its ordinance, \$39,611.32, composed of various specified claims and items, and the sureties further proposed to themselves to pay \$8,211.64, which latter sum was made up of various notes and checks in the treasurer's office which had been given to the treasurer for liquor licenses, water rates, and taxes and assessments, but not paid. For the remainder of the deficiency stated by the city, \$78,119.30, the sureties agreed to deposit to the credit of the city in certain banks named that amount. Among the banks named was the Security Savings Bank, and the amount to be deposited therein was \$7,721.82. It was stated further in the proposition that it was made for the purpose of compromise and settlement, and should not be considered binding unless accepted by the city, and should not be construed as an admission of any liability upon the part of any of the sureties on the official bond of Krug; and, in case of non-acceptance by the city, that the sureties reserved the right to make any legal defense to any action brought on the bond. The fifth paragraph of the proposition submitted by the sureties was as follows: "In the event of the acceptance of this proposition, the city is to dismiss all civil suits begun against said Krug and us, or against any of us, at its own costs, and to turn over to us all securities now in its hands, or in the hands of the finance committee, except such securities as may be or may have been accepted by said city, belonging to said Krug, or in which he is directly or indirectly interested; and except, further, that the securities named in paragraph two hereof, shall be retained by the city for the purpose of collection, and to be turned over to us only in the event of the failure to collect said items or any of them." The securities named in paragraph 2, referred to above, were those items which made up the amount of \$8,211.64, which were to be collected by the city, if practicable, and turned over to the sureties. The proposition of the sureties was accepted by the city by ordinance. Thus, by the agreement between the city and the sureties of its defaulting treasurer, the city was to accept certain securities in lieu of cash as a payment of the deficit. The balance of the defalcation then remaining was to be made up by the sureties in the form of deposits to the credit of the city in different banks; and in return for such payment all remaining securities in the possession of Krug and of the city were to be turned over to the sureties for their reimbursement. In the settlement between the sureties and the

city the credit of \$25,978.58, deposited by Krug, as city treasurer, with the defendant the North End Bank of Seattle, was rejected by the city, and was included in the amount which the sureties were to pay by their various deposits in the city banks. The defendant bank was at that time insolvent, and had closed its doors. Subsequently to this settlement the city claimed there were other deficits of its treasurer which had not been included in the settlement of \$125,942.26, as found by the ordinance. It is also claimed by the defendant bank that the sureties did not comply with the terms of their contract in that they did not deposit the sum of \$7,721.82 to the credit of the city in the Security Savings Bank, but the testimony in the record supports the finding of the court below that this was done, and the fact that the Security Savings Bank became insolvent thereafter could not fairly place the loss upon the sureties. The ninth finding of fact, in substance that the sureties fully performed the condition of their undertaking as sureties, and carried out the terms and conditions of their contract of settlement with the city for the defalcation of Krug as treasurer, and that the city accepted the performance by the sureties as a full and final settlement of the defalcation, is fully sustained by the record.

Counsel for the city and the defendant bank maintain that there could be no subrogation of the sureties in place of the city to demand the amount due from the defendant bank until the whole amount of the defalcation of the city treasurer was paid by the sureties, and testimony tending to show that a larger deficiency existed than that stated in the ordinance settling with the sureties had afterwards been discovered was offered by defendants. Such testimony was excluded by the superior court. Much authority is cited to sustain the contention that sureties are not entitled to subrogation until they have made complete payment of the amount due from the principal in default. The legal proposition thus stated by counsel for the defendant is unquestionably correct; but, in the view we take of this case, it is not essential to determine whether the settlement made was in fact a payment. It was unquestionably a compromise and settlement between the city and the sureties of its defaulting treasurer, and neither fraud nor mutual mistake is alleged as ground for reopening the settlement made. In the absence of such allegations in the pleadings, such settlement and agreement made between the city and the sureties must stand, and, if the sureties have performed their undertaking in the agreement, they are entitled to have the city make performance on its part of the stipulations contained in the agreement.

The defendant bank set up as a partial defense an unlawful agreement alleged to have been made between the city treasurer, Krug, and the cashier of the bank, by the terms of which the city treasurer was to be paid inter-

est on deposits in the bank, and the cashier was to derive certain benefits to himself personally by the use of the money so deposited, and that the bank did not receive the benefit of the money so deposited. To prove such unlawful agreement, the defaulting city treasurer, Krug, when testifying as a witness, was asked on cross-examination by counsel for the defendant bank the following question: "Is it not a fact that you made the arrangement with Mr. Bixby [the cashier]—that you put some money with Mr. Bixby at the North End Bank, for which Mr. Bixby was to pay you eight per cent. interest on such money as you left with him?" To this question objection was made by counsel for plaintiff, who then stated to the court, "I will ask you to instruct the witness that he may refuse to answer the question." The court instructed the witness that he had a right to refuse to answer, that he had a right to protect himself against any testimony which might be used against him in a criminal prosecution. The witness Krug had testified in his examination in chief that he made deposits in the defendant bank, and that such deposits consisted of the funds of the city, and were deposited by him as city treasurer. Counsel for the defendant bank assign the ruling upon the question as error, and it is discussed at considerable length in the brief. The contention of counsel is severely technical. The question propounded to the witness upon its face could not be answered affirmatively without the crimination of the witness. The court could plainly see this. It was the duty of the court to here caution the witness that he might avail himself of his privilege, and not answer. It was the duty of counsel present to suggest to the court such caution, and the state of the case at the trial made it unnecessary to go further, and take the opinion of the witness on his oath that the answer to the question would tend to criminate him. We perceive no error in the ruling of the trial court upon this testimony.

Before the commencement of the action the sureties mentioned assigned all their rights to the respondent as trustee for the purposes of the suit. Demand was made upon the city for transfer of the claim it held against the defendant bank, and upon the bank for payment. We conclude that the findings of fact of the superior court are correct, and, perceiving no error in the record, its judgment is affirmed.

SCOTT, C. J., and ANDERS and DUNBAR, JJ., concur. GORDON, J., did not sit in this case.

STATE ex rel. CHAMBERLAIN et al. v.
DANIEL, County Assessor.
(Supreme Court of Washington. May 28, 1897.)

TAXATION—EXEMPTIONS—VALIDITY.

Const. art. 7, §§ 1, 2, declare that "all property not exempt under the laws of the United

States or under this constitution shall be taxed"; that the legislature shall provide a uniform and equal rate of taxation on "all property in the state, * * * provided that a deduction of debts from credits may be authorized"; and "that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation." Held, that the words "and such other property," etc., refer to property of the same general character as that specially enumerated, and do not authorize the legislature to exempt any private property.

Appeal from superior court, Spokane county; L. H. Prather, Judge.

Proceeding by the state of Washington, on the relation of Frederick D. Chamberlain and another, for a writ of prohibition against J. W. Daniel, as county assessor of the county of Spokane. From a judgment granting the writ, defendant appeals. Affirmed.

John A. Pierce and Harris Baldwin, for appellant. Blake & Post, for respondents.

DUNBAR, J. This was a proceeding by the respondents in the court below for a writ of prohibition against the appellant, as the assessor of Spokane county, prohibiting him from allowing the exemptions provided for in subdivisions 6 and 8 of section 5 of the revenue law passed by the last legislature. These provisions of the law exempt each person liable to assessment from taxation on personal property to an amount not exceeding \$500, and also improvements upon land of each person liable to assessment to an amount not exceeding \$500. It is contended that these provisions of the statute are unconstitutional, as being in conflict with sections 1 and 2 of article 7 of the constitution. A demurrer was filed to the respondents' complaint, which was overruled, and, appellant refusing to plead further, final judgment was rendered directing the issuance of a writ of prohibition against the appellant as prayed for in the complaint. From this judgment the present appeal is prosecuted.

Sections 1 and 2 of article 7 of the constitution, under the title of "Revenue and Taxation," are as follows:

"Section 1. All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt.

"Sec. 2. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall pre-

scribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: provided, that a deduction of debts from credits may be authorized: provided, further, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation."

It is the contention of the respondents that the constitution, in both sections 1 and 2, provides especially for the taxation of all property, and that the clause in the latter part of the second proviso of section 2, viz. "And such other property as the legislature may by general laws provide," must be construed to mean such other property of like kind and character as the property specially described in the proviso; in other words, that it falls within the rule of ejusdem generis. The contention of the appellant, however, is that the rule of ejusdem generis is not applicable in the construction of this law; and it was argued with much force by the attorney who supported the legality of the law in the case of *Buchanan v. Bauer*, 49 Pac. 1119, a companion case, which was argued in conjunction with and at the same time as this case, that, inasmuch as the proviso mentions specially property of the United States and of the state, counties, school districts, and other municipal corporations, the genus or class of property which was comprised in the proviso was made full and complete by the use of the expression "and other municipal corporations," and that, consequently, there was no room for the application of the rule of ejusdem generis, so far as the other expression "such other property" is concerned, and that, necessarily, the expression "such other property" referred to property outside and independent of the class of properties enumerated. To a student of technical logic this argument would appeal very strongly, but it is doubtful if the members of the constitutional convention indulged in so fine a discrimination of the use of words and phrases and were governed by such refined distinctions. It may be conceded that the rule which is urged by the appellant in this case is the correct one, and must be followed by the court, viz. that where the language of the act is plain and unambiguous there is no room for construction; also, it may be conceded that the policy or impolicy of the law is a matter which the courts will not consider, but that that is a consideration resting entirely within the discretion of the legislature. Mr. Sutherland, in his work on *Statutory Construction* (section 238), says: "When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law. Its consequences, if evil, can only be avoided by a change of the law itself, to

be effected by the legislature, and not by judicial construction." And this, no doubt, is the accepted rule; but there are some qualifications—or, rather, explanations—of this rule, one of which the author just above quoted proceeds to give in the following language: "But an interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible, if the statute is susceptible of another interpretation by which such consequences can be avoided." Another qualification is that, "where words conflict with each other, where the different clauses of the instrument bear upon each other, and would be inconsistent unless the natural and common import of the words be varied, construction becomes necessary."

If the proviso mentioned were to be construed alone, there is little doubt that it would bear the construction contended for by appellant; but in this instance it becomes necessary, under all the rules of construction, to consider the proviso with reference to the whole section. Mr. Sutherland, in section 239, in speaking on this subject, says: "The practical inquiry is, usually, what a particular provision, clause, or word means. To answer it one must proceed as he would with any other composition,—construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of any part. This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord, if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general design. A statute should be so construed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose. If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature." Again, in section 240: "The presumption is that the lawmaker has a definite purpose in every enactment, and has adapted and formulated the subsidiary provisions in harmony with that purpose." So, in the constitutional provisions under discussion, to obtain the actual meaning of the clause, "And such other property as the legislature may by general laws provide shall be exempt from taxation," such clause must be read in connection with the act in which it occurs, and with relation to the subject-matter under consideration by the lawmaking power, and the relation that it bears to other provisions of the same act. This clause, as all other clauses in the act, must be read, if possible, in harmony with the other provisions of the section or act. Another rule of interpretation is that an act must be so construed that every part of the act, and every legislative expression, will, if possible, be given effect;

and still another, that in case a proviso to an act is absolutely inconsistent with the provisions of the principal act, and one cannot stand with the other, the proviso must be sacrificed to the life of the principal act. These canons of interpretation are, however, at the most aids to construction, and after all it becomes the duty of the court to determine, if possible, what the real intention of the law-makers was. There is, however, a principle of construction which applies to statutes, viz. a principle of strict construction, that does not apply to the construction of constitutions. "A constitution," says Mr. Endlich in his Interpretation of Statutes (section 526), "is 'intended for the benefit of the people, and must receive a liberal construction.' 'The principle of strict construction would frustrate important provisions in every newly-constructed frame of government.' Such is the general rule—the keynote, as it were—of all interpretations of constitutional provisions, and is in harmony with the principles already discussed." Another rule of construction invoked by the appellant in this case is that of contemporaneous construction. It appears that, since the adoption of the constitution, the legislature has enacted exemption laws differing only in degree from the law under construction, and it is contended that the construction placed upon the constitution by the legislative bodies since the adoption of the constitution should have much weight with this court in interpreting or construing the constitution. There is no doubt that some weight ought to be given to contemporaneous construction, as bearing upon the sentiment of the representatives of the people, which to a certain extent would probably indicate the mind of the lawmaking power, and explain their expressions. Still, if contemporaneous construction of legislative acts were to have a controlling influence, no law would ever be pronounced unconstitutional, for the question is only presented to the courts after the contemporaneous construction or the enactment of the unconstitutional law. Neither can acquiescence for any length of time affect the true meaning of the constitutional enactment. This is the first time that the courts have been called upon to construe this provision of the constitution, and if, from the language of the act itself, it is to be determined that there was a limitation upon the legislature in relation to the exemptions, that construction cannot in any way be affected by the lapse of time. In our judgment this is not such a provision that the idea of construction cannot be entertained.

We have examined with much patience the authorities cited by counsel, and all other authorities that were obtainable, but, outside of the rules of construction just spoken of, we have received but very little aid, from the fact that our constitution is materially different from any other constitution in the Union, and the cases cited under the constitutions of

different states are of very little value in construing this constitution. Many cases are cited by the respondents from California, notably *People v. McCreery*, 34 Cal. 432, where there is a very exhaustive decision on the principles involved in this case. But it is not controlling here, for the reason that the California constitution, while providing that all taxation shall be equal and uniform throughout the state, and providing, as does our constitution, that all property in the state should be taxed in proportion to its value, does not have the proviso which is the very essence of the controversy in this case, viz. that such other property as the legislature may by general laws provide shall be exempt from taxation. In Texas the constitution provides as follows: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation." Under such a constitution as this the contention that there was no room for construction would be tenable. In Missouri the constitution provides that "all property subject to taxation in this state shall be taxed in proportion to its value," and the contention in the case which came up from that state was over the meaning of the word "subject," and what property was subject to taxation. In Minnesota there is no doubt about the power of the legislature to exempt under the constitution, for that instrument provides: "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, to be equalized and uniform throughout the state: provided, that the legislature will, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe." There the exemptions which are authorized by the legislature are especially enumerated; and so it is with a majority of the constitutions, without specially reviewing them.

As we have before indicated, it is an acknowledged principle in the construction of laws, whether constitutional or statutory, that the court must, if possible, adopt that construction which will give force and effect to every part of the law, to every clause in a section, and to every word in a clause, rather than a construction which will destroy or render meaningless any portion of the law; and, applying this rule to the constitutional enactment in question, it will readily be seen that the construction contended for by appellant is illogical. The constitution provides, in the first place, that all property not exempt under the laws of the United States, or under this

constitution, shall be taxed in proportion to its value. This is a mandatory declaration of the constitution that all property, with the exceptions mentioned, shall be taxed. Section 2 then further provides that the legislature shall provide a uniform and equal rate of assessment and taxation on all property in the state. Here is another announcement or declaration that all property in the state shall be taxed, and if there are any exemptions they must be especially and clearly indicated. The constitution makers seem to have exhausted the English language almost in attempting to secure a just and equal valuation for taxation of all property, for they explain the reason of the rule announced in the first part of section 2 as follows: "So that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." So that, outside of the rule of *ejusdem generis*, there is grave doubt whether the exemption provided for in this statute could be maintained. Then comes the provision that a deduction of debts from credits may be authorized, and the further proviso that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation. These mandatory provisions in reference to the taxation of all property, so often reiterated, were manifestly inserted in the fundamental law for some purpose. What was the purpose? Was it to express the idea that all property except the property of the United States and the municipal corporations should be taxed if the legislature saw fit to tax it, and should be exempt if the legislature saw fit to exempt it? Were all these cautionary expressions, and all these provisions which would seem to be used for the purpose of securing universal and uniform taxation of property, employed merely for the purpose of exempting the property mentioned above? The adoption of this theory logically follows the appellant's contention; for, if the term "such other property" is to be given the comprehensive meaning contended for, the provision that a deduction of debts from credits may be authorized would be entirely unnecessary, for such deduction or exemption would be authorized under the general provision in relation to other property. In fact, outside of the exemption of United States and municipal corporation property, the two sections of the constitution under consideration would be absolutely meaningless, and without force and effect. They would amount to nothing more than a reference of the whole subject, without limitation, to legislative discretion, where it is already lodged, in the absence of constitutional inhibition. For it must be kept in mind that the constitution is not a grant of power, but a limitation on legislative action.

Conceding to the framers of the constitution a knowledge of this principle of law, and

of the further principle, referred to above, that the taxing power is inherent in sovereignty, and that the legislature possesses it under the general grant of the legislative power, entirely independent of constitutional provisions, we must conclude that the constitutional announcement that all property shall be taxed was not intended as a grant of power, but was intended as a limitation on legislative exemptions, if it had any office at all. But all effect as a limitation, as we have before indicated, is destroyed by adopting the contention that the words "other property," used in the proviso, give the legislature power to exempt all property. Thus it will be seen that this contention can be adopted only by imputing to the framers of our fundamental law ignorance of the force and effect of constitutional law, or an indulgence in declamatory vaporings. We do not think it necessary in this case to resort to imputation, but think a reasonable construction can be placed upon the enactment which will give intelligent force and effect to each separate provision of the law, viz. that the use of the expression "other property," in the proviso, was as a matter of caution, on the supposition that the special enumeration might not have embraced all public property, and that the changing conditions of society and of business, and changes of law, might create public property not then in existence. It is not unreasonable to conclude that in this connection they had also reference to property which is of a quasi public nature, and which it has been customary for legislatures to exempt from taxation, such as charitable institutions, public libraries, cemeteries, and a similar class of properties. It cannot truthfully be said that such property is strictly private property. It does not enter into competition with private property. The public has an interest in such property, and in its maintenance. A public library, for instance, is for the exclusive benefit of the public. Its office is to develop the more intelligent and better citizenship. Such a consummation would benefit the state, even from a financial standpoint. Charitable organizations perform services which the state would otherwise frequently be called upon to discharge, and the theory upon which they are exempted is that to a certain extent they relieve the state of expenses. Under this head the framers of the constitution might also reasonably have had in contemplation household furniture to a limited amount for the benefit of very poor people, and which it was necessary for them to possess to prevent them from becoming public burdens; and in this sense it is a class of property in which the public have an interest, although, to meet the requirements of the constitution as to the uniformity of taxation, the exemption must apply to all, and must specify the particular property exempted, and the same reasoning might apply to tools of trade, etc. This construction is reasonable. It harmonizes otherwise conflicting

portions, and makes operative the whole act. Our conclusion is that the acts of the legislature in the particulars complained of are unconstitutional. The judgment of the court will be affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

(17 Wash. 160)

JENKINS v. JENKINS UNIVERSITY et al.¹
(Supreme Court of Washington. June 17, 1897.)

APPEAL—DEFECTIVE BOND—ERRORS AGAINST RESPONDENT—EDUCATIONAL INSTITUTIONS—RIGHT TO APPOINT ATTORNEY—GIFTS—REVERSION—REFORMATION OF INSTRUMENTS—MISTAKE.

1. Objection to an appeal by a corporation, and appeal bond thereon, on the ground that neither the appeal nor the bond was authorized by its trustees, cannot be raised for the first time on appeal, where it does not appear that the facts were not known to respondent in time to have made the objection below.

2. Respondent may urge error in overruling his objection that the attorney appearing below for a defendant corporation was not authorized so to do, without appealing from the judgment, which was entirely in his favor.

3. The court in which an action against an educational institution is pending may authorize an attorney to appear for such defendant, at the request of some of its trustees, though the board of trustees had not authorized such appearance, as the trustees have no greater pecuniary interest than the public.

4. A finding that the project of founding a university had been abandoned, so that gifts for that purpose would revert to the donor, is sustained by evidence that proposed buildings had not been erected; that a large indebtedness had been incurred; that part of the property donated had been lost by mortgage foreclosure, and part had been returned to the donors; and that the trustees had failed to meet for a long time, and had apparently relinquished all efforts,—though some witnesses testified that they "thought" the enterprise might be revived.

5. An organization assumed the debts of a defunct university, by agreement with it, and proposed to maintain a like institution. A donor of lands to the former institution transferred the same to the new organization, in trust solely for the purpose of maintaining an educational association. The deed contained a warranty, authorized the trustees to sell the land, but provided that the funds so derived must be kept intact, and segregated a certain portion which might be mortgaged for present needs. It contained no express provision for reversion to the donor on abandonment of the trust. There was no consideration for the transfer except the assumption of the debts of the former institution. *Held*, that the lands reverted to the donor on abandonment of the trust.

6. Though a mortgage describes the land by metes and bounds, it will be reformed for mutual mistake in believing that the land was that on which certain buildings were situate.

7. The mortgagee is entitled to such reformation as against one to whom the lands have reverted for abandonment of the trust for which they were donated to the mortgagor, where the deed of gift, by a like mistake of the donor, described the same tract as the mortgage, and authorized it to be mortgaged, and the donor participated in the negotiation of the loan for which the mortgage was given.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by David P. Jenkins against the Jenkins University, the Spokane College, and

Hamilton S. White. There was judgment for plaintiff, and defendants appeal. Reversed in part.

R. J. Danson, for appellants. Graves, Wolf & Graves and Blake & Post, for respondent.

SCOTT, C. J. In 1882, the plaintiff, being the owner of the real estate in controversy in this action, conveyed the same by deed to the defendant the Spokane College, as a gift, the deed containing the following provisions: "Provided, always, and this conveyance is made upon the express conditions following, that is to say, that the grantee herein shall erect and constantly and perpetually maintain on said premises a college of learning, teaching languages, and sciences, and the higher branches of education, and shall erect and maintain suitable buildings, and provide and constantly maintain a competent and proper corps of instructors. The true intent and meaning of this condition is to provide against the establishment or maintenance of a nominal organization, but that it shall be an actual and successful institution of learning, of the character aforesaid. And the said institution shall be fully organized and in operation within three years and nine months from the date of this deed. And, in addition thereto, the grantee may establish and maintain on said premises other institutions for educational purposes. And said premises shall be appropriated and used solely and exclusively for the several purposes aforesaid. And in the event of the grantee, its successors or assigns, failing to maintain and comply with any or all of the conditions aforesaid, said premises shall revert to and vest in the grantor, his heirs or assigns." The donee entered into possession thereof, and improved the same by building two large buildings thereon, one a brick, and the other a frame, at an expenditure of some \$25,000, and thereafter organized and conducted a college until January, 1892. At that time the college was embarrassed for want of funds, and was some \$30,000 in debt. At said time, in pursuance of a movement then under way to establish a nonsectarian university, the defendant the Jenkins University was organized. Such negotiations and arrangements were entered into between the plaintiff, the Spokane College, and the Jenkins University that the college reconveyed the real estate by quitclaim deed to the plaintiff, and he conveyed it to the university. The deeds were delivered on the 9th of said month. The university assumed the debts of the college, amounting to about \$30,000. The deed recited that it was made in consideration of one dollar paid to the plaintiff, "and various other considerations to him moving"; also, that it was made in trust, and not otherwise, for the uses and purposes therein declared; and it contained the following provisions: "It is the true intent and purpose of this conveyance to convey to the above-named corporation the lands described as an endowment for educational

¹ Rehearing pending.

purposes; the principal to be held and forever remain intact, but with power, nevertheless, to sell and convey by good deed any or all of said ground whenever, in the opinion of the trustees of said university, it shall be deemed desirable to do so; but, in case any or all of said land is sold, the proceeds, of whatsoever character, received in payment thereof, shall immediately become subject to the trust herein created, and constitute a part of the whole of this endowment, and forever held intact as principal. But the proceeds arising in any manner from the principal hereby created may be by the trustees of said university used and appropriated in such manner as they shall deem best to foster and promote the subject of education, as contemplated in the organization of this university; and in using and investing the principal hereby created, or any part thereof, not more than ten thousand dollars (\$10,000) in value shall ever be intrusted, loaned, or placed under the control of any one person, association, or corporation at any one time, and that in case of loss, at any time, by any means, of any part of said principal, as soon as the fact of said loss is ascertained, the trustees of said university shall at once commence crediting all proceeds, of every kind, arising from the other portions of this endowment, to the principal, until said principal shall be fully restored and made whole. But the foregoing portions of this deed are subject, nevertheless, to the following provisions: Whereas, the said university has assumed the payment of certain indebtedness of the Spokane College, which indebtedness has been scheduled, and the amount not to exceed thirty thousand dollars (\$30,000); and whereas, the party of the first part in this instrument proposes to secure the payment of the said debt not to exceed the sum aforesaid, and for that purpose he hereby segregates and sets aside the following described part or parcel of the above-described tract of land, commencing at a point in the south line of College avenue, where the west line of Madison street, projected south, would cross College avenue, and from said point running west on the south line of College avenue to where the east line of Jefferson street, projected south, would cross College avenue, and running thence in a straight line south three hundred (300) feet; thence east the same distance as the north line, and parallel with the same to a point; thence north, in a straight line, to the place of beginning,—the same being known as part of the Spokane College ground, and where the buildings of said college are located: Now, the party of the first part intends by this conveyance to authorize the party of the second part to use said last-described piece of ground as a security for the payment of said indebtedness, and for this purpose authorizes said second party to mortgage or incumber said property to secure the payment of said indebtedness. But it is the true intent and meaning that said property shall not be ultimately seg-

arated or segregated from this endowment, and this endowment is not intended to pay said indebtedness, but to secure the same, in order to aid the said second party in the payment of the same; and it is hereby made obligatory on the party of the second part to see to it that this land or proceeds thereof shall not be lost to this endowment. If the party of the second part shall incumber or mortgage the said last-described piece of ground for the payment of said indebtedness and the same shall be finally lost to this endowment, it shall constitute at once an indebtedness against the second party to the amount of the full value of the property lost, which shall carry interest; and no part of the proceeds of the rest of this endowment shall be used by said second party until the part lost or last described shall be fully paid and restored to the principal. It is the true intent and meaning of this conveyance that in providing for the use of a part of this endowment as security for said Spokane College indebtedness, that it may be used as a security only, and not to go into the hands of the second party as means to pay said indebtedness; and when said Spokane College indebtedness is disposed of, or when this last described segregated piece is restored to the principal, it shall all be restored to the principal, and covered by the general principles of this trust. This endowment is made with intent to aid in fostering and building up an important institution of learning, in which no sectarianism shall be taught, and in which all useful branches may be taught of learning, the great object being to investigate and ascertain the truth; and it is intended that the second party, in using this endowment, shall not be trammelled or circumscribed in carrying out these principles, and in using the proceeds of this endowment for such purposes, but it is intended that the principal shall never be risked, put at hazard, or frittered away in any manner or way whatsoever; and for said purpose, and not otherwise, said corporation shall have and hold said premises, together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, to said party of the second part, its successors and assigns, forever." Thereafter the university sought to obtain a loan of \$30,000 to pay the indebtedness assumed, and succeeded to the extent of \$10,000, which it borrowed from the defendant White. To secure the payment thereof, it executed to him a mortgage on the 300 feet square set aside in the deed, for the purpose of securing the indebtedness assumed as aforesaid. At the time of the transfer of the property, the university took charge of the school then in progress, and conducted the same to the end of the school year in June, 1892; but it was not again reopened. The university had also received other donations of property, but they were subsequently reconveyed to the donors, in consequence of the failure upon the part of the university to comply

with the terms of such gifts in erecting another school building contemplated, and in conducting the school, etc. The university incurred additional debts for taxes and otherwise, which remained unpaid, and also failed to pay the interest upon the loan aforesaid obtained from White, and he foreclosed his mortgage. It was afterwards ascertained that the description therein by metes and bounds did not cover the entire buildings, and the material proceedings in relation thereto will be hereinafter adverted to in disposing of his appeal. The plaintiff brought this action to recover the real estate, except that part described by metes and bounds mortgaged to White, and to have a reversion thereof declared, on the ground that it had been conveyed by him in trust for the certain specified charitable purposes aforesaid, and that the trust had wholly failed of its purpose, and could not be carried out. The university resisted, denying the same, and contended that the deed was an absolute one, for a valuable consideration, and that there could be no reversion. Under an order of the court, the Spokane College and White, who was in possession of the entire buildings, were made parties defendant. Said last-named defendant sought a reformation of his mortgage and the sheriff's deed executed in pursuance of the foreclosure sale, to make the same cover the buildings. The plaintiff was successful in the lower court, and the cause is before us on appeal.

The first question to be considered is a motion by the respondent to dismiss the appeal herein of the Jenkins University, on the grounds that the appeal bond was not executed by said appellant, or by any person by it lawfully authorized; also, that the defendant the Jenkins University had never appeared in the action, and, as affirmatively appeared from the record, had never authorized counsel to appear for it, and had not in fact appealed the cause, and had never authorized or directed R. J. Danson, who appeared for it as its attorney, to appeal the same, and that his appearance for it was entirely unauthorized.

The points with reference to the giving of the appeal bond and the taking of the appeal are based upon affidavits of some of the trustees of the university first filed in this court, and said appellant objects to their consideration, and asks that the same be stricken from the record. We think they are not properly here for our consideration in passing upon these matters. Such a matter, going to the jurisdiction of the court, is not properly triable upon affidavits filed here, if objected to. No exception to the bond was taken in the lower court, nor was its sufficiency in any wise controverted. The defects relating to its execution, if any, were apparently as well known to the plaintiff then as now. At least, nothing appears to the contrary, and, under such circumstances, he will not be heard to question it here for the first time.

As to the authority of the attorney who

represents said defendant and appellant to appear for it in the action, it appears that the plaintiff raised this question in the lower court; and, upon the hearing there had, the court found against him, and held that such attorney was authorized to appear for the university, and resist the action. Said appellant contends that the question cannot be reviewed here, for the reason that the plaintiff did not appeal therefrom. We do not think this point is well taken, for the judgment was ultimately rendered in favor of the plaintiff in the lower court, and there was nothing for him at that time, certainly, to appeal from. He is not precluded from raising the question upon this appeal in consequence of a failure to appeal from the order of the court when made, if the same were then appealable; and we are of the opinion that he may insist on the question being reviewed at this time. But we are satisfied with the finding of the lower court thereon.

It is conceded that a different rule obtains with regard to such matters where charitable and educational institutions are involved than does with reference to corporations formed for pecuniary benefit, as in the case of charitable and educational institutions no one has any special personal interest to protect. Respondent concedes that, if the trustees of such corporation fail to do their duty in its behalf in respect to litigation or otherwise, the power would lie in a court of chancery, at the suit of some person interested, to compel a discharge of those duties, and that members of the board of trustees have no more interest therein as such, or as individuals, than have other citizens of the community. This being so, and the action being pending in a court of equity, we are of the opinion that the court had authority to authorize said attorney to appear for such defendant at the request of some of its trustees, even though no regular authority was shown therefor, such as a resolution adopted by the board of trustees; and, as this disposes of the further question with reference to the taking of such appeal, the motion is denied.

In considering the question as to whether or not the plaintiff was entitled to have a reversion of the property which is involved in the appeal of the university, it is first in order to determine some of the facts. By its sixth finding of fact, the lower court found that the project of founding and conducting the university had been abandoned, and that the purposes contemplated by the trust established by the plaintiff's deed had wholly failed, and were impossible of fulfillment. Said appellant contends that the court should have found otherwise from the evidence, but we cannot agree with him, for, in our opinion, the evidence is ample to sustain the finding. The university had incurred some \$3,000 indebtedness additional to that assumed, and unpaid taxes upon its property had accumulated, amounting to more than \$11,000. That part of the property covered by White's mort-

gage had become lost to it under the foreclosure proceedings. It had failed in erecting the contemplated building, and had been obliged to return to the donors a large amount of other property given to it. Its trustees had failed to meet for a long time, and there was an apparent relinquishment of all efforts to found or conduct the university; and, while some of the witnesses said they thought the enterprise might be revived, it is evident that there was nothing more than a mere possibility of its happening, which was entitled to no weight whatever, as there was no likelihood of its taking place.

The next question is as to whether the deed from the plaintiff should be regarded as a gift, or whether the university bought the property for a valuable consideration. Of course, in the latter event a different rule with regard to a reversion would apply. This question is not free from difficulty. The contention upon the part of the university that it paid a valuable consideration for the property is based upon the fact of the assumption of the \$30,000 indebtedness of the Spokane College; but we are unable to find from the evidence that this was done by virtue of any agreement with the plaintiff, or at his request. It was apparently brought about under an arrangement with the Spokane College. To have amounted to a consideration, it was necessary that there should have been some understanding to that effect between the plaintiff and the university. That the university assumed an additional burden, or sustained a loss, is not alone sufficient. Under the express limitations of both deeds, none of the property could have been taken for this indebtedness with the exception of that part which plaintiff authorized to be mortgaged to secure it in the second deed. While this deed did not in express terms provide for a reversion, and while it contained a general warranty clause in addition to the provisions above set forth, and contained the general clause mentioned with reference to other considerations in addition to the nominal one of one dollar, and notwithstanding the fact that conditions subsequent or forfeitures are not favored in law, and that, as to such matters, deeds are generally construed against grantors, yet, under all the facts in this case, we are forced to the conclusion that the deed should be regarded as a gift for the purposes of the trust only; and, the trust having failed, the property should revert to the plaintiff.

It is not contended that there was anything else in the shape of a consideration than the assumption of such indebtedness. The deed expressly provided that it conveyed the property as an endowment for educational purposes, and the recitation that whereas the party of the first part proposed to secure the payment of such indebtedness, and for that purpose "he hereby segregates and sets aside the following part and parcel," etc., is only consonant with a gift. Also, in the subsequent dealings and communications between

the trustees of the university and the plaintiff, the land was treated as a gift or endowment, and in a letter by the trustees to the plaintiff it was spoken of as a gift, and he was commended for his philanthropy in donating it.

A great many cases have been cited by the appellant on the subject of somewhat similar gifts, and the right to a reversion, but many of them are not applicable. In most cases the property had been conveyed to a municipal corporation, and had been diverted to a different use from that contemplated in the deed. But here was an entire abandonment of the purposes of the trust, and apparently of the property, by the appellant, and the respondent's inquiry is a pertinent one,—that, if the land does not revert, what is to become of it? It cannot be taken to satisfy the debts contracted, with the exception of that part which was authorized to be mortgaged; and it could not be devoted to another like charitable purpose, the specific one having failed, as is sometimes done in the case of a devise. If the plaintiff is not entitled to a reversion of the property under such circumstances, who is to have it? The authorities generally agree that it is not essential that such a deed shall contain a clause providing for a reversion, and, while it is to be construed against the grantor, it must not be construed so strongly as to make it impossible to have a reversion where none is expressly provided for in terms. It seems to us, considering all the facts and the terms of the gift, that the plaintiff is entitled to a reversion; and, even if the deed had contained an express condition to that effect, it could have made the case little, if any, stronger. 2 Pom. Eq. Jur. (2d Ed.) § 1032; 1 Perry, Trusts (4th Ed.) §§ 159, 160; *Gumbert's Appeal*, 110 Pa. St. 496, 1 Atl. 437; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927, and 28 N. E. 54; *Schlessinger v. Mallard* (Cal.) 11 Pac. 728. The judgment of the lower court is in such respect sustained.

As to the appeal of appellant White, the mortgage given him followed the description contained in the plaintiff's deed to the university, describing the tract by metes and bounds, with the statement that it was where the buildings were located; and the mortgage also contained a provision that the buildings should be kept insured for the benefit of the mortgagee. At the times the deed and mortgage were executed, and for a long time thereafter, the parties all supposed that the buildings were entirely situated upon this tract. Nor was it discovered that the fact was otherwise until after appellant White had foreclosed his mortgage, obtained a sheriff's deed to the property, and had entered into possession of it, including all the buildings. The ground was unplatted, and it was thereafter discovered that some 59 feet of the brick building was not situated upon the tract as described by metes and bounds, but would have been upon one of the streets of the city had the same been extended. But the situation of

the buildings was not so readily apparent as to charge the mortgagee with negligence; for it is apparent that neither the plaintiff, nor the trustees of the college, nor the university, had discovered the true condition, or knew anything of it during the times in question, and until some time after White had taken possession of the property. It is a fact that the tract, by metes and bounds, described the particular tract that was intended to be mortgaged, considering the fact that it was thought that the buildings were upon that tract. It is equally apparent from the instruments, and from the negotiations between the parties at the time the loan was made, that it was understood and intended that the mortgage should cover the buildings, and the loan would not have been made otherwise, as the principal value of the buildings was in the one constructed of brick. This had been constructed as one building, with only one entrance, and the entrance was outside of the tract, as described. The respondent contends, although the tract described was that upon which the parties supposed the buildings were located, and was that upon which they intended to have erected the buildings and intended to mortgage, that the fact that the buildings were not upon such tract was not such a mistake as would entitle the appellant to a reformation of the mortgage and the sheriff's deed to him thereunder.

We have examined the cases cited by the respondent, but do not think they support his contention. It is true the terms of the mortgage were stated according to the intent of both parties, but there was a material error upon the part of both of them in respect to the thing to which the terms applied; and we are of the opinion that the authorities sustain the appellants' contention in this respect, and that he was entitled to a reformation of the instrument. This would hold good as against the plaintiff, for he was present and participated in the negotiations for the loan. The mistake originated in the deed which he gave. In support of the above, the following authorities are cited: 2 Pom. Eq. Jur. § 853; 1 Story, Eq. Jur. § 140, note a; Improvement Co. v. Marshall (Minn.) 59 N. W. 294; Osborn v. Ketchum (Or.) 35 Pac. 972; Lewis v. Lewis, 5 Or. 169, 174. The judgment of the lower court is reversed to the extent of according to appellant White the relief he asks for, and the cause is remanded accordingly.

ANDERS, REAVIS, GORDON, and DUNBAR, JJ., concur.

MEARS v. LAMONA et al.

(Supreme Court of Washington. June 17, 1897.)

VESTED INTEREST—SALE TO PAY DEBTS.

By a suit in the nature of a creditors' bill, plaintiff sought to subject defendant's interest in his mother's estate to the payment of a judgment rendered in December, 1895. The mother's will provided that defendant should take nothing

thereunder until his sister became of age, in August, 1899. Defendant was one of the executors of the estate, and had no other property of his own. *Held*, that his interest in the estate should not be sold until the sister became of age, since an immediate sale would cause an inequitable sacrifice of his property.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Winnifred Mears against Perry W. Lamona and others. From judgment for plaintiff, defendants appeal. Modified.

W. H. Smiley, for appellants. Jones, Belt & Quinn, for respondent.

SCOTT, C. J. This is a proceeding whereby the plaintiff is undertaking to subject the interest of the defendant Perry W. Lamona in his mother's estate to the payment of a judgment obtained against him on a promissory note. An execution had been issued, and returned nulla bona. The interest aforesaid arises under the terms of the will of the mother, Hessa Ann Lamona, which, omitting the formal parts, is as follows: "First. I bequeath to Mrs. Winnifred Fruit the sum of two hundred and forty dollars, to be paid from my said estate in lawful money of the United States, without deduction or diminution from said sum for any purpose, and without interest thereon up to the time my estate shall be by my executors distributed as hereinafter specified; but nothing herein contained shall prevent my said executors from paying said sum from the proceeds of my estate by the sale of personal property, or from the increase of the community property now belonging to my husband, John H. Lamona, and to myself, at any time my said executors may deem it best to make such payment. Second. I give and bequeath to my husband, John H. Lamona, the sum of two thousand dollars, to be paid to him out of my estate, in lawful money of the United States, without deduction or diminution from said sum for any purpose whatsoever, and without interest on said sum up to the time hereinafter provided for the distribution of my said estate; and nothing herein contained shall be construed to prohibit the sooner payment of said sum to the said John H. Lamona upon the unanimous consent and agreement of my said executors. Third. I give and devise the rest, residue, and remainder of my said estate, consisting of my interest in the community property of myself and my said husband, John A. Lamona, consisting of both real and personal property, to my son, Perry W. Lamona, and to my daughter, Alma E. Lamona, share and share alike. And it is my wish that said community property, both real and personal, be kept intact as far as may be possible, and managed and controlled by my said executors, John H. Lamona and Perry W. Lamona, until my said daughter, Alma E. Lamona, shall become of lawful age, or until her sooner decease, deducting from my interest in said community property a proportionate share of all neces-

sary expenses of keeping, maintaining, and educating my said daughter, Alma E. Lamona, and also the proportionate share of all taxes, interest, and insurance on such property; but the said expenses of education, keeping, and maintenance of my said daughter, together with the interest, insurance, and taxes upon said property, are to be paid from the rents, issues, and profits of said community estate, each bearing the proportionate share thereof; and I give and bequeath to my said husband, John H. Lamona, all the rest, residue, and remainder of the rents, issues, and profits of my share of said community property. Fourth. But in case it becomes necessary or profitable, in the opinion of my said executors, that a sale of any of the property belonging to said estate shall be made, then the share of said property belonging to my said estate shall be placed at interest for the benefit thereof, upon approved and ample real-estate security, or in United States, state, or municipal bonds of approved value as security. Fifth. When my said daughter, Alma E. Lamona, shall become of lawful age, or when she would have reached the age of eighteen if living, then it is my order that my said son, Perry W. Lamona, have his said share of the proceeds of my said estate at its then value, the same being one-half of my interest in said estate, the rents thereof, and interest thereon, if any, having been appropriated by my said husband, John H. Lamona, but all increase in value of the real estate and personal property being construed to be a portion of my said estate for distribution under the provisions hereof. Sixth. When my said daughter, Alma E. Lamona, shall have arrived at the age of twenty-five years, it is my order that her share of said estate be paid to her, under the provisions of this will; but until said date her said share of my said estate shall be held in trust by my said executors for her use and benefit, paying to her the rents, issues, and profits thereof for her support and maintenance. And, if it shall be deemed for the best interests of my said estate that the real and personal property thereof shall be sooner sold, that the same shall be invested in approved securities, and held, subject to the provisions of this will, for payment to my said son, Perry W. Lamona, after August 12th, 1899, if he shall so elect, and to my said daughter, Alma E. Lamona, after she shall have arrived at the age of twenty-five years. Seventh. In case my said daughter, Alma E. Lamona, shall not live to reach the age of eighteen years, or in case of her subsequent death without marriage and without issue, then her proportion of my said estate shall be divided, share and share alike, between my said husband, John H. Lamona, and my said son, Perry W. Lamona; and in case of the death of my said husband before my said daughter, Alma E. Lamona, shall have arrived at the age of eighteen years, then it is my wish that the guardianship of my said daughter be in-

trusted to my said son, Perry W. Lamona, and that her said estate be held by him in trust for her and to be paid to her, the rents, issues, and profits thereof, for her maintenance and support until she arrives at the age of twenty-five years, and her interest therein to be paid to her thereafter as she may direct. Eighth. I hereby nominate and appoint my said husband, John H. Lamona, and my said son, Perry W. Lamona, both of the city and county of Spokane and state of Washington, to be the executors of this, my last will and testament, without bonds, and with full power to deed, mortgage, sell, and convey my said estate, both real and personal, and to do any and all things necessary or proper for the management and control of the trust herein imposed, providing, however, both my said executors shall concur in mortgaging, selling, and conveying any portion of my said estate, giving also to my said executors power to act as herein provided, without the intervention of the courts of this state, and without further proceedings therein than the probating of this, my last will and testament; and it shall not be necessary that letters testamentary shall be taken out, and this, my last will and testament, shall be sufficient authority for the performance of any and all acts necessary or proper as in this will directed; and I hereby revoke and annul all former wills by me made, and declare this instrument to be my last will and testament." The will was admitted to probate in the superior court of Spokane county, where the present proceeding originated. Letters testamentary were issued to Perry W. and John H. Lamona, and they entered upon the execution of the trust. After the return of the execution, and after the expiration of the year for the presentation of claims, the plaintiff presented a petition to said court on the equity side, setting up the foregoing matters, that the estate was of the value of \$45,000, and that the defendant Perry W. Lamona had no other property, and prayed for an order or decree subjecting the interest of said defendant in the estate, or so much thereof as might be necessary, to the satisfaction of her claim, and that said executors be required to dispose of a sufficient amount of said property within such time as the court might deem just for the purpose of obtaining the necessary funds therefor. A motion to strike out certain parts of the complaint or petition was granted, but under the present aspect of the case no material question is raised thereby. A demurrer was interposed and overruled, and the defendants answered, alleging that the said Alma E. Lamona would not reach the age of 18 years until August 18, 1899, and asked that the proceedings be dismissed. The plaintiff moved for judgment on the pleadings, and the court granted it, whereupon this appeal was taken.

The argument of the appellants is largely based upon a misconception of the judgment of the court, as we view it. The appellants

understand by the judgment that the court directed a sale of a part of the property of the estate, and contend that this could not be done under the terms of the will, as the property was to be kept intact until the daughter arrived of age, and, of course, this contention would have to be sustained upon the statement of it, as the defendant Perry W. Lamona obtained no title to any specific property under the will, and the income received from the whole of it was to be devoted to the support and education of the daughter until she attained her majority, with the surplus, if any, to the husband; so that, until the daughter became of age, the defendant Perry W. Lamona had no beneficial interest in the estate whatever. The appellants characterize the interest of said defendant in the estate as a vested remainder, and while not technically correct, as, strictly speaking, such a term can be applied only to lands, and the estate consisted of both real and personal property, with power conferred upon the executors to convert the real estate into money if they should deem it advisable, thus making the interest of said defendant what might be termed more properly a quasi remainder (20 Am. & Eng. Enc. Law, p. 894); yet the distinction is not very material in this instance, and the designation is substantially correct. While said defendant had a vested interest in said estate, with a certain future right of possession, it is clear that he had no authority or right to sell or convey any specific property belonging to the estate, and his creditors certainly could obtain no greater rights in the property than he himself had under the will. The misconception by the appellants of the court's order was probably based upon its findings contained in the decree, one of which was as follows: "(2) That the plaintiff is entitled to a decree subjecting the interest of the said defendant Perry W. Lamona in the estate of said Hessa Ann Lamona, deceased, to the satisfaction of plaintiff's said judgment, and declaring the same to be a lien upon his interest therein, and requiring said executors to dispose of a sufficient amount of said property to pay and satisfy the plaintiff's said judgment within a reasonable time." But, if the findings were indefinite in this particular, the decree rendered thereon was not. It was as follows: "It is therefore ordered, adjudged, and decreed that the interest of the said defendant Perry W. Lamona in and to the estate of Hessa Ann Lamona, deceased, be, and is hereby, declared subject to the lien of plaintiff's said judgment, procured on the 17th day of December, 1895, for the sum of seven hundred fifty-two and $\frac{10}{100}$ dollars (\$752.10), and that so much of his interest in said estate as may be necessary be sold by the said executors to obtain sufficient funds to pay said judgment within sixty (60) days, or that said executors show cause to this court why they cannot do so." By this decree, the court ordered that only the interest of said defendant in said estate, or so much thereof as

might be necessary, should be sold to satisfy the plaintiff's judgment, and did not direct the sale of any tangible property.

The respondent contends that, as Perry W. Lamona took a vested interest in his mother's estate at the time of her death, this would carry with it the right of alienation, and that a restriction upon the right to alienate under such circumstances, if contained in the will, would be void. It is sufficient to say that no such restriction is contained in the express terms of the will as to his interest, and we are of the opinion that the right to alienate such interest existed, although he could not convey any specific property belonging to the estate. The contentions of the respondent in this particular are somewhat involved, and, if we understand them, seem to conflict. The authorities cited in her brief apply only to cases where the beneficial interest had vested, and in such cases some courts have held that a restriction upon the right to alienate is void, and that the property might be reached by creditors. See *Hallett v. Thompson*, 5 Paige, 583; *Sparhawk v. Cloon*, 125 Mass. 263; *Sears v. Putnam*, 102 Mass. 5. But, whether the argument of the respondent is directed to the intangible interest or the tangible property, the cases cited by her have no important bearing upon this case as it stands here. Perry W. Lamona had no immediate beneficial interest, and would have none until his sister arrived of age. He could not reduce his interest in the estate to possession before that time, and the provisions postponing his right of possession and enjoyment were undeniably valid, under all the authorities. Owing to the power conferred upon the executors to convert the real estate into money at their option, and to loan the same, there was also an uncertainty as to the kind of property which he would ultimately take. He simply took a vested interest in the estate at the time of his mother's death, with a certain future right of possession, with no beneficial interest meanwhile, and it was not such an interest as could be reached by an execution. *Freem. Ex'ns* (2d Ed.) § 122. Our statutes are not as full and explicit with reference to reaching such interests as those of most of the other states, and many of the cases are not applicable for that reason. It not being any tangible property, nor a debt due, nor a fund in court, none of the provisions with reference to garnishment here would seem to cover the case from the consideration which we have given them, and it is not contended that they do. If it can be reached by virtue of any statutory authority in this state, it must be found in chapter 6, 2 Hill's Code, providing for proceedings supplementary to execution. At least, we have found no other statute bearing upon the subject, and none has been cited by the parties. In fact, neither of them has cited the above chapter, and apparently the respondent has not relied upon its provisions. In *Murne v. Schwabacher*, 2 Wash. T. 130, 3 Pac. 899, the supreme court of the territory held that pro-

ceedings of this kind were in the nature of and intended to serve the end of a creditors' bill, and we are aware of no change in the statutes up to this time that would require a different construction. There might be some ground for contending, however, that proceedings under said chapter are only intended for the purpose of reaching tangible property, except in the case of its provisions with reference to debts. But whether or not proceedings thereunder can have the full scope of a creditors' bill is not important here, for otherwise the remedies would be concurrent, and a creditors' bill is intended to reach all species of property not exempt which could not be reached by an execution for the satisfaction of a judgment. *Bank v. Robinson*, 57 Cal. 520; *Hadden v. Spader*, 20 Johns. 554; *M'Dermutt v. Strong*, 4 Johns. Ch. 687.

The proceeding resorted to, while seemingly appropriate, is somewhat novel. As stated, it is not claimed to have been brought under the provisions of any statute, nor is it claimed to be a creditors' bill. Nothing is said upon the subject. But, of course, it is in the nature of a creditors' bill, and no technical questions of procedure have been raised. The plaintiff filed her petition or complaint in the court where the will was probated, and the defendants voluntarily appeared, and resisted it. While, in their answer, they asked for a dismissal, their real contention seems to have been that the court had no authority to direct a sale before the interest of the defendant Perry W. Lamona in the estate could be reduced to his possession. At least, that is their contention here. We take this from the explicit concession in the appellants' brief, the concluding paragraph of which is as follows: "The appellants, therefore, submit, in closing, as they did in the beginning, that the decree should be reversed; and that the lower court should be directed to enter a decree declaring the judgment to be a lien on the remainder, and that the executors be required to dispose of a sufficient amount of the property after August 12, 1890, to satisfy respondent's claim. This is consonant with justice; otherwise, the sister will suffer for the brother's debts,"—although this was made upon the theory that the court had directed a sale of tangible property belonging to the estate. It is apparent that there is no desire on the part of the defendant Perry W. Lamona to avoid payment of the debt, and the sole question raised is as to whether the court could enforce the payment of the debt prior to the time that the estate should be reduced to the possession of said defendant as stated, and it is not free from difficulty. The interest of said defendant in said estate was, of course, property, and the policy of the law is to subject every species of property of a judgment debtor above exemption to the payment of his debts. The vesting of estates, and the right to alienate property, are also favored in the law; and, as a matter of right, the defendant Perry W. Lamona could at any time, after the death of

his mother, by any appropriate conveyance, have disposed of his interest, or any part of it, in the estate. Tied. Real Prop. (Enlarged Ed.) §§ 399, 400. Practically, however, there would have been many difficulties in the way, for it is evident that, under the terms of the trust imposed by the will upon the executors, the market value of his interest would have been little, if anything; at least, much less than its prospective value. The executors were authorized to act without resorting to the courts except to prove the will, and without bonds. The defendant Perry W. Lamona was one of the executors. They were empowered to convert the real estate into money, and to loan it. Under such circumstances, it is probable that no purchaser could have been found who would have paid anything like an adequate price as compared with the value of the estate when it should be reduced to possession, and in the case of an adverse sale by a creditor the difficulties would be aggravated. In the first place, there was no method provided by the statutes or in the order of the court for making the sale. The entire interest of Perry W. Lamona was not directed to be sold unless the same should be necessary for the satisfaction of the debt. How was his interest to be exposed for sale? To the purchaser who would take the least interest for the amount of the debt, or in what manner? It is true, by the effect of the order of the court, this was left primarily to the discretion of the executors, and later the court could have controlled it if found necessary, but further difficulties would likely arise. Said defendant may have been entitled to exemptions, and to redemption rights as to his interest in the lands, and how could these be protected? In case of a sale of his interest in whole or in part, the duty imposed upon the executors by the will would remain the same. They must continue in the management of the trust estate until the daughter became of age, except in case of their resignation or removal; and, while the court might restrain them from a mismanagement of the estate under some circumstances, it is clear that, under a forced sale of the interest of this defendant, the property would likely have brought little or nothing. His interest in a valuable estate would have been sacrificed, and he powerless to prevent it, for it was found that he had no property aside from said interest. He had no income from the estate with which to pay it, and none of the property itself could be sold; nothing more than his intangible interest, or some part of it, in the estate. Although he had a right to sell his interest in the estate at any time, and could have sold it provided he could have found a purchaser, we very much doubt whether a creditor should be given that right under the circumstances. It certainly would be inequitable, and this creditor has had to resort to a court of equity to enforce her rights. Why cannot the court protect both parties? Said appellant is willing to pay his

debt. He simply asks that the sale be postponed until such time as the estate is reduced to possession, at which time tangible property can be sold, which will presumably bring its market value. In her petition the plaintiff asked for a sale of the property "within such time as the court may deem just." In this instance the time said appellant asks would not be very long, and no great hardship would result from a postponement. Under creditors' bills, instead of directing an immediate sale, receivers have been appointed to take charge of the property, and preserve and manage it for a time. As a matter of justice, this judgment should be modified; and, in the absence of any authority showing an absolute right upon the part of the creditor to have a sale at this time, we are disposed to grant said appellants the modification contended for, and the judgment is reversed, and remanded accordingly.

REAVIS, ANDERS, GORDON, and DUNBAR, JJ., concur.

(15 Utah, 161)

MADER v. TAYLOR-ROMNEY-ARMSTRONG CO.

SAME v. SALT LAKE BLDG. & MANUF'G CO.

(Supreme Court of Utah. June 17, 1897.)

ACTION AT LAW—ASSIGNMENT OF ERRORS—CONFLICTING EVIDENCE—MONEY HAD AND RECEIVED.

1. A simple action for money had and received is an action at law, and not a suit in equity.

2. An assignment of errors that "the court erred in its findings of fact" when it found certain facts, intended as a specification of the insufficiency of the evidence to justify the decision, is not a compliance with subdivision 8 of section 3402 of the Compiled Laws of Utah of 1888.

3. Where there is a substantial conflict of evidence in a law action, under section 9, art. 8, of the constitution of Utah, which provides that "in cases at law the appeal shall be on questions of law alone," this court will not weigh conflicting evidence to decide upon which side is the preponderance.

4. Numerous lumber dealers, including the defendants, associated together as a lumbermen's exchange, severally bought of B. & Co. lumber and other material, for which they paid part cash and the balance in the individual and several promissory notes of the purchasers, in amounts proportionate to the material apportioned to each. The material purchased was delivered to D., an agent of the purchasers, with instructions from them to deliver it to the dealers who called for it, and to collect cash from those who drew more than the amount apportioned to them, and to pay the cash thus collected to those who received less than the amount due them. All the said notes were paid B. & Co., except the ones given on behalf of the C.-L. L. Co. None of the material represented by the unpaid notes was received by the C.-L. L. Co., but three other dealers, who received more material than their proportion, paid cash for the same to the agent, D., without special instructions to whom to pay it. D. deposited this money in his general bank account, as agent, with other money of the dealers, and afterwards paid to the defendants, by check on the general fund at the bank, the proportion of funds due them,

and also the proportion due the C.-L. L. Co. *Held*, that the plaintiff, who was assignee of the unpaid notes, was not entitled to recover of the defendants the amounts received by them, due to the C.-L. L. Co., there being no privity between plaintiff and the C.-L. L. Co.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by Charles Mader against the Taylor-Romney-Armstrong Company, and by the same against the Salt Lake Building & Manufacturing Company. Judgment for defendants, and plaintiff appeals. Affirmed.

J. M. Thomas, W. A. Byers, and J. M. Bowman, for appellant. Bennett, Harkness, Howat & Bradley, for respondents.

HART, District Judge. These two causes, being dependent upon the same facts, were by consent tried together by the court without a jury. The findings were in favor of the defendants, and the actions dismissed at plaintiff's cost. A motion for a new trial was made and denied, and an appeal taken from the judgment and order to this court. While an appeal will not lie to this court from an order denying a motion for a new trial, under section 9, art. 8, of the constitution of Utah, yet on appeal from the judgment the errors committed by the trial court in denying motion for new trial may be reviewed, when properly embodied in a bill of exceptions, or otherwise properly preserved in the record, as decided in this court at this term in the case of *White v. Pease*, 49 Pac. 416. Both cases at bar will be treated as one in this opinion.

This is a simple action for money had and received, and corresponds with the old common-law action of *indebitatus assumpsit*. It is an action at law, and not a suit in equity. 1 Am. & Eng. Enc. Law, p. 882; 2 Enc. Pl. & Prac. pp. 888-1016.

Appellant's assignment of errors in his statement on motion for new trial is as follows: "(1) That the court erred in its findings of fact when it found that Visser gave his notes because the Cary-Lombard Company could not give notes, when the evidence showed the notes were given to enable Mader to show that Beggs & Co. owned the claim for \$703, and to settle with his partner; when it found the Beggs yard had been turned over to the exchange, when the evidence showed it to have been turned over to the dealers. (2) That the court erred in its conclusions of law when it found that Mader had no interest in the excess money paid to the defendants, when the evidence showed the money belonged to Mader, which fact was known to the defendants when they received it. (3) That the court erred in rendering judgment against plaintiff and in favor of defendants, when the evidence showed that the Cary-Lombard Company did not claim the money, but that it belonged to Mader." Appellant probably intended to assign and rely upon the insufficiency of the evidence to justify the decision, but

It is very doubtful if he has brought himself within the requirements of section 3402, subd. 3, of the Compiled Laws of Utah of 1888, which provides: "When the notice of motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion." This court has before indicated that the provisions of this statute were intended to be enforced. *Slater v. Railway Co.*, 8 Utah, 178, 30 Pac. 493; *Sterling v. Parsons*, 9 Utah, 81, 33 Pac. 245; *Bankhead v. Railroad Co.*, 2 Utah, 507; *Canal Co. v. Edwards*, 9 Utah, 477, 35 Pac. 487. If the insufficiency of the evidence in any particular is relied on, it is easy to say so, and not designate it as error of the court,—error in law. In the case of *Smith v. Christian*, 47 Cal. 19, under a statute like our own, the court declined to consider errors assigned in a manner similar to the foregoing. But, treating the assignment of errors in this case as though made in compliance with the statute, we fail to find any reversible error in the record. Briefly stated, the findings of fact are as follows: (1) That in 1891 some 14 firms of lumber dealers of Salt Lake City, including these defendants, composed a voluntary association known as the Salt Lake Lumbermen's Exchange, and that during its existence one W. G. Donnell was its secretary. (2) That in that year negotiations were made by said exchange to purchase the lumber and stock in trade of George Beggs & Co., a partnership, at the price of \$10,652, and that it was finally mutually agreed between said dealers who were members of said exchange and George Beggs & Co. that said dealers would purchase the stock in trade and other personal property of George Beggs & Co.; each dealer to take a certain percentage of the same, which was allotted to each by a committee appointed by said dealers, said allotment being as follows: Salt Lake Building & Manufacturing Co., 6.83 per cent.; Cary-Lombard Lumber Co., 7.08 per cent.; Taylor-Romney-Armstrong Co., 11.06 per cent.; Parker & Depue, 6.66 per cent.; Morrison, Merrill & Co., 9.53 per cent.; Mason & Co., 12.20 per cent.; and others,—making a total of 100 per cent. That of said \$10,652 there was paid in cash by said dealers the sum of \$643.88, according to said percentages, and the remaining \$10,008 was to be in notes by each of said dealers according to the allotted percentages. (3) That in pursuance of this agreement each of said dealers, except the Cary-Lombard Lumber Company, on or about the 15th day of November, 1891, gave his promissory note to George Beggs & Co. in the pro-

portion agreed, and that at the same time one E. A. Visser, the manager of Cary-Lombard Lumber Company, gave his promissory notes to George Beggs & Co., aggregating \$703, which was the amount allotted the Cary-Lombard Lumber Company, less its cash allotment, which it paid; said Visser giving his notes for the reason that the Cary-Lombard Company was a corporation, and by its charter was prevented from signing any notes. That all of said notes have been paid except the notes of said Visser, no part of which has been paid. (4) That after the original negotiations to purchase, and before it was agreed that each lumber dealer who was a member of said exchange should be allotted a certain proportion of the stock in trade of George Beggs & Co., said George Beggs & Co., by direction of the members of said exchange, turned over to W. G. Donnell, as agent of said dealers, the stock in trade of George Beggs & Co.; and thereafter, and after the giving of the notes as aforesaid, said Donnell was directed by said lumber dealers to keep an account of what each of said lumber dealers took from said stock in trade, and to recover of each dealer who received more than the amount of his original allotment the excess, and from the sum so received to pay the dealers who had received less than the original allotment the amount they had not received in material. That some of the dealers drew lumber in excess of their allotment, but the Cary-Lombard Lumber Company drew an amount equal only to their cash payment. That on the 5th day of November, 1891, Parker & Depue paid to Donnell \$536, Mason & Co. paid to Donnell \$192, and Morrison, Merrill & Co. paid to Donnell \$106, in payment of lumber drawn in excess of their proportion. That at the time of said payments no directions were given by them, or either of them, to said Donnell, in regard to the disposition of said money. (5) That said exchange had an account with the Utah National Bank, as its bankers, and the said Donnell placed all the moneys so received by him from Parker & Depue, Mason & Co., and Morrison, Merrill & Co. to the credit of the exchange, in the general account at said bank, which then aggregated \$3,067, the greater portion of which had been received from dealers in payment of the excess of material received by them. That on the 5th day of November, 1891, said exchange was indebted to the defendant the Taylor-Romney-Armstrong Company in excess of \$768 and to the defendant the Salt Lake Building & Manufacturing Company in excess of \$836.50, and on that day said Donnell paid to each of said defendants the respective amounts above mentioned; the same being the proportion they were entitled to from the amount in said bank, computed upon a percentage that the same would pay to the persons to whom the exchange was indebted, and were paid by checks on said account in said bank. (6) That in the said amounts paid as aforesaid to the defendants there was includ-

ed \$575 due to the Cary-Lombard Lumber Company, or to E. A. Visser, derived from the transaction with George Beggs & Co. as aforesaid, and the defendants gave Donnell a bond to protect him against any claims, demands, or suits arising out of said payment. That the said sum of \$575 was divided proportionally between defendants,—\$435 to the Taylor-Romney-Armstrong Company, and \$140 to the Salt Lake Building & Manufacturing Company. (7) That plaintiff, Charles Mader, after the execution of said notes, and prior to the payments aforesaid, became the owner, by assignment, of the notes executed by E. A. Visser to George Beggs & Co.

As conclusions of law the court found substantially as follows: (1) That George Beggs & Co. took the notes of the several dealers, including the note of E. A. Visser, as the several promises of each of the makers of said notes, respectively, and that the indebtedness of said dealers was several, and not joint, and that none of said dealers were liable to George Beggs & Co. for anything further than the amount of the notes given by such dealer. (2) That neither the said George Beggs & Co. nor the said Mader, as the assignee of said notes of said Visser or otherwise, ever were interested in, or had any right to, any of the money paid by any of said dealers to said Donnell for the excess lumber received by said dealer in excess of the amount allotted to them. (3) That plaintiff had no interest in the sums of money paid by Parker & Depue, Mason & Co., and Morrison, Merrill & Co. to Donnell, and had no interest in the money paid by Donnell to the defendants. (4) That plaintiff's complaint against each of the defendants should be dismissed at plaintiff's cost.

Appellant objects to the finding that the Beggs lumber yard was turned over to the exchange, and insists that the evidence shows that it was turned over to the dealers. In view of the finding that the sale was made to the dealers individually and severally, and that they were severally, and not jointly, liable, it is immaterial to whom the delivery was made under such sale. Besides, the finding is that the property purchased was turned over to W. H. Donnell as agent of the dealers. It is also insisted that the evidence shows that the Visser notes were given to enable Mader to show that Beggs & Co. owned the claim for \$708, and to settle with his partner, Beggs, and were not given because the Cary-Lombard Lumber Company could not, under its charter, give notes. Taking the other findings to be correct, it is immaterial why the Visser notes were given. If they were given as appellant contends, that would not prove that the Cary-Lombard Lumber Company was not liable to Beggs & Co. for its original apportionment of the Beggs & Co. material. Neither would it prove that those dealers who drew excess lumber were liable therefore to Beggs & Co., nor that the payment made by them to Donnell was for the use and benefit of Beggs & Co. Besides, the transcript of the testimony shows a substantial conflict

of evidence as to why the Visser notes were given, and this being a law action, and governed by that part of section 9 of article 8 of the constitution of the state of Utah which provides that "in cases at law the appeal shall be on questions of law alone," this court will not weigh conflicting evidence to decide upon which side is the preponderance. A careful examination of the transcript shows there was legal evidence supporting all the facts found, and that upon most points there is not even a conflict of testimony. Accepting the facts found as being sustained by the evidence, it is too clear for argument that the conclusions of law are correct, and are the only ones to be deduced from the facts. The fact that the defendants received from Donnell a proportion of funds on hand that the Cary-Lombard Lumber Company or E. A. Visser might have legally laid claim to does not give the plaintiff the right to recover the same simply because he is a creditor of the Cary-Lombard Lumber Company or E. A. Visser, no assignment of the claim having been made to plaintiff by either of said parties. The judgment of the trial court is ordered affirmed as to both cases at plaintiff's cost.

ZANE, C. J., and MINER, J., concur.

(15 Utah 467)

DARKE v. BOARD OF COM'RS OF SALT LAKE COUNTY.

(Supreme Court of Utah. May 31, 1897.)

COUNTY INDEBTEDNESS—BONDS.

1. The indebtedness of Salt Lake county for the year 1895, which exceeded the debt limit of that year by \$89,563.32, and which was validated by the act of 1896 (Sess. Laws, pp. 179, 524), became, by the authority of the legislature, an indebtedness of 1895, the year when the consideration was received; and the promise, though illegal at the time, was made, and was therefore indebtedness, prior to January, 1896; and the county board were authorized by section 14, p. 524, Sess. Laws 1896, and sections 1, 2, Sess. Laws 1897, to issue bonds for its payment.

2. The balance of the \$120,000 indebtedness before statehood, viz. \$30,432, which was paid in part by the revenue of 1896, may be regarded as indebtedness of 1895, for which bonds may be issued, and the county revenue of 1896 may be reimbursed by the payment of the amount misapplied from the funds of that year in payment of the indebtedness of 1895.

(Syllabus by the Court.)

Suit by S. W. Darke against the board of county commissioners of Salt Lake county for a writ of prohibition. Denied.

D. C. Eichnor, for plaintiff. Waldemar Van Cott, Graham F. Putnam, and Ray Van Cott, for defendants.

ZANE, C. J. The plaintiff presents his affidavit and petition to the court, in which he alleges that he is a resident and taxpayer of Salt Lake county, Utah; that the board of county commissioners of said county are about to issue county bonds to the amount of \$120,000, with the intention of selling them and

of applying their proceeds to the payment of indebtedness to that amount; that the indebtedness accrued prior to the 4th day of January, 1896; that the supreme court of the late territory of Utah held \$89,568.32 of the \$120,000 invalid because it exceeded the debt limit of the county as fixed by statute of the territory; that an act of the legislature of the state of Utah in force June 5, 1896, validated the same. Plaintiff insists that the sum of \$89,568.32 must be regarded as indebtedness of 1896, and that the board has no authority to bond it. The plaintiff also alleges that \$30,432, the residue of the \$120,000, was valid indebtedness of the county, and evidenced by warrants outstanding on January 4, 1896, when Utah became a state, but that a considerable part of it was actually paid from the revenue of 1896, and that the board has no power to bond it for that reason. The defendant interposes a demurrer to the affidavit and petition on the ground that the facts stated do not show a cause of action. But the parties agree that all the essential facts are correctly stated in the affidavit, and submit the case for final decision and judgment on them. We are called upon to decide whether the plaintiff is entitled to a final writ,—whether the county board shall be prohibited from issuing bonds to the amount of the \$120,000, or to any part of that amount.

1. As to whether the \$89,568.32 should be regarded as 1895 or 1896 indebtedness: This indebtedness was invalid because it exceeded the debt limit fixed by an act of the territorial legislature. Therefore that legislature had the power to raise the limit and authorize the indebtedness, but the state legislature of 1896 ratified such action of the board in creating it without authority, validated the indebtedness, and authorized the issuance of bonds to provide money with which to pay it. Sess. Laws Utah 1896, pp. 179, 524. The consideration for the indebtedness was received by the county in 1895, though the promise to pay at that time was invalid, and remained so until the act of June 5, 1896. That act validated the indebtedness, and thereby the promise. But for the consideration and the illegal promise in 1895, the law of 1896 would have been of no avail. The legislature could not, *ipso facto*, without any consideration, by its own fiat impose indebtedness upon the county. The people did not intrust such arbitrary and absolute power to the legislature to impose upon them such unjust burdens. We must regard the \$89,568.32 as indebtedness of the county existing before statehood.

2. As to the \$30,432, the residue of the \$120,000, it is conceded that it was existing indebtedness against the county before statehood; but it is insisted that it cannot be bonded, because it has been paid in part from the revenue of the year 1896. In *Fritsch v. Board of Com'rs* (not yet officially reported)

47 Pac. 1026, in construing section 3. art. 14. of the constitution, we held that the revenue of the year should be appropriated to the payment of the indebtedness of the year,—that is to say, to indebtedness falling due during the year, so far as required; and, if a surplus should remain, it should become a part of the revenue of the next year. The county board were authorized by section 14, p. 524, Sess. Laws Utah 1896, and by sections 1, 2, Sess. Laws Utah 1897, to fund any outstanding indebtedness on the 4th day of January, 1896, and to issue bonds therefor. The board had no right to appropriate the revenue required for the payment of the indebtedness of 1896 to the indebtedness of 1895 or previous years. In so far as the revenue of 1896 was paid upon indebtedness of 1895, it appears that the revenue of the year first named was insufficient to pay the indebtedness of that year. The purpose of the defendants is, as it appears, to raise money by a sale of bonds, which it is authorized to issue and sell for the payment of indebtedness that existed before statehood, and to reimburse the revenue of 1896, and thereby enable the county to pay the persons holding valid indebtedness of 1896, which remains unpaid in consequence of the wrongful payment of the revenue of that year on the indebtedness existing before statehood, on indebtedness of 1895. The county could not be prejudiced in a pecuniary point of view by payment of valid indebtedness existing before statehood from the revenue of 1896, and by the payment of an equal amount of the indebtedness of 1896 from money that ought to have been applied to the payment of indebtedness before statehood, but was not. It can cost the county no more to pay both classes of indebtedness in that way. However, we do not wish to approve of such a misappropriation of the funds of 1896; but the wrong having been done to the creditor of the latter year, from a mistaken view of the law, the present board should be permitted to remedy it in the way they propose,—by paying the county funds that should have been paid on the indebtedness before statehood to the creditors of 1896, who should have received the misapplied funds. The \$120,000 appears to be a valid indebtedness existing before statehood. The board may lawfully issue bonds to that amount. If any part of it shall hereafter be found to be fraudulent, that cannot invalidate the bonds purchased in good faith before. It would simply require the board to refuse to pay such fraudulent indebtedness, and appropriate so much of the proceeds of the bonds to the payment of legitimate indebtedness of the county. The writ of prohibition is denied. Judgment will be entered for the defendant, and for costs.

BARTCH, J., concurs in the result. HILES, J., concurs.

(5 Kan. A. 806)

CITY OF SYRACUSE v. REED et al.¹

(Court of Appeals of Kansas, Southern Department, W. D. June 18, 1897.)

JUDGMENT—PLEADING—VARIANCE—INSTRUCTIONS.

1. A party is bound by the allegations of his pleadings, and is not entitled to recover a judgment against one of two defendants as a city treasurer, when the petition alleges that the defendants are jointly indebted to plaintiff as a banking firm, but must recover against both defendants, or wholly fail in the action; and it was proper for the trial court to so instruct the jury.

2. No error in refusing the instructions asked for by plaintiff.

(Syllabus by the Court.)

Error from district court, Hamilton county; A. J. Abbott, Judge.

Action by the city of Syracuse against W. F. Reed and Darius Reed. Judgment for defendants, and plaintiff brings error. Affirmed.

A. A. Howell and Geo. Getty, for plaintiff in error. H. F. Mason, for defendants in error.

MILTON, J. The city of Syracuse brought this action against W. F. Reed & Co. to recover \$218.79. The petition alleged that defendants were a partnership, engaged in the banking business in Syracuse, Kan., and that on May 10, 1888, said defendants, as bankers, received from N. W. Harris & Co., of Chicago, \$8,360, which was the proceeds of certain bonds of the city of Syracuse that had been sold in Chicago, and that the defendants had paid over only the sum of \$8,141.02, and had refused to pay the city the balance of the amount received, although payment thereof had been demanded. The answer admitted that Syracuse was a city of the third class, and that the defendants were a co-partnership, and denied generally the further allegations of the petition. Verdict by a jury, and judgment by the court in favor of defendant. To reverse this judgment, these proceedings in error are brought by plaintiff city.

It appears that \$1,000 of these bonds belonged to a private party, to whom they had already been delivered, and that Guy & Son, of Syracuse, had undertaken to sell the bonds for the city and for this person. The city council had agreed to pay Guy & Son 1½ per cent. for such sale. In April, 1888, W. F. Reed, one of the defendants, was treasurer of said city, and one Bentley, having been appointed as his successor, qualified as treasurer on May 2, 1888. During said month of April, Guy & Son sold the bonds to N. W. Harris & Co., and the transaction was fully completed on the part of said city by April 25th. Harris & Co. sent Guy & Son a draft drawn against themselves for the proceeds of the bonds, which draft was to be signed by the city treasurer, and forwarded for collection. The treasurer thereupon forwarded the bonds to Harris & Co., and drew the draft upon them, and subsequently said draft was paid by Harris & Co. When this draft was paid, the

amount was placed in the First National Bank of Chicago. There is a conflict in the evidence as to whether it was placed to the credit of defendants, as a banking firm, or to the credit of W. F. Reed, as treasurer of said city; but the preponderance of the evidence is in favor of the latter conclusion. No demand was ever made of the firm for the amount sued for, although a demand was made for its payment by W. F. Reed's successor, upon him as ex-treasurer. The evidence does not clearly show when the deposit in the Chicago bank was made, and the jury might have legitimately inferred from the whole evidence that it was made before Bentley qualified as treasurer. Under an ordinance of the city of Syracuse, the treasurer was entitled to 3 per cent. of the money received by him, as compensation for his services; and W. F. Reed claimed that the amount sued for herein was retained by him under the terms of this ordinance. It was proven that Guy & Son were paid by Mr. Reed the amount of commission, which the council had agreed to pay them, for the sale of the bonds, and that the amount sued for in this action includes the sum paid to them. There was positive testimony that the banking firm had no connection with the sale of the bonds, or with the handling of the proceeds, and was not entitled to or claiming any commission on account of the sale.

Counsel for plaintiff in error claims that W. F. Reed was not acting as city treasurer at the time he received this money; that the law required Mr. Reed to put in a voucher for his claim if he desired to have it allowed; that he filed no voucher; and that he was not entitled to any part of the proceeds of the bonds. Counsel further contends that the trial court erred in its instructions, and also in refusing to give certain instructions; but these matters are not so presented that the court can readily discover the ground of objection. The instructions referred to are not set out in the brief. The instruction complained of is as follows: "Should you, however, believe from the evidence, that the money was received and handled by W. F. Reed himself, as treasurer of the city, and not as associated with Darius Reed, in their firm capacity, as bankers, your verdict should then be for the defendants, without regard to the manner in which the 3% salary was collected. The city cannot sue W. F. Reed & Co. as bankers, and in the same action get a judgment against W. F. Reed only, as treasurer of the city." The court also instructed the jury that, in order that the plaintiff might recover, they must find that the firm of Reed & Co., in their capacity as bankers, acquired possession of the proceeds of the bonds as the funds of the city, not in the official custody of the city treasurer, and refused to pay some part of them to the city or the city treasurer. We see no proper objection to these instructions, and also find that the instructions as a whole state the law correctly.

One of the instructions refused was drawn from the language of the supreme court in 46

¹ Rehearing denied.

Kan. 520, 26 Pac. 1043, when this action was before that court for review of the ruling of the trial court sustaining a demurrer to the evidence introduced by the plaintiff in the first trial of the action, and is to the effect that when funds derived from the sale of bonds of a city of the third class are received by the city treasurer, or a person acting on behalf of the city, the entire amount should, on demand, be paid into the city treasury; that such persons cannot fix their own compensation for services in respect to such funds or withhold a part of such proceeds as compensation for their services; that any such claim must be presented to the city council in writing, and allowed by it; and that if the jury should find from the evidence that the defendant W. F. Reed did not present his voucher in writing, although he might have been acting as city treasurer, then the jury must find for the plaintiff. This instruction was not necessary or even proper under the evidence; for it does not matter whether or not W. F. Reed presented a voucher to the council, since he was not sued as treasurer. In fact, he was not sued in his individual capacity. The banking firm, as such, was sued. The facts developed on the second trial are not the same in some respects as those presented at the first trial. The issues having been properly submitted to the jury, and their verdict, based on conflicting evidence, approved by the trial court, its judgment will be affirmed. All the judges concurring.

STROUSSE v. BANK OF CLEAR CREEK COUNTY et al.

(Court of Appeals of Colorado. May 24, 1897.)

LEASE—RENEWAL—TENANCY FROM YEAR TO YEAR
—SALE BY LESSOR—OBJECTION TO
JURISDICTION.

1. A lease reciting that it was for the term of five years, and renewable from time to time, and for such periods as the lessee may elect, does not, by reason of the provision that all debts, present or future, of lessor to the lessee, shall be an offset against rents due or to become due, and that the lessee may, under this contract, hold and defend his possession for payment and settlement of any indebtedness that he may have against the lessor, and may defend it against all claims of him, or any one claiming through him, entitle the lessee, without a renewal, to remain in possession till such time as the lessor ceases to contract debts to him in excess of the amount of rents reserved.

2. The lessee under a lease for five years, and renewable from time to time, and for such periods as the lessee may select, and providing for rent payable annually, having without any renewal continued in possession, with the consent of the lessor, for several years after expiration of the term, becomes a tenant from year to year, on the same terms as formerly, no changes having been made in the conditions.

3. A tenant from year to year having the right to set off, against the rent, indebtedness of the lessor to him, cannot, as against one who purchases the property at sale, under a trust deed given by the lessor, set off indebtedness of the lessor contracted after the lessee had notice of the trust deed.

4. The provision of the Code, allowing objec-

tion at any time to the jurisdiction of the court over the subject of the action, does not allow of the objection, for the first time on appeal, that, though the court had jurisdiction of the subject-matter, the case was not within its equity jurisdiction, there being remedy at law.

Appeal from district court, Clear Creek county.

Suit by Samuel Strousse against the Bank of Clear Creek County and others. Judgment for defendants. Plaintiff appeals. Affirmed.

J. C. Helm, D. J. Davies, and W. T. Hughes, for appellant. Fillius & Davis and Thomas Mitchell, for appellees.

THOMSON, J. Samuel Strousse brought this suit against Jesse M. Copeland, the Bank of Clear Creek County, and William A. Hamill to obtain a decree establishing his alleged possessory rights in certain real estate, and to enjoin the Bank of Clear Creek County from interfering with his possession. Demurrers were sustained successively to the plaintiff's original and amended complaint, an amendment to the amended complaint was filed, the defendant the Bank of Clear Creek County answered, the plaintiff replied, and upon the pleadings as they then stood the cause proceeded to trial. Judgment went against the plaintiff, and he appealed. On the 1st day of March, 1881, the defendant Hamill executed and delivered to the plaintiff the following instrument in writing: "This agreement witnesseth, that the undersigned, William A. Hamill, of Georgetown, Clear Creek county, Colorado, lessor, lets unto Samuel Strousse, of the same town, county, and state, lessee, his heirs and assigns, the north thirty-one (31) feet of lots five (5) and six (6), in block number eighteen (18), in the town of Georgetown, county and state aforesaid, for the term of five (5) years, and renewable from time to time, and for such periods as the said Strousse may elect, at the annual rental of fifteen hundred dollars (\$1,500) per annum, payable monthly or annually, in advance, as may be elected by the parties hereto; the said lessor giving and granting unto said lessee the use of said premises free of rent for the first two (2) months as an inducement to said lessee to enter into and make this contract. And it is further agreed on the part of said lessor that any and all book accounts, unpaid accounts of any other nature or kind, including any and all moneys that may be from time to time due and owing said lessee by said lessor, or any other indebtedness now due, or which may yet become due, or accrue, or exist in favor of the said lessee, and owing from said lessor, shall at all times stand and be an offset against any and all rents due, accrued, or to become due; and that until all such indebtedness now due or which may hereafter become due, as hereinafter stated, are fully paid and discharged by said lessor, the rents of said premises may be and are a set-off, to be held as such by said lessee against said lessor, his heirs and assigns; and

the said lessee is hereby authorized and empowered to enter on, take, hold, and possess said premises, in consideration of this inducement and on this understanding; and said lessee may, under this contract, hold and defend his possession for payment and settlement of any and all just claims and indebtedness that he may have against said lessor, and may defend the same against all claims of said lessor, or any person or persons claiming or to claim by or through the said lessor, his heirs or assigns. Possession of said premises to be given on the 1st day of May, A. D. 1881. Witness my hand and seal this 1st day of March, A. D. 1881. [Seal.] William A. Hamill." In pursuance of this contract, Strousse entered into the possession of the premises which it described. Afterwards, on the 1st day of January, 1883, Hamill executed and delivered to Strousse the following further contract: "Georgetown, Colorado, January 1, 1883. I hereby let and contract with Samuel Strousse, as follows, to wit: Giving to him, his heirs and assigns, the possession, use, and occupancy of certain premises adjoining the north thirty-one (31) feet of lots five (5) and six (6), block eighteen (18), and heretofore occupied by the Merchants' National Bank, and being the north twenty-six (26) feet of lots three (3) and four (4), in block eighteen (18), town of Georgetown, Clear Creek county, Colorado, co-terminous with a contract dated March 1, 1881, and given by me to him, of premises adjacent to those last above described, and upon the same terms and conditions; said Strousse, his heirs and assigns, to have, hold, use, and occupy said premises until full and complete performance by me, as provided for in said lease. For the use and occupancy of all the premises described in the lease aforesaid, as well as this one, said Strousse is to pay the sum of eighteen hundred dollars (\$1,800) per annum, payable annually or monthly, in advance, as either of us may elect. Possession of the last premises mentioned in this lease to be given January 1, 1885. [Seal.] William A. Hamill." Strousse then took possession of the real estate described in the last contract. He used and occupied the entire property continuously after taking possession, selling Hamill goods, and advancing him money from time to time. On January 1, 1888, Hamill, in settlement of the indebtedness then due from him to the plaintiff, made and delivered to the plaintiff his promissory note for \$4,500, due one year from date, with interest at the rate of 12 per cent. per annum, to be compounded at the same rate if not paid as it accrued. On December 15, 1890, Hamill executed another note to the plaintiff for one thousand dollars (\$1,000), due in three months, with interest at the same rate, compoundable if not paid annually. On September 7, 1893, Hamill made a further note to the plaintiff for \$272.77, due in three months, with the same interest, also compoundable annually. On May 1, 1890, one

Harry C. Hamill gave the plaintiff his promissory note for \$300, due in 90 days, with interest at the rate of 2 1/2 per cent. per annum, to be compounded if not paid annually. The defendant Hamill afterwards assumed the payment of this note. On August 14, 1888, one William A. Hamill, Jr., executed his note to the plaintiff for \$1,779, with interest at the rate of 2 per cent. per month, to be paid annually or be compounded at the same rate. In August, 1891, the defendant Hamill assumed the payment of this note. On the 15th day of June, 1888, the defendant Hamill executed a conveyance of the real estate described in the two contracts to the defendant Copeland, as trustee, to secure the payment of a note for \$15,000, of the same date with the trust deed, with interest from date at 1 per cent. per month, which note became the property of the Bank of Clear Creek County. In pursuance of the authority given by the trust deed, the defendant Copeland, at the instance of the bank, on November 19, 1894, sold the real estate described in the trust deed; the bank being the purchaser, and receiving a deed of conveyance of the land from the trustee on the same day. Afterwards the bank commenced proceedings for the possession of the property, which were pending when this suit was brought.

The contention of plaintiff's counsel is that the contracts have the effect of a mortgage upon the use and occupation of the premises, by virtue of which Strousse has the right to continue in possession until such time as Hamill shall cease to contract indebtedness to the plaintiff in excess of the amount of the rents reserved. This theory is based on the provision in the contract that the lessee might hold and defend his possession for payment and settlement of the indebtedness, accrued or to accrue, against the lessor and all persons claiming under him; and, if we understand the argument, its effect is that, having taken the possession, the lessee was entitled to retain it as security for then existing debts and future advances, regardless of the term limited by the contract. Whether the language upon which counsel rely would, in any view, be susceptible of the construction which they give it, we need not inquire; because, in our opinion, the argument is effectually answered by the presence in the contract of a covenant for renewal. The first contract was a lease for a fixed term of five years, with a right in the lessee to demand and receive a renewal of the lease, when the term should expire, for such further period as he might elect. The evident intention of the parties was that the term should, in the first instance, be confined to five years, and that any occupancy of the premises by the lessee beyond that term should be in virtue of a renewal of the original lease, and not in virtue of the lease itself. Without a renewal, his right to possession was limited by the express terms of the lease to five years, while with a renewal

it would continue through the new term, and then expire. The fixing of the term of possession in the original lease, together with the provision for fixing a further term in the event of a renewal, is wholly inconsistent with any theory that the parties contemplated a possession of indefinite duration. The possession which the lessee might hold and defend was a possession which accompanied, and was commensurate with, the tenancy which the contract created. Strousse was under no obligation to extend credit to Hamill, and with knowledge of the limits of his tenancy he could easily regulate his advancements so that upon the termination of his right of possession under the contract he would be whole. If he suffered Hamill to be in his debt when his tenancy was at an end, it was his own fault. The second contract, executed after the first, but during its life, was a lease to Strousse of other real estate upon the same terms and conditions, but reserving an aggregate annual rental of \$1,800 for the entire property. It was expressed to be co-terminous with the other. Its term of lease was therefore to be measured by the remainder of the term first created, and expire with that term; and, one gross sum having been reserved as rent for all the property, the effect was to make the second contract a part of the first, so that the two instruments should embrace but one lease. A renewal would therefore include all the property, and was due, at the option of Strousse, at the expiration of the time limited by the first contract. Now, it is entirely clear from the evidence that there never was any renewal, or any pretense of renewal, of the first, second, or combined lease. Strousse refused to accept a renewal offered to him by Mr. Hamill, saying that the old contract was good enough. He was a witness for himself, and insisted strenuously that no new agreement of any kind was ever made, and that his sole claim to possession was based on the original contract. But the tenancy under that contract was a tenancy for five years, and expired in the spring of 1886. The contract was not that upon the expiration of his term he might, if he so desired, continue in the occupancy of the premises for a further fixed period, so that upon his election the further period would be only a continuation of the original term, and would, therefore, be embraced in the contract. The contract was for a renewal of the lease for a period not fixed, but to be designated by Strousse. It was, therefore, incumbent upon him, when the time came, if he desired the property longer, to so notify his landlord, and designate the further period for which he elected to take it. Upon this being done, a new agreement was necessary to cover the new term; and, if the new term was for a longer period than one year, the agreement must be in writing, or it would be void by the statute of frauds. There having been no renewal of the lease, the tenancy

which it created terminated on the 1st day of May, 1886, and the further occupancy of the premises by Strousse was not in virtue of the original contract. It is plain that he held over by the consent of Hamill, and the terms upon which he held were governed by a new contract which the law implies from the facts. It does not appear that any change was made in the conditions upon which he formerly held. He therefore impliedly held subject to them. As the rent reserved in the first lease was payable annually, and as a lease, not in writing, for a longer period than one year would be invalid, his occupancy of the premises after his term by the consent of his landlord would be evidence of a new demise for a year; and, as he continued in possession by the consent of his landlord for a number of years after the expiration of his tenancy, we think he must be regarded as a tenant from year to year during that time. *Schuyler v. Smith*, 51 N. Y. 309; *Digby v. Atkinson*, 4 Camp. 275; *Tayl. Landl. & Ten.* § 58. On November 19, 1894, the defendant bank succeeded to the title of Hamill by virtue of the sale and conveyance made by the trustee. The bank was, of course, bound by any valid contract subsisting between Hamill and Strousse in relation to the property at the time the trust deed took effect as to Strousse; but its rights would be unaffected by any agreement between the original parties made after that time. The trust deed was not recorded until the 30th day of November, 1889. At that time the deed took effect as to Strousse, even if he had no previous knowledge of its existence. But, in addition to the constructive notice which the record imparted, Strousse had actual notice of the execution of the deed. He examined the records in December, 1889, and found it. Also, in the same year, he had information of it from Hamill. On the 1st day of January, 1888, the indebtedness from Hamill to Strousse, after deducting the rents which had accrued, was \$4,500. This Hamill settled by his note. When or how this indebtedness arose, whether it was a debt left over from the original term, whether it accrued partly or wholly afterwards, or with what rights in relation to the possession of the property it invested Strousse as against Hamill, we can form no idea from the record; but the questions are immaterial, and we shall assume that, even if it accrued while Strousse was merely a tenant from year to year, by some agreement between himself and Hamill, the latter could not terminate the tenancy until the debt should be canceled by the rent. Strousse would then be entitled to retain his possession until, by the application upon it of the rents, the note, with its compound interest, should be paid. This was the only indebtedness to Strousse from Hamill outstanding when the trust deed was recorded, or when Strousse actually knew that it was executed. All the other notes mentioned in

the complaint were executed after 1889, except the note of William A. Hamill, Jr., for \$1,779, which the defendant Hamill assumed. But he did not assume that note until August, 1891, and it therefore did not become his debt until that time. Whatever rights in the possession of the property the indebtedness contracted after 1889 may have given Strousse as between himself and Hamill, those rights were subject and subordinate to the trust deed. By applying the yearly rent of \$1,800 upon the note for \$4,500, given January 1, 1888, the note would be fully paid before the expiration of the year 1892. As the debt evidenced by that note was the only one to which the trust deed was subject, when the bank received the deed from the trustee it took the property unincumbered by any possessory right in Strousse arising from his dealings with Hamill, excepting only such rights as were incident to a tenancy from year to year. The rents were thereafter due to the bank, and it could resort to its possessory remedy for their nonpayment, or it could determine the tenancy in the manner provided by the statute, and then recover the possession. What the grounds of the bank's proceeding for possession were does not appear, but no complaint is made that it was in any respect irregular; and upon the assumption that it was in conformity with the law the right of the bank to judgment in that proceeding cannot be gainsaid.

The position is now taken in behalf of the plaintiff that his complaint does not entitle him to equitable relief; that it appears on its face that he could have interposed the facts upon which he relied to protect him in his possession as a defense to the action brought by the bank; that, therefore, his remedy at law was ample, and his case was not within the jurisdiction of a court of equity. The argument proceeds further to the effect that the answer of the bank, setting up the execution by Hamill of the trust deed to Copeland, the default in the payment of the note which it secured, the sale and conveyance to the bank of the property it described, and praying a decree establishing its title, and granting it other relief against the plaintiff, set forth no facts upon which the court was authorized to decree equitable relief to the defendant, because it showed upon its face that whatever remedy the defendant had was at law, by an action for the possession of the property. We concede the general propositions advanced by counsel. The remedy at law of each of the parties was adequate. An action for the possession of the property was open to the defendant, and it appears that it did commence one; and, under our present system of practice, whatever right the plaintiff had by virtue of his contract with Hamill to retain the possession could have been set up by him as a defense and adjudicated in that action. But the points made in the argument were never suggested until

now. The suit was brought, the answer filed, the case tried, the decree rendered, and the errors assigned in this court upon the theory, accepted by both parties, that the case as made by the pleadings was one of equitable cognizance; and the question is whether either party can now be heard to say that it was not. Under the practice prescribed by the Code, two objections are in order at any time,—one to the jurisdiction of the court over the subject of the action, and the other that the complaint does not state facts sufficient to constitute a cause of action. All other objections, if not taken in time, are waived. Respecting the first, it is not necessary to say much. It is not, and could not successfully be, disputed that the trial court had jurisdiction over the subject-matter of this suit. The objection is that the case as made by the pleadings was not within its equitable jurisdiction; but this is not the kind of jurisdiction to which the Code has reference. The term "equitable jurisdiction," when used in connection with cases arising under the Code, refers solely to the method of procedure by which a court, having acknowledged jurisdiction of the subject-matter of the action, shall adjust the rights of the parties before it. The code provision to which we have alluded has reference to the general jurisdiction of the court, and not to the manner in which it shall take cognizance of the causes submitted to it.

If the allegations of the complaint were true, the plaintiff had possessory rights in the property in controversy, which he was entitled to assert and have adjudicated. The complaint is, in some respects, not very specific, but it avers the possession, the continuance in possession, and the right of possession, of the plaintiff, in pursuance of the contract with Hamill, and of the performance by the plaintiff of all the conditions of the contract. It contains enough to permit the introduction of evidence of a renewal of the lease, and of any other matters arising out of the contract which entitled him to retain the possession. It was the failure of his proofs to support his allegations which resulted in the failure of his case. There is not such a want of a cause of action on the face of the complaint as would authorize us to entertain an objection to its sufficiency, made now for the first time, even if it were not made by the plaintiff himself. But, as we understand it, the objection is not that no cause of action is stated, but that the cause set forth is of legal, and not of equitable, cognizance. Even if this objection came from the defendant, we should summarily dismiss it. To be available here it must have been made in apt time below. "The court of chancery will not refuse to take jurisdiction of a case, and to make a proper decree therein, merely upon the ground that the complainant has a perfect remedy by an action at law, when the parties have submitted themselves to the jurisdiction of the chancellor without objection." *Bank v. Mersereau*, 3 Barb. Ch. 528,

574. See, also, *Cumming v. Mayor, etc.*, 11 Paige, 590; *Creely v. Brick Co.*, 103 Mass. 514; *Amis v. Myers*, 16 How. 492; *Sexton v. Pike*, 13 Ark. 193.

In reference to the answer, we have this to say: The plaintiff brought the defendant into a court of equity to defend a suit, the purpose of which was to obtain a decree impairing, if not destroying, a claim which it asserted to property. In self-defense it was compelled to set up the facts constituting its title; and although, from those facts, it appears that it might have maintained an action at law for the possession of the property, yet the plaintiff, having brought it into court, and made a statement of its title necessary in order to defeat his action, was not in a position there to make the objection to the answer which he now makes; much less can he make it here. However, he offered no objection there, and, in any view, the objection comes too late. Upon his invitation the court took cognizance of the case, and he must abide by the record he has made. The chancellor, having, by consent of parties, taken jurisdiction of the case, was authorized to render such decree as would finally adjust and settle their conflicting claims; and upon the facts as disclosed by the record we think the decree rendered was proper and just.

There is a peculiarity about the plaintiff's present position which we cannot forbear making the subject of some comment. Throughout the whole course of the litigation until the present time he has vigorously maintained that the equities of the case were with him, and that the decree should have been for him, as prayed in his complaint, and against the defendant. Now, to avoid the decree against him, he turns suddenly upon his tracks, and says that the action which he brought was one which he had no right to bring, that his suit ought to be dismissed, and that the defendant's case should fall with his. His efforts to discredit his own pleading, involving as they do a species of self-stultification, are not calculated to produce a favorable impression, and are deserving of no serious consideration.

After the court had announced its decision, the plaintiff applied for leave to amend his complaint, which leave was refused, and error is predicated on the refusal. If the amendments desired had been material, or might have affected the result, we should still be unable to say that, in declining to receive them after trial and decision, the court abused its discretion; but everything proposed which was of any consequence was already in the complaint in some form; the evidence was introduced and received as if the proposed allegations had been made with the utmost distinctness and detail; and upon the question whether the lease was ever renewed, the amendments would have directly contradicted the plaintiff's own testimony. In our opinion, the judgment below was right, and we therefore affirm it. Affirmed.

X. Y. IRRIGATING DITCH CO. v. BUFFALO CREEK IRR. CO.¹

(Court of Appeals of Colorado. May 10, 1897.)
IRRIGATION DISTRICTS—PRIORITIES IN USE OF WATER—NECESSARY PROOF—APPEAL.

No fixed rule can be laid down as to the amount or kind of proof concerning the acreage continuously and beneficially irrigated, which will warrant a decree of priority for an irrigating ditch, such matter resting almost wholly in the judgment of the *nisi prius* judges, and the instruments they employ, whether jurors or referees.

Appeal from district court, Bent county.

Proceedings by the X. Y. Irrigating Ditch Company and another against the Buffalo Creek Irrigation Company to determine water rights. From the decree the X. Y. Irrigating Ditch Company appeals. Affirmed.

Chas. E. Gast and Henry A. Dubbs, for appellant. Rogers & Shafroth, for appellee.

WILSON, J. This is an appeal from a decree of the court in the matter of the adjudication of priorities to the use of water in water district No. 67. The ditch of appellee was adjudged to have priority No. 5 for an appropriation of 67.5 cubic feet of water per second of time, and that of appellant was decreed priority No. 11 for an appropriation of 69 cubic feet of water per second of time. The case comes before us on the exceptions of appellant solely to that part of the finding and decree of the court which relates to the priority of the ditch or canal of appellee. It is urged on behalf of the appellant, and assigned as error, that "the testimony in behalf of the appellee in reference to the beneficial application of water to the land was so uncertain, vague, and indefinite that the court erred in rendering any decree whatever on behalf of the appellee"; but counsel say in their brief that the sole question which they desire to raise upon this appeal is: "What degree of certainty must exist in testimony concerning the acreage continuously and beneficially irrigated to warrant a court in entering a decree of priority for an irrigating ditch?" We have carefully read the whole record before us with reference to this objection. The proceedings for the adjudication of the water rights in this district were initiated by the appellant and one other owner of a canal by a petition filed November 24, 1893, and a referee was appointed by the court on December 7th following. After several extensions of time were granted, the referee presented a report on February 1, 1895, and on February 26th following, the court, being of opinion that "on account of the volume of the record herein, the difficult questions involved, and the magnitude of the interests to be affected," no final decree should be rendered until the court should have "sufficient time for full examination and investigation of all questions of law and fact in-

¹ Rehearing denied June 14, 1897.

involved," entered up an interlocutory decree only for the temporary guidance and government of the parties interested. On July 1st following, the court rendered its final decree sustaining the findings of the referee as to the rights of the parties to this appeal, and in accordance therewith. The whole proceedings in this adjudication seem, so far as disclosed by the record, to have been conducted with that caution and deliberation which was demanded by the important interests at stake. The report of the referee bears evidence of having been prepared with great care, and displays an intelligent appreciation and knowledge of the principles involved in the reference. His conclusions of law, so far as the matters concerned in this appeal are affected, appear to have been correct, and his findings of fact were warranted by the evidence. It is true that he says "the proofs in many cases are uncertain, and the evidence in many cases amounts to but little more than a guess," and, further referring specially to the ditch of appellee, "the evidence is very unsatisfactory as to the exact number of acres of land irrigated from this ditch,—that is, the number irrigated in good faith"; but in his findings of fact, at least so far as appellee is concerned, he seems to have made due and full allowance for any deficiency of positive testimony. The appellee claimed the capacity of its ditch to be 137.4 cubic feet per second, and that by it an appropriation of water sufficient for the irrigation of about 6,500 acres, belonging to the ditch owners, had been actually made. There was also testimony of two witnesses who had been connected with the ditch from the time its construction was begun in September, 1884,—one the president of the company, and the other its manager,—that of these lands there had been irrigated through this ditch from three to four thousand acres: the manager stating positively that all of the water which the ditch carried had been applied to the land lying under it. If this be true, taking the capacity of the ditch at only 104.49 cubic feet per second, as found by the referee, this water so applied was sufficient, according to the evidence, for the irrigation of nearly 6,000 acres. The referee found, however, that there had been irrigated from this ditch only 3,000 acres; that this amount of land would require 54 cubic feet for its irrigation; and that, allowing for seepage and evaporation, there would be required at the headgate 67.5 cubic feet per second of time. This finding was approved by the court, and decree rendered accordingly.

We must confess our inability to give a definite answer to the question suggested by counsel for appellee, and which they say is the sole one desired to be raised on this appeal. This must depend upon the facts of each particular case, upon the character, intelligence, interest, and opportunities for information of the witnesses, as well as their

manner of testifying, upon the length of time over which the proofs are required to extend, upon the topographical features of the land in controversy, and upon numerous other incidents which occur to the individual as the occasion presents itself in the every-day business of life. To determine what amount or degree of certainty must exist in testimony to substantiate a given fact, appellate courts must rely almost wholly upon the judgment and perception of nisi prius judges, and the instruments which they employ, whether jurors or referees.

It is urged upon us that the custom of appellant to keep memoranda, based upon actual surveys, and made during the irrigating seasons, so as to show precisely what acreage had been irrigated in each year, and its particular location, in what crops particular tracts had been planted, and how much of each 40-acre tract had not been or could not be irrigated, or was used for buildings, cattle inclosures, or other purposes, is the proper practice to be pursued by appropriators of water. This practice cannot be too highly commended, and, if more generally followed, would render proof in such cases as this much easier and more certain, as well as save much time and trouble to courts and judges. This court must confine itself strictly, however, to its commendation and approval of this most laudable method of preserving accurate testimony. It cannot declare, in the face of the fact that disastrous consequences would in many cases assuredly follow, that the proof necessary to maintain water rights, which affect interests of such immense value in this state, must be measured by such a standard only, and stand or fall thereby. Such a rule would be especially inequitable and unjust to the early appropriators of water. They were the pioneers of their respective localities, and founded their homes when the supply of water was abundant,—in excess of all demands,—and neither law, custom, nor necessity required them to keep an accurate account of the quantity of water used, or the amount of land cultivated or irrigated. It should be remembered, too, as pertinently suggested by counsel for appellee themselves, "that in the early years of water adjudications in this state priorities were decreed upon the capacities of the ditches." During those years the information acquired and preserved by the use of this custom would not have been material in determining the quantity of water to which an appropriator was entitled. We would be very reluctant at any time to set aside the decree of a court on the ground that it is not supported by the evidence, where, as in this case, it appears to have been rendered only after long and careful consideration and deliberation. After a full examination of this record, we are unable to perceive any error, and it is therefore ordered that the judgment and decree be affirmed. Affirmed.

NYLAN v. RENHARD.

(Court of Appeals of Colorado. May 10, 1897.)

GARNISHMENT IN AID OF ATTACHMENT—JUSTICE'S FEES—SUFFICIENCY OF COMPLAINT—RAISING OBJECTIONS ON APPEAL—REVIEW ON APPEAL—NECESSITY OF EXCEPTING TO JUDGMENT.

1. Under Gen. St. § 2007, garnishment in aid of attachments before justices is begun by leaving with the garnishee a copy of the writ and a notice of attachment. Section 2008 permits the garnishee to deliver any money or effects to the constable. Section 2009 provides that the garnishee shall appear for examination at a time and place mentioned in the notice; and section 2010 requires the constable at the time of serving the writ, to request a written statement of what the garnishee owes defendant, or of the property in his hands. Section 2020 then provides that on the garnishee's failure to pay or deliver, or to appear for examination, or to furnish the statement, etc., upon judgment for plaintiff in the attachment suit, the justice shall issue a summons in plaintiff's name, requiring said garnishee to appear and show cause why judgment should not be rendered against him. *Held* that, on the service of such summons, the justice for the first time acquires jurisdiction to proceed against the garnishee, and that not until then do the garnishment proceedings constitute a separate "civil action," in which costs may be taxed in favor of the justice and constable, in addition to those taxed in the original attachment suit.

2. An objection that the complaint does not state facts sufficient to constitute a cause of action may be made for the first time in the appellate court. Code, § 55.

3. In a suit by an attachment plaintiff against a justice of the peace to recover money collected from the garnishee, plaintiff must allege that judgment was rendered in his favor against the attachment defendant for an amount equal at least to the sum paid by the garnishee.

4. Failure to so allege is not cured by an incidental reference to plaintiff, in the answer, as "the judgment plaintiff" in the attachment suit.

5. A judgment on the pleadings may be reviewed, though no exception to the judgment was taken.

Error to district court, Arapahoe county.

Action by Charles Renhard against C. R. Nylan for the recovery of money. Judgment for plaintiff on the pleadings was rendered both in the county and district courts, and said plaintiff appeals. Reversed.

Clay B. Whitford and H. A. Lindsley, for plaintiff in error. Muller & Weil and C. W. Stephenson, for defendant in error.

WILSON, J. Nylan, defendant in the lower court, was a justice of the peace at Globeville, in Arapahoe county. Plaintiff, Renhard, instituted suit in attachment before him against one Sandell, and, in the course of the proceedings, 15 "attachment and garnishment" writs were issued. Defendant collected from the garnishees \$168.75, of which he paid to plaintiff \$105.50, withholding \$63.25 for court costs. Plaintiff claimed that this taxation of costs was excessive, and instituted suit in the county court on account for money received to and for the use, etc., to recover from the justice the amount so withheld for costs. Defendant answered, setting up the facts of the

suit, and an itemized account of his costs, showing a total charge of \$33.10 for his own costs in the garnishment proceedings, and \$5.80 in the original cause, also \$24.30 for costs of the constable. Replication denied all new matters in the answer. Judgment on the pleadings was rendered in favor of the plaintiff. Appeal was taken to the district court, where the same judgment was again rendered.

The question sought to be raised is whether a garnishee proceeding is a separate action. If this be true, there were in this case 15 separate actions (exclusive of the original action), in each of which costs could be taxed in favor of the justice and constable; otherwise, the matter would come within the proviso to section 13, Laws 1891, which provides "that the total amount of justice's fees taxed in any civil action shall not exceed, in counties of the first class, the sum of \$5." By a like proviso to section 14 of the same act, the fees of constables in the same class of counties are limited to \$6. The object of a garnishee proceeding in an attachment suit is to attach the credits, effects, debts, etc., of the defendant which are in the possession or under the control of a third party, as security for any judgment the plaintiff may recover against the defendant. Primarily, it is in aid of the original suit. That it is of itself a suit is laid down by the text-books. Wade, *Attachm.* 332; Drake, *Attachm.* 452. It has likewise been so held in a number of adjudicated cases, both in the federal and state courts. *Tunstall v. Worthington*, *Hempst.* 662, *Fed. Cas. No. 14,239*; *Delacroix v. Hart*, 24 *La. Ann.* 141; *Moore v. Stainton*, 22 *Ala.* 831. In the latter case the court said: "That a proceeding by garnishment, to subject the funds of a defendant in attachment to the judgment or debt of a creditor, is a suit, is a proposition well sustained by authority." The reasoning in support of this position is sound and convincing. The purpose of the proceeding is a legal investigation by the same means, and through the same instrumentalities employed in an ordinary suit or action between plaintiff and defendant. The garnishee is brought into court by a summons. He has his day in court. Issues of fact are made up by the pleadings. Evidence may be offered, and a trial had by court or jury, as in other actions. Judgment is rendered, costs decreed, and execution issued on the judgment. It is urged that there is not necessarily a contest between the plaintiff in the original action and the garnishee, but the same is true of any action at law. The defendant may make default or confess judgment. Our own supreme court, however, has settled this question in this jurisdiction. It has expressly held that "a garnishment proceeding is a proceeding at law,—a suit." *Metzler v. James*, 12 *Colo.* 333, 19 *Pac.* 885. That a "civil action," the term used in the statute under consideration in this case, is a suit, cannot be denied. In

U. S. v. 10,000 Cigars, 1 Woolw. 123, Fed. Cas. No. 16,451, Mr. Justice Miller said: "The phrase 'civil actions' includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved." It is also held that, in a legal sense, "action," "suit," and "cause" are convertible terms. *Ex parte Milligan*, 4 Wall. 2. The case of *Metzler v. James*, supra, was one arising, however, in a court of record, and the opinion therein had reference and application only to garnishment proceedings as provided and regulated by the Code. The same may also be said of the other authorities above cited. The questions therein arose upon similar provisions expressed in code or statutes. Under our Code, the officer having the writ of attachment is required, upon request of plaintiff, to "summon such person or persons as the plaintiff may direct as garnishees to appear before the court wherein such action is pending." Code Civ. Proc. 119. Thereupon such officer issues a writ of garnishment, separate and distinct from the attachment writ, whereby the garnishee is required, among other things, to answer within a specified time certain interrogatories thereto attached, and is notified that, in case of his failure so to answer within said time, the plaintiff may apply to the court for relief against him *ex parte*. Code Civ. Proc. 120. Upon the return of the writ, showing due service, the court acquires "jurisdiction to proceed against such garnishee as hereinafter provided." Code Civ. Proc. 122. Garnishee is required to answer in writing under oath, and, upon failure to do so within the time specified, default is taken. Upon answer, if issue be joined by the plaintiff, a trial is had as in other cases, and judgment rendered accordingly. It will be readily seen that this procedure in garnishment is precisely similar in manner, substance, and effect to that in ordinary civil actions or suits. It is true that the garnishee may discharge himself after answer, by paying to the officer the money which he may owe to the defendant in the original action, or by delivering up the property of defendant in his hands, but so also may the defendant interpose no obstacle to the recovery of plaintiff. The distinguishing feature which stamps this proceeding as a suit or action is that the writ of garnishment operates as a summons, its service bringing him into court, and subjecting him to its jurisdiction.

Garnishment proceedings in aid of attachments before justices are regulated by statute, and are in many material respects essentially different from those under the Code. The initial step is (Gen. St. § 2007) the leaving with the garnishee or his agent by the constable a copy of the writ of attachment issued in the original suit, with a notice that the debts owing by him to defendant, and the credits, effects, etc., in his hands belonging to such defendant, are attached. Section 2008 permits

the garnishee to pay to the officer any money owing by him to defendant, or to deliver any property of defendant in his hands, and to take his receipt therefor. Section 2009 provides that the person "so garnisheed"—that is, by the service upon him of the writ and notice specified in section 2007, supra—shall be required to appear for examination before the justice at a time and place to be mentioned in the "garnishee summons." The garnishee summons here referred to can apply only to the notice required to be served by section 2007, no other being provided for. Section 2010 requires the constable, at the time of the service of the writ of attachment and notice, to request the garnishee to give him a written statement under oath of the amount of his indebtedness to defendant, and of the things in action belonging to him which are in possession or control. Now, if the garnishee fails to deliver the property of defendant in his hands, or to pay to the constable the money owing by him to defendant, or to appear for examination as required, or to give the memorandum or statement requested, the justice cannot enter default or render judgment against him, as could be done under the Code of Civil Procedure. The notices and copy of writ served upon him have not had the force and effect of a summons; the court has not acquired jurisdiction to further proceed against him; and hence in this proceeding the most essential element necessary to constitute an action or suit is lacking. Section 2020 then provides that in case of such failure of the garnishee, upon judgment being rendered in favor of the plaintiff in the original action, the justice shall issue a summons in the name of the plaintiff, and against such garnishee, requiring him to appear and show cause why judgment should not be rendered against him for the amount of such judgment in favor of plaintiff, or so much thereof as remains unsatisfied. Upon the service of this summons, the justice for the first time acquires jurisdiction to proceed against the garnishee, and then only does the proceeding partake of the character of a separate action. If the garnishee appears in response to this summons, a trial is had; if not, judgment may be rendered against him for the full amount of the judgment against the defendant and costs of suit.

It follows from this expression of our views that, in our opinion, a garnishment proceeding in a justice court in aid of an attachment suit would constitute a separate civil action or suit only when begun under the provisions of section 2020, and that all other such proceedings, under other sections of the statute above cited, would be only incident to and part of the original suit in attachment, and would not constitute a separate suit or civil action. The sections last above cited are from an act of the general assembly of 1879, in relation to attachments in justices' courts. At the same session of the legislature, an act entitled "An act concerning garnishment in courts of record and before justices of the peace on judgments ren-

dered, and in relation to the practice and proceedings in garnishment," became a law. This act has been repealed so far as it relates to courts of record, but still remains in force so far as it applies to justices' courts. Laws 1879, p. 76; Gen. St. p. 517. Under it the method of procedure differs in some particulars from that prescribed in the other, but, so far as the principle involved in this case is concerned, it is essentially the same. The garnishee in this case, as under the other method, may discharge himself by answering the interrogatories prescribed by statute, and, if he is indebted to the defendant in the attachment suit, may pay to the officer serving the writ the money which he so owes. No summons or scire facias can issue by which the garnishee is brought into court, and made subject to its jurisdiction to the extent of becoming liable to have final judgment rendered against him until after he has failed to make answer, and a conditional judgment has been rendered against him in consequence of such default, or, after having answered, his answer is controverted by plaintiff. Until such process is issued, the proceeding does not become, and is not entitled to be called, a separate action. It does not clearly appear from the record before us what the precise garnishment proceedings were, nor at what stage the money was paid by the garnishees in this case; but as the judgment must be reversed on another ground of error assigned, and a new trial had, the trial court can apply our opinion upon this question, which is material to the issue, to the facts as they may be shown.

It is objected that the complaint did not state facts sufficient to constitute a cause of action. It is true that this question is raised for the first time in this court, and that objections so made in appellate courts are viewed with judicial disfavor; but, by express provision of the Code (section 55), this may be raised at any time. In the very recent case of *Creswell v. Woodside* (decided by this court) 8 Colo. App. 514, 46 Pac. 842, it was held that, "where a complaint is substantially defective in its statement of a cause of action, the point may be made for the first time in the appellate court." It was an indispensable prerequisite to plaintiff's right to recover in this action that judgment should be rendered in his favor, and against the defendant in the attachment suit, before the justice, and for an amount equal at least to the sum paid by the garnishees. Until such judgment he had no right to demand or receive any money collected from the garnishees. This being a material and essential fact, he should have alleged it, but he failed to do so. This defect is not cured by the answer. The only language in it bearing upon this point in the remotest degree is an incidental reference to plaintiff as "the judgment plaintiff therein." This is entirely too slight and uncertain to supply the want of such a material allegation. Even if it were, however, the record nowhere furnishes the least information as to what the amount of such judg-

ment was, so that, for aught we know, the sum which the defendant justice alleges that he paid to the plaintiff, and which is not disputed, may have been the full amount of such judgment, and all to which he was entitled. Counsel for appellee urge that the record does not disclose any exception to the judgment of the district court, and hence it is not proper for this court to review it. In support of this, they cite a number of decisions of this and of the supreme court. All of these are to the effect that there must be such an exception, in causes tried to the court, to authorize the appellate court to review it upon the facts or upon the law as applied to the facts, or, where no such exception is taken, an assignment of error that the judgment is contrary to the law, and the evidence will not be considered. None of these authorities are pertinent. This judgment was rendered upon a motion for judgment upon the pleadings. It is a case wherein a review is sought upon the law as applied to the pleadings. We agree with counsel that "justices' courts are fundamentally the poor man's court," and regret that the pleadings are not in such shape as to present all of the facts, so that we might settle without further trial and expense the question at issue. However, we have endeavored to make our views positive and clear upon all points which may arise in the case, so far as shown by the record; so that, in a rehearing upon proper pleadings, there will be no difficulty in arriving at a conclusion when the facts are presented. For this error of fatal defect in the complaint, the judgment is reversed, and the cause remanded. Reversed.

(9 Colo. A. 400.)

**LEADVILLE ILLUMINATING GAS CO. v.
CITY OF LEADVILLE.¹**

(Court of Appeals of Colorado. April 26, 1897.)

MUNICIPAL CORPORATIONS—CONTRACTS—APPROPRIATIONS—MANDAMUS—CONSTRUCTION OF STATUTE.

1. Laws 1877, § 2671 (Mills' Ann. St. § 4440), providing that no contract shall be made nor expense incurred by a city or any of its officers "unless an appropriation shall have been made concerning such expense, except as herein otherwise expressly provided," does not apply to a contract for lighting a city for a period of 25 years, in form of an ordinance passed pursuant to a special election, as expressly authorized by section 2655, subdivision 60, nor to expenses thereunder, since to hold that it does apply thereto would nullify the latter subdivision.

2. Such statute does not apply to such contract or expenses for the further reason that they are brought within its saving clause by the provision of said subdivision 60, authorizing cities to pay for light furnished under such a contract such sum as may be agreed on by the parties, and subdivision 71, providing a method for paying such indebtedness by the levy of a special tax.

3. Conceding that Laws 1877, § 2655, subdivision 71, authorizing a special tax for paying indebtedness created by contract for lighting municipal corporations, provides an exclusive remedy, mandamus would not lie to compel the city to

¹ Rehearing denied June 16, 1897.

levy or collect a special tax, or, if collected, to pay it over on an amount claimed to be due under an illuminating contract, where such amount has never been adjusted between the parties.

Error to district court, Lake county.

Action by the Leadville Illuminating Gas Company against the city of Leadville. From a judgment for defendant, plaintiff brings error. Reversed.

Wolcott & Vaile and W. W. Field, for plaintiff in error. John A. Ewing, James Glynn, and L. Frank Brown, for defendant in error.

WILSON, J. As alleged in the amended complaint of plaintiff, a contract was entered into in August, 1879, between plaintiff and the defendant city, whereby the former agreed for a period of 25 years to light the streets, alleys, and public places of the city for a stipulated sum of money, the street lamps and posts to be furnished and maintained by the city. This contract was evidenced by a city ordinance passed in pursuance and by authority of a special city election previously held, as provided by the laws of the state then in force. It is further alleged that, some time after the contract went into effect, the city requested the plaintiff to maintain and keep in repair the street lamps and posts, and contracted to reimburse it therefor; that the plaintiff has fully complied on its part with the terms of said contract, but that the city has failed for a number of years to pay to plaintiff the full amount of the indebtedness accrued to it under said contract. This action is brought to recover judgment for such balance of indebtedness. Five causes of action are set forth in the amended complaint, and to each defendant interposed a demurrer, which was sustained by the court; and, the plaintiff electing to stand by its complaint, judgment for defendant was rendered accordingly. Plaintiff comes here by writ of error.

Several grounds are set forth in defendant's demurrer, but the only one urged upon our consideration is that the amended complaint did not state facts sufficient to constitute a cause of action. In fact, all of the special causes alleged are embraced in this general one. No question is raised as to the validity or regularity of the special election or of the city ordinance. It is claimed in support of the demurrer that the amended complaint, in order to constitute a cause of action, should have alleged a prior appropriation by the city to meet the expense to be incurred by and under the contract. This contention is based upon section 2671 of the General Laws of Colorado of 1877, which was in force at the time when the contract was executed, and which is the same as section 4449, Mills' Ann. St. This provided in substance that no contract should be made nor expense be incurred by a city or any of its officers, "unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The au-

thority under which this contract was executed is given in subdivisions 67-69 and 71 of section 2635 of the General Laws of 1877. We do not believe that it was the intent of the legislature that the provisions of section 2671, supra, should apply to contracts like the one in question. To so hold would amount to a nullification of subdivisions 69 and 71 of section 2635, which expressly grant to cities and towns the power to make such contracts. The lighting of a city is a paramount necessity for the comfort, convenience, and protection of its citizens in their persons and property. It is also a matter of general knowledge that it requires a large expenditure of money to establish the required plant and facilities for furnishing this light. If a city were not allowed in such case to contract for light for some reasonable period of time, and the individual or company furnishing light was compelled to trust for his compensation, from year to year, to the varying moods of city councils, it is safe to say that no one would engage in such a hazardous enterprise. A city then must furnish its own light, which is most frequently deemed inadvisable,—at least in smaller cities and towns,—or remain in darkness. This contract was for a period of 25 years, for which length of time the city had the express authority of law to execute it. Gen. Laws 1877, § 2635, subd. 69. No indebtedness was to accrue until after the company had commenced supplying gas, and what this would be for any given length of time it was impossible to determine in advance. If a prior appropriation was essential to the validity of the contract, then it could not have been executed at all, for the reason that it was impossible to compute the amount which would be due during the 25 years, even if it had the power to make such an appropriation for such a length of time or during any part of said time. It is unreasonable to presume that the legislature required the performance of impossibilities, or that, having once expressly granted to a city the power of making such contracts as that in question, as it did in section 2635, it then, in a succeeding section of the same act, imposed such restrictions as to practically nullify such grant of power. *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325. We are clearly of the opinion that the provisions of section 2671 do not apply to contracts such as that in question in this suit, nor to such contemplated incurring of expense. In construing a statute, reference must be had to the object to be attained and the means to be employed. It will not be presumed that the legislature attempted to authorize a proceeding unreasonable in itself. *Neenan v. Smith*, 50 Mo. 523; *Sedg. Stat. Const. Laws*, 235. "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits they are to be favored by the courts. Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent con-

struction. *Kyle v. Malin*, 8 Ind. 34, cited with approval in *City of Pueblo v. Robinson*, 12 Colo. 598, 21 Pac. 899. Moreover, the sixty-ninth subdivision of section 2655 having expressly granted to cities and towns the power to enter into contracts such as the one in question, and to pay, for the gas furnished, "such sum or sums as may be agreed upon between said contracting parties," and the seventy-first subdivision of the same section having provided for a method of payment of such indebtedness by the levy and collection of a special tax, this character of contract would seem clearly to come within the exception of section 2671, "except as herein otherwise expressly provided." The case of *Smith Canal or Ditch Co. v. City of Denver*, 20 Colo. 86, 36 Pac. 844, turned upon the construction of a special provision of the special charter of the city of Denver, and did not involve an express contract or any contract authorized by any provision of the charter. It is not applicable to this case, especially as we hold that the contract in this case was within the exception of the statute. Neither is the case of *Town of Durango v. Pennington*, 8 Colo. 257, 7 Pac. 14. In that case the ordinance awarding the contract was held to be absolutely null and void, because on its passage in the council the yeas and nays were not called and recorded. There was no judicial construction of section 2671, and the facts of the case did not require it. Holding, as we do, that no prior appropriation by the city was necessary or essential to the validity of the contract in question, it necessarily follows that the complaint of plaintiff was not defective by reason of a failure to allege it.

The second and main contention of defendant in error in support of the demurrer, and which is urged by counsel with much force and ability, both in their brief and in oral argument, is that subdivision 71 of section 2655, *supra*, having provided a method of payment for indebtedness incurred under contracts, such as the one in question, by the levy and collection of a special tax, that method of payment is exclusive; that the plaintiff can look only to the fund arising from the collection of that tax for its payment; and that the city is liable only for a failure to levy or collect such special tax, or to pay it to plaintiff when collected. This is, in substance and in its final result, a claim that plaintiff has mistaken its remedy, and can only proceed by mandamus to compel the city authorities to levy or collect the special tax, or, if collected, to pay it over to plaintiff. As the issues are presented by the record in this case, it is not necessary for us to express an opinion as to whether or not the method of payment by special taxation, referred to, is exclusive. This question cannot possibly arise till after judgment, if such is rendered, in favor of plaintiff.

The facts, as we gather them from the complaint, and hence admitted by the demurrer, are that the indebtedness sued upon is a mat-

ter of account for gas supplied during a period of years, and that the account has never been audited or allowed by the city, nor adjusted between the parties. The specific sum due does not and cannot, from the nature of the transaction, appear in the contract. This depends upon the varying number of street lamps which may have been furnished with gas during a given period of time, upon the amount, character, and value of repairs, and also upon the partial payments which may have been made on account. All of these matters are open to dispute. The city may insist that the plaintiff has not supplied the gas to the number of lamps claimed, or that the repairs have not been of the character and extent charged for, or that the city has made payments for which it has received no credit. If this account had been audited or adjusted, and this proceeding was upon a warrant (as is true of the principal cases cited by counsel for defendant), or certificate, or any record acknowledgment by the city of any specific sum due, an entirely different question would be presented. Certainly, mandamus would not be the proper proceeding for the adjudication of such contested rights, or rights which may be contested, as arise upon the facts in this case. The primary object of mandamus is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Code, § 301. Its proper function is merely to set in motion, to compel action, and coerce the performance of a pre-existing duty. High, Extr. Rem. 7. Before the writ can issue, "it must appear in the petition therefor that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or to refuse." *Daniels v. Miller*, 8 Colo. 553, 9 Pac. 18. Even if it were conceded, as contended by defendant's counsel, that the sole method of payment in this case is by special taxation, it must first be shown that some specific sum is due to plaintiff, before mandamus would lie to compel the city to levy or collect the tax with which to make payment, or to pay if collection has been made. This can only be adjudicated in some other proceeding, and the suit instituted by plaintiff is the proper one to determine this.

The question as to how the judgment, if one is obtained by plaintiff, shall be enforced, is not before us. These views expressed by this court are not in conflict with the opinions of the court in *Smith Canal or Ditch Co. v. City of Denver*, 20 Colo. 86, 36 Pac. 844; nor in *Forbes v. Board of Com'rs* (Colo. Sup.) 47 Pac. 388; nor in *Hockaday v. Board of County Com'rs*, 1 Colo. App. 362, 29 Pac. 287,—all of which have been cited by counsel for defendant. The questions presented and decided in each of those cases are entirely different from those in this case, as we consider them. The court erred in sustain-

ing the demurrer to the amended complaint of plaintiff, and the judgment should be reversed, and cause remanded. Reversed.

ARRANO et al. v. PEOPLE.

(Supreme Court of Colorado. June 22, 1897.)

CRIMINAL LAW—JUDGMENT ON PLEA OF "GUILTY"
—EXAMINATION OF WITNESSES—RECORD.

1. Mills' Ann. St. § 1463, relating to prosecutions wherein the accused pleads "Guilty," and declaring that it shall be the duty of the court, in all cases where it possesses any discretion as to the extent of the punishment, "to examine witnesses as to the aggravation and mitigation of the offense," is mandatory.

2. Compliance with such provision must appear in the record proper.

Error to district court, Huerfano county.

Antonio Arrano and others were convicted of murder in the second degree, and bring error. Reversed.

James J. McFeely, for plaintiffs in error.
Byron L. Carr, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and George H. Thorne, Asst. Atty. Gen., for defendant in error.

GODDARD, J. At the October term, 1891, of the district court of Huerfano county, Antonio Arrano, John Arrano, Lorenzo Perriceo, Dominacio Keado, and Bartholomico Oberto were indicted for the crime of murder. On the 8th day of October, they were arraigned, and severally entered pleas of not guilty. Afterwards, and on the 16th day of October, the defendants, in open court, withdrew their plea of not guilty, and tendered pleas of guilty of murder in the second degree, which pleas were accepted by the district attorney; and the court explained to the defendants the nature and extent of their punishment provided by law for the offense of murder in the second degree, and, the defendants still persisting in pleading guilty as aforesaid, such pleas were received and recorded; whereupon, as shown by the record, the following proceeding was had as to each of the defendants: "And now, neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the plea of guilty heretofore made in this cause, therefore it is ordered and adjudged by the court that the said defendant, John Arrano, be taken from the bar of this court to the common jail of Huerfano county, * * * and from thence, by the sheriff of said county, * * * to the penitentiary of this state, * * * and be delivered to the warden or keeper of said penitentiary; and the said warden or keeper is hereby required and commanded to take the body of said defendant, * * * and confine him in said penitentiary in safe and secure custody for and during his natural life, at hard labor." At the February term of 1893 a motion to vacate the judgments, and for rehearing, was filed and overruled. At the

February term of 1895 a petition to vacate the judgments was heard and overruled. The defendants bring the case here on error, and ask for a reversal of this judgment and sentence upon several grounds; among them, because the court sentenced the defendants, upon their plea of guilty, without examining witnesses as to the aggravation and mitigation of the offense. This specification of error, we think, presents a meritorious objection to the validity of these sentences. The proceeding was had under section 1463, Mills' Ann. St., which enacts: "In all cases where the party indicted shall plead 'Guilty,' such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party indicted insists in pleading guilty, said plea shall be received and recorded; and the court proceed to render judgment. * * * In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." The punishment provided by our statute for the crime of murder of the second degree is that the person convicted "shall suffer imprisonment in the penitentiary for a term not less than ten years, and which may extend to life." Id. § 1176. The term of imprisonment within these limits is wholly within the discretion of the court. It was therefore clearly the duty of the court, under the mandatory provision of section 1463, before imposing sentence, to examine witnesses as to the circumstances under which the homicide occurred, in order to ascertain whether such circumstances tended to aggravate or mitigate the offense. The attorney general, in his argument, does not question the correctness of this conclusion, but insists that, the record being silent, it must be presumed that the statute was complied with; in other words, that the matter complained of should not appear in the record proper, and can be made to appear only by bill of exceptions. With this we cannot agree, but think that a compliance with this provision of the statute must appear in the record proper. Mr. Bishop, in discussing what the record in a criminal case shall contain, in his work on Criminal Procedure (volume 1, § 1347) says: "The leading purpose of the record, wherein, if it fails, it is certainly inadequate, is to set down and justify the punishment. Hence it must state what will affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence." By the statute of Texas, three things are essential to support a plea of guilty of a felony: First, he should be admonished by the court; second, it must appear that he is sane; third, it must plainly appear that he was uninfluenced by fear or by any delusive hope of pardon. And, if the punishment of the offense was not absolutely fixed by law, it was further provided that a jury should be impaneled to hear evi-

dence and assess the punishment. In *Saunders v. State*, 10 Tex. App. 336, the court, speaking of these conditions, say: "If these matters are essential, and must concur to render the plea a valid one, then it seems to us that, as conditions precedent, the record should show their existence." In *Turner v. State*, 17 Tex. App. 587, it is said: "But the record fails to show affirmatively that the punishment was assessed upon a valid plea of guilty, and that evidence was submitted to the jury to enable them to decide as to the proper punishment to be assessed." And, because these matters did not appear affirmatively by the record, the judgment was reversed. The same doctrine is announced in *Paul v. State*, 17 Tex. App. 583; *Harris v. State*, Id. 559; *McCauley v. U. S.*, 1 Morris (Iowa) 641; *Evers v. State*, 31 Tex. Cr. R. 318, 20 S. W. 744. We think, therefore, that the record must affirmatively show all steps which are essential to sustain the sentence; and the record before us failing to show that the court examined witnesses as required by statute, but in effect negatively showing that this was not done, the plaintiffs in error were sentenced in a manner not sanctioned by the law, and such sentence is invalid. We do not regard the other objections as well taken; but, for the reasons given, the judgments must be reversed, and the cause remanded for resentencing, after an examination of witnesses as provided by the statute. Reversed and remanded.

GARTLEY et al. v. PEOPLE, to Use of PUEBLO COUNTY.

(Supreme Court of Colorado. June 1, 1897.)

COUNTY TREASURER—PUBLIC MONIES—LIABILITY FOR LOSS—BANK FAILURE—PLEADING—INCONSISTENT DEFENSES.

1. The official bond of a county treasurer recited, as required by Mills' Ann. St. § 886, that if the treasurer "shall faithfully and promptly perform the duties of said office, and if said [treasurer] * * * shall pay according to law all moneys which shall come into his hands as treasurer, * * * and shall deliver over to his successor * * * all moneys * * * belonging to his office, the above obligation to be void." *Held*, in an action on the bond for public moneys collected by the treasurer, that the fact that the moneys were deposited in a solvent banking institution, which thereafter failed, causing a loss of them, was no defense.

2. It is error to render judgment for plaintiff on the pleadings where the answer contains a specific denial of allegations of the complaint, though inconsistent with other defenses.

Goddard, J., dissenting.

Appeal from district court, Pueblo county.

Action by the people of the state of Colorado, for the use and benefit of Pueblo county, against William P. Gartley and others. From a judgment in favor of plaintiff, certain defendants appeal. Reversed.

This is an action brought for the use of Pueblo county against Wilson P. Gartley, as principal, and J. B. Orman, William Crook,

W. H. Anderson, and A. M. Pryor, and others, as sureties upon his official bond, as county treasurer of Pueblo county. The complaint, inter alia, avers his election to said office; the due execution and delivery of a bond in the prescribed form, with the statutory condition; charges that he received, in his official capacity, the sum of \$10,218.34, which he failed to turn over to his successor in office, and which he converted and appropriated to his own use. Joint and separate answers were filed by defendants, containing, inter alia, a specific denial of the receipt by Gartley of the sum alleged, averring that he never received as such treasurer any moneys in excess of \$2,500; that he paid over and truly accounted to his successor in office for all moneys which ever came into his hands as such treasurer; and as a separate and special answer and defense averred that the moneys sued for were deposited by Gartley, as county treasurer, in a reputedly safe and solvent bank, which bank had subsequently failed while the moneys remained on deposit therein; and, as a consequence, said Gartley, without any fault or negligence on his part, was unable to turn over to his successor the fund in controversy. Motion for judgment on the pleadings was sustained, and judgment rendered for the sum of \$10,218.34 and interest. From this judgment the defendants named prosecute this appeal.

Waldron Devine, for appellants. C. J. Hughes, Jr., A. B. Seaman, and T. J. O'Donnell, amici curiæ. E. C. Glenn, G. W. Collins, W. L. Hartman, and D. F. Mitchell, Co. Atty., for appellees.

HAYT, C. J. (after stating the facts). This is an action against the county treasurer of Pueblo county and the sureties upon his official bond for failure to pay over certain public moneys collected by such treasurer. The answer sets up several inconsistent defenses, the most important of which is the claim that the money was deposited by the treasurer in his official capacity in a reputable and solvent banking institution, which subsequently failed, so that the money was entirely lost, and, as it is alleged, without any fault or negligence on the part of the treasurer. The district court overruled this defense, and this raises the principal question in the cause. The authorities in support of the liability of the treasurer and the sureties upon his official bond in these circumstances are so numerous as to practically preclude the citation of any cases within the limits of this opinion, except those most easy of access: *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154; *U. S. v. Dashiel*, 4 Wall. 182; *U. S. v. Keebler*, 9 Wall. 83; *Boyden v. U. S.*, 13 Wall. 17; *Bevans v. U. S.*, Id. 56; *U. S. v. Thomas*, 15 Wall. 337; *Muzzy v. Shattuck*, 1 Denio. 233; *Commissioners v. Lineberger*, 3 Mont. 231; *State v. Moore*, 74 Mo. 413; *Tillinghast v. Merrill* (N.

Y. App.) 45 N. E. 375. The case first cited—U. S. v. Prescott—is admittedly the leading case upon the subject. It was an action against a receiver of public moneys, who had given bond conditioned to keep safely the moneys collected by him, and it was held that the fact that the money was feloniously stolen without any fault on his part constituted no defense. The conclusion reached in that case is affirmed in many later cases, and in no case has it been modified or changed except by act of congress. It is true that in the subsequent case of U. S. v. Thomas, supra, it was held that a receiver of public moneys was excused if prevented from rendering the money by the act of God or the public enemy, without any fault or neglect on his part. The opinion of the court in the Thomas Case was rendered by Mr. Justice Bradley. As this case has sometimes been referred to as changing the rule announced in U. S. v. Prescott, supra, it may be well to note the particular modification of the former opinion, which is, in fact, made in that case. This modification sufficiently appears from the opinion, wherein it is said of the Prescott Case: "After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required: 'The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.' This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, as now contended for by the government. But that case was one in which the defense set up was that the money was stolen, and a much more limited responsibility than that indicted by the above language would have sufficed to render that defense nugatory." We think this language shows that the court did not intend to intimate that an incorrect result was reached in the Prescott Case. The real point decided in the latter case was that the forcible seizure by the Confederate authorities, during the Civil War, of public moneys in the hands of loyal government agents, free from fault or negligence, was a sufficient discharge from their obligations in reference to such moneys. The majority of the court was of the opinion that the facts presented made out a complete defense, and judgment was given accordingly. While Justices Swayne, Miller, and Strong dissented from this conclusion, yet it should not be overlooked that this dissent was from the conclusion of the majority that the defense was good. Of the dissenting justices, Miller alone filed an opinion, in which he expressly disclaims speaking for any of his associates. Statements made in this dissenting opinion are relied upon for the purpose of enforcing the argument in favor of the discharge of the defendants in this case; but the dissent of the learned justice was from a decision declaring against the liability of the officer, and not from a decision upholding such liability. In other

words, Justice Miller was of the opinion that, as the law then stood, the defense was not good. The following from the opinion of the court in the case of U. S. v. Prescott, supra, has certainly never been modified by any subsequent decision of that court, and is as applicable to present conditions as it was appropriate at the time it was penned: "Public policy requires that every depository of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if, indeed, any can be found, where any relief has been given in such cases by the interposition of congress." The decision in the Prescott Case is put expressly upon public policy, and upon the conditions of the bond. The cases in which a contrary result has been reached are few in number, and serve to call attention to the general rule, and the unanimity with which it has been indorsed, rather than to weaken the force and effect of the solid foundation upon which the rule rests. The leading case upon the opposite side of the controversy is that of *Inhabitants of Cumberland Co. v. Pennell*, 69 Me. 357. The force of this decision is somewhat weakened by the fact that out of a court of seven members the chief justice and two associate justices dissented. The majority of the court, in a strongly reasoned opinion, held, however, that robbery constituted a valid defense to an action upon the official bond of a county treasurer for public moneys received by him. Referring to the Maine case, the supreme court of Nevada, in *State v. Nevin*, 19 Nev. 162, 7 Pac. 650, says: "We say the Maine case stands alone in its opposition to what it is pleased to term the new-born policy of the law. In that case some reliance seems to have been placed upon the case of *Supervisors v. Dorr*, 25 Wend. 440, but the principles of that case were repudiated in *Muzzy v. Shattuck*, supra, and hence we are authorized to say that the case in Maine is unsustained by any other recognized authority in any of the courts of the United States, federal or state." In the case of *York Co. v. Watson*, 15 S. C. 1, it was, however, held upon the statutes of South Carolina that no higher obligation should be exacted of a county treasurer than that imposed by the common law, and in an action on his official bond the fact that the

money was deposited in a savings bank which was in good standing at the time the moneys were placed there, but which afterwards failed, occasioning a loss of the fund, was held a sufficient defense upon the bond. This is the only case to which we have been cited, or which we have been able to find, in which such a defense has been upheld; while in the very recent cases of *Fairchild v. Hedges* (Wash.) 44 Pac. 125, and *Tillinghast v. Merrill* (N. Y. App.) 45 N. E. 375, and *Bush v. Johnson Co.* (Neb.) 66 N. W. 1023, a contrary conclusion has been reached. In these cases it is held that a county treasurer is liable for money deposited by him in a bank which afterwards became insolvent, though free from negligence himself, and though the county has failed to provide a safe place of deposit for the public funds. See, also, *Wilson v. Wichita Co.*, 67 Tex. 647, 4 S. W. 67.

The case of *State v. Houston*, 78 Ala. 570, is also cited in support of the minority rule. We do not think, however, that this case can afford any aid to plaintiffs in error, for the reason that the court bases its decision almost entirely upon the official bond of the officer; while in the case at bar the weight of the argument is directed to show that the official bond can in no way enlarge the liability of the officer, it being given solely, as it is claimed, for the purpose of indemnifying the county in case the officer does not conform his conduct to the requirements of the statutes. The condition of the bond under consideration by the Alabama court, as fixed by the statute, was "that the collector will, with fidelity, skill, and diligence, perform the duties of the office, and keep inviolable the trust reposed in him." Although the court held that a bond conditioned as provided by the statute did not impose absolute and unconditional liability, it also decided that the statute and considerations of public policy enlarged the degree of responsibility beyond that of a mere bailee for hire, and that, having exercised the highest care, vigilance, and diligence to prevent loss, the collector, if robbed of money belonging to the state, by an overpowering force, should be discharged. Here, again, the bond was construed as enlarging the liability, and, while holding the defense interposed good in law, the court confines the defense to a case where the specific funds of the state have been forcibly taken, and adds that if it should appear that the funds received by the collector have been used or changed for any unauthorized purpose, he will become thereby a debtor, and he and his sureties would be bound to absolute payment, as for a debt. To constitute a defense, the court holds that the robbery must be of money, the property of the state; and that, where an amount has been substituted for the amount misused, the defense would not be good, and the court expressly limits its decision "to the case of irresistible force." The case, as we have seen, is a direct authority in favor of the doctrine that

liability may be enlarged by the conditions of the bond. It is a mistake to class the New York cases in support of the minority doctrine. It is true that in the case of *Supervisors v. Dorr*, 25 Wend. 438, the supreme court of New York held that a public officer intrusted with public funds is not responsible for money stolen from his office, in the absence of negligence or other default on his part. This case was taken to the court for the correction of errors. See 7 Hill, 533. Upon the question being put upon error, "Shall this judgment be reversed?" 12 members of the court of errors voted for affirmance, and 12 for reversal. The judges being equally divided in opinion, the judgment of the supreme court was allowed to stand, but the effect of this equal division did not settle the question of law, and consequently the case has no force as a precedent. *Bridge v. Johnson*, 5 Wend. 342. Indeed, when the question of law again came up in that state for determination, it was settled the other way. See *Muzzy v. Shattuck*, 1 Denio, 233. Of this latter decision, Mr. Hill, in his note to the report of the case in 7 Hill, says: "That decision, which appears to be utterly irreconcilable with the one reported in the text, was subsequently reviewed by the court for the correction of errors, and in December, 1846, was unanimously affirmed." And, as we have said, in the recent case of *Tillinghast v. Merrill*, supra, the New York court of appeals takes a position squarely against the contention of appellants in the case at bar. We do not regard the case of *State v. Lanier*, 31 La. Ann. 423, as in point, for the reason that the evidence in that case showed that the robbery pleaded as a defense could have been avoided by the exercise of ordinary care and diligence on the part of Lanier, the tax collector; hence the defense was not made out, and the court was, consequently, not called upon to decide, and, in fact, did not decide, the abstract question of law as to the validity of the defense of robbery, where the officer has exercised due care and diligence. Hence we find nothing in the opinion to indicate what the conclusion of the court would have been upon the general proposition. In the case of *Walker v. Association*, 18 Adol. & E. (N. S.) 276, the treasurer against whom the suit was brought was sued for private funds. Similar principles do not prevail in such cases, as it is admitted that a higher degree of responsibility is exacted of a public officer intrusted with public funds than of a mere private bailee. See *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119, and cases cited.

The authorities favoring the stricter rule of liability largely outnumber those favoring the contrary rule, and the courts maintaining the former doctrine are certainly of equal standing and learning as those upholding the "new-born doctrine." We therefore conclude, upon authority as well as reason, that the well-established rule upon the subject is that public officers intrusted with public funds, and

required to give bonds for the faithful performance of their public duties, are not mere bailees of the money, bound only to exercise ordinary care, since their liability is influenced by the policy of the law, which requires greater strictness, and also by the conditions of their official bonds. In accordance with the great weight of authority this court held in *Goss v. Board of Com'rs*, 4 Colo. 468, that "the bond of the county treasurer is the measure of his duties as treasurer, and is the contract covering his duties, and all those in his employ, performing the duties of the office." In the case of *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119, it was contended that the state treasurer is a bailee or trustee of the public funds, and, as such, subject only to the common-law liabilities of trustees. But the court refused to take this view of the law, and pointed out a difference in several particulars wherein the obligation of the treasurer differs from that of an ordinary trustee or bailee. In the *Walsen* Case it was held that the state treasurer, under our constitution, was absolutely liable for all the public moneys received by him.

Appellants rely very strongly upon two cases in 19 Colo.,—*McClure v. Board of Com'rs*, 19 Colo. 122, 34 Pac. 763, and *Wilson v. People*, 19 Colo. 190, 34 Pac. 944. In the *McClure* Case the attempt was made to trace public moneys collected by the treasurer into the purchase of certain property for the purpose of having a trust declared and enforced against such property. In determining this question, it became necessary to investigate the relationship that a county treasurer holds to the money which comes into his hands by virtue of his office, and the court said: "We think that under the provisions of our statute relating to a county treasurer the money collected and received by him belongs to the county, and that he holds a fiduciary relationship thereto that constitutes him a bailee with express and extraordinary liability." As this declaration is immediately followed by the statutory requirements of his bond, it would appear that the enlarged liability imposed was based to some extent, at least, upon the conditions of his bond. The opinion is a direct authority for the doctrine that the relationship of the treasurer to the public money collected by him in his official capacity is not that of a bailee at the common law. The question presented in the case of *Wilson v. People*, supra, was as to the liability of the clerk of the district court for moneys of private litigants, which had been deposited with him to abide the result of the suit. No question was then before the court with reference to the liability of a public officer for public moneys received by him. The case does not refer to the case of *Goss v. Board of Com'rs*, 4 Colo. 468, and it certainly was not the intention of the court, as then constituted, to overrule the former decision. The conclusion reached in the *Wilson* Case was, without doubt, correct, but in the argument certain expressions were used with

reference to the bonds of public officers, which should have been confined strictly to the facts of the case then under consideration. The bond which is the basis of this suit is in the language of the statute. The conditions are the same as those under consideration in the *Goss* Case, supra, viz.: "That if the said Wilson P. Gartley and his deputies and all persons employed in his office shall faithfully and promptly perform the duties of said office, and if said Wilson P. Gartley and his deputies shall pay, according to law, all moneys which shall come into his hands as treasurer, * * * and shall deliver over to his successor * * * all moneys * * * belonging to his office, the above obligation to be void." *Mills' Ann. St. § 886*. The bond is not essentially different from that passed upon by the supreme court of the United States in the case of *U. S. v. Prescott*, 3 How. 578. The statute fixing the form of the bond was enacted in territorial times, when the decisions of the supreme court of the United States upon statutory construction were controlling in this jurisdiction, and by a familiar rule, in adopting the statute, we did so with the construction theretofore placed upon it. It is urged that the force of the decision in the *Prescott* Case was practically destroyed by a subsequent act of congress, and that we should, therefore, favor a less strict rule of accountability; in other words, we are asked to construe something into the statute which is not there. As in that case an act of congress was found necessary to give relief, so here relief must come from the legislature and not from the courts. The strictness of our law with reference to the liability of public officers for public funds is apparent from the constitution and statutes of this state. By section 12 of article 10 of our constitution, it is provided that "the general assembly may provide by law further regulations for the safe-keeping and management of the public funds in the hands of the treasurer, but, notwithstanding any such regulation, the treasurer and his sureties shall in all cases be held responsible therefor." It is true the last clause of the sentence makes absolute the liability of the state treasurer for all public funds received by him by virtue of his office, but, taking the whole sentence together, we are of the opinion that it was not intended to create a new liability, but to avoid the possibility of regulation on the part of the general assembly from being construed as creating an exception to the general rule of absolute liability.

In addition to the indication of the policy of the law to be gathered from the condition of the bond of a county treasurer, which we have sufficiently considered, attention is called to the following: "Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments, as provided in this act." *Mills' Ann. St. § 3778*. Aside from the instances therein specially excepted, this makes

the liability of the county to the state absolute, so that in this case, should the treasurer's special defense be held good, the county would not, for that reason, be discharged from its obligation to pay over the amount of tax collected for state purposes, although it would have no recourse upon the county treasurer for reimbursement,—a construction that we think should not be indulged. Our conclusion is that, in an action on the official bond of a county treasurer for public moneys collected by him, the fact that the moneys were deposited in a solvent banking institution, which thereafter fails, causing the loss of the funds, constitutes no defense. Whether a county treasurer would be excused from rendering the money if prevented from doing so by the act of God or the public enemy, without any fault or negligence on the part of the treasurer, is not presented in this case, and therefore not decided. Notwithstanding our conclusion is against the appellants upon what we have considered the main controversy in the case as now presented, the judgment of the district court must be reversed for error in sustaining plaintiff's motion for judgment upon the pleadings in view of the specific denials contained in other defenses of the answer. *People v. Lathrop*, 3 Colo. 429; *Pike v. Sutton*, 21 Colo. 84, 39 Pac. 1084. For this error the judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed and remanded.

GODDARD, J. (dissenting). I cannot concur with my associates in the conclusion that the admitted facts set out in the separate and special answer do not absolve the defendants from liability for the loss of the money in controversy. The importance of the question involved justifies a brief statement of my reasons for dissent. This question, concisely stated, is whether, under our statutes, a county treasurer and his sureties are liable for public funds deposited by the treasurer in a reputable and apparently solvent bank, which are lost by an unexpected and sudden failure of such bank, when such deposit was made by him in good faith, and after due inquiry touching the solvency of the bank; and where he was guilty of no negligence or fault in allowing it to remain there, coupled with the fact that neither the state nor county authorities provided such treasurer with any safe place or means for the custody of such funds. Upon the question of the liability of a county treasurer and the sureties on his official bond for the loss of public money coming into his hands, the courts of this country entertain different and irreconcilable views. Some hold—and among them those cited by the Chief Justice—that the liability is absolute, and that it constitutes no defense to an action for its recovery that the money was taken by irresistible force, or the loss occurred through unavoidable accident; basing their conclusion either

upon the ground that the officer holds the relation of debtor to the county for the money received by him, or upon the theory that an absolute obligation to pay the money when called upon is imposed, when the statute, or the condition of the bond, provides for such payment without modification or condition. This doctrine was first announced in *U. S. v. Prescott*, 3 How. 578, decided in 1845, and was based largely on considerations of public policy and the particular provisions of the federal statute, and was accepted as the correct rule as to the liability of receivers of public money in subsequent cases in that court until very much modified, if not in effect overruled, by the decision in *U. S. v. Thomas*, 15 Wall. 337. While it is true that the court did not, in the latter decision, expressly overrule the doctrine of absolute liability announced in the former cases, such, I think, was the logical result of its reasoning and conclusion. This was the view of Mr. Justice Miller, as shown by the language he uses in his dissenting opinion. He says: "I understand the opinion in the present case to be directed to two points: First, mainly to undermining the ground on which the prior decisions on this subject rest. * * * As regards the first point, if the opinion or judgment of the court were based upon a frank overruling of those cases, and an abandonment of the doctrines on which they rest, I should acquiesce in that. * * * But if the opinion of the court is to be construed as permitting those cases to stand as law, while the principles on which alone they can be defended are weakened by its argument, I must express my dissent from that view of the case." And in the same opinion, in speaking of *U. S. v. Prescott* and the other federal decisions wherein so much had been predicated upon the ground of public policy, he said: "Nor do I believe that prior to these decisions there was any principle of public policy recognized by the courts or imposed by the law which made a depository of public money liable for it when it had been lost or destroyed without any fault or negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping." And, no doubt influenced by the manifest injustice of the harsh and oppressive doctrine of those cases, congress, on May 9, 1866, enacted a statute (14 Stat. 44) conferring upon the court of claims jurisdiction to hear and determine the claim of any paymaster or other disbursing officer for relief from responsibility on account of loss of government funds occurring without his fault or negligence, thus practically destroying the effect of those cases in so far as they deny to such officer the right to interpose such defense.

The other line of decisions is to the effect that a treasurer is a bailee of the money that comes into his hands by virtue of his office; and, while he is bound to exercise a very high degree of care in the protection and

preservation of such funds, and to strictly and faithfully perform the duties prescribed by the statute, he and his sureties are not responsible for its loss without fault on his part. This rule is approved in *Inhabitants of Cumberland v. Pennell*, 69 Me. 357; *York Co. v. Watson*, 15 S. C. 1; *State v. Houston*, 78 Ala. 576; *Supervisors v. Dorr*, 25 Wend. 438, affirmed 7 Hill, 583, by an equally divided court, Chancellor Walworth voting in the affirmative; and it is also recognized by implication in *State v. Lanier*, 31 La. Ann. 423. In *Walker v. Association*, 18 Adol. & E. (N. S.) 276, an action on the bond of a treasurer of a benefit association, the same rule of liability obtained. Upon the doctrine that a public officer who receives money by virtue of his office holds the relation of bailee, and not of debtor, former decisions of this court are in accord with the latter cases. *McClure v. Board of Com'rs*, 19 Colo. 122, 34 Pac. 763; *Wilson v. People*, 19 Colo. 199, 34 Pac. 944. These cases also recognize the doctrine that the duties and obligations of such officer in respect to the money so received are measured by the law of bailment, unless affected by constitutional or legislative provisions; and that his official bond does not extend such obligations, but its office is to secure the faithful and prompt performance of his legal duties. This rule is also expressly approved in *U. S. v. Thomas*, supra. Mr. Justice Bradley, who delivered the opinion of the court, said: "So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges in the great generality of the remarks made in some of the cases referred to with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. * * * The condition of an official bond is collateral to the obligation or penalty. It is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes." And Mr. Justice Miller, in the opinion already quoted from, said: "When the case of *U. S. v. Dashiell* [4 Wall.

182], came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation." To the same effect are *Potter v. Titcomb*, 7 Me. 302; *Bank v. Hallowell*, 52 Me. 545.

Therefore, in my opinion, the solution of the question before us depends upon whether the provisions of the statute of this state prescribing and regulating the duties of county treasurers, impose an absolute duty to pay over the public moneys received by them. These provisions are as follows:

Section 890 (Mills' Ann. St.): "It shall be the duty of the county treasurer to receive all moneys belonging to the county, from whatsoever source they may be derived, and all other moneys which are by law directed to be paid to him. All moneys received by him for the use of the county shall be paid out by him only on the orders of the board of commissioners, according to law, except where special provision for the payment thereof is or shall be otherwise made by law."

Section 891: "The said treasurer shall keep a just and true account of the receipts and expenditure of all moneys which shall come into his hands by virtue of his office, in a book or books to be kept by him for that purpose, which books shall be open at all times for the inspection of the board of county commissioners, or any member thereof, and to all county and state officers; and at the meeting in July and January of the said board of commissioners, or at such other time as they may direct, he shall settle with them his account as treasurer, and for that purpose he shall exhibit to them all his books and accounts, and all vouchers relating to the same, to be audited and allowed."

Section 893 makes it "the duty of the district court of each county in this state, at each term thereof at which a grand jury is summoned and impaneled, to appoint a committee of such grand jury, or other reputable persons, which committee shall consist of not less than three nor more than five, to investigate the official accounts and affairs of the treasury of such county."

Section 894: "It shall be the duty of such committee to carefully and fully investigate the official accounts of such treasurer and ascertain the condition of the treasurer's accounts, and of each fund thereof, and to ascertain and report the amount of money due each and every fund and account in the hands of such county treasurer, * * * and the exact amount of each of such funds, where the same are or have been kept, and whether,

if not kept in the office occupied by the county treasurer, they have been deposited in any bank or banks, or with any person or persons; to inquire, ascertain and report what interest, if any, has been paid or agreed to be paid, directly or indirectly, for said funds by said bank or banks, or other person or persons with whom said funds may be found to have been left or deposited."

By the act of 1889 (Mills' Ann. St. §§ 1248-1251) it is made a felony for a county treasurer to convert to his own use in any way the public moneys in his hands, or to loan the same, with or without interest.

Section 1250 provides that: "if any such officer * * * shall make any contract or agreement with any person or persons, bodies or body corporate, or other association, by which such officer * * * is to derive any benefit or advantage, directly or indirectly, from the deposit with such person * * * of any moneys or valuable securities held by such officer * * * by virtue of his office, * * * such contract shall, as to such officer, * * * be utterly null and void; but the person or persons, body or bodies corporate, or other association, shall be liable to the county * * * in an action for the recovery of all such benefits or advantage as would, by the terms of such contracts or agreement, have accrued to such officer * * *; and payment to the officer * * * shall not protect the person or persons, body or bodies corporate, or other association, against an action of recovery brought by the county * * * whose funds are so deposited."

The condition of the bond he is required to give before entering upon the duties of his office, as provided by section 886, is, in legal effect, a guaranty on the part of the sureties that the treasurer will faithfully perform the duties thus fixed and prescribed by the statute. It will be seen that these provisions merely prescribe the duties of the county treasurer in collecting and disbursing the public revenues, and do not, like section 12, art. 10, of the constitution, which prescribes the responsibility of the state treasurer, "in direct terms or by their tenor" subject him to an absolute liability as an insurer of the money so collected, or impose upon him a responsibility in regard thereto other than that which the rules governing the relation of bailee sanction and approve. In *U. S. v. Thomas*, supra, Mr. Justice Bradley, in discussing the general rule of official obligation as imposed by law, said: "The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee, and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change the common-law rule of responsibility. * * * Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to

do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the nonperformance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law." My conclusion is that, while the provisions of our statute in relation to a county treasurer do not constitute him an insurer of the money that comes into his hands, yet, when construed in connection with the nature of the trust imposed upon him, affecting, as it does, the welfare of the public, their intention manifestly is to exact the utmost fidelity and the exercise of such a degree of care on his part in the safe-keeping and preservation of the same as is commensurate with the importance of the duties imposed; that is, the highest care known to the law, such as a very prudent man exercises in the management of his most important affairs. *State v. Houston*, supra; *McClure v. Board of Com'rs*, supra. I think this view is consonant not only with the principle of justice and fairness that is recognized as the controlling consideration in all business dealings between individuals, but will best conserve the interests of the public, and better insure the faithful performance of their official duties on the part of its fiscal agents. It is a matter of general knowledge that prudent and cautious business men not only do, but in the transaction of their financial affairs are obliged to, resort to the banks of the country as the only depositaries with whom they can place their money with the assurance that, unless some unforeseen contingency happens, it will be safe and available when needed. And why should not a practice thus universally approved and adopted by business men in the management of their private affairs, and shown by experience to be the safest and surest way of protecting large sums of money from loss, be followed in the handling and administration of the public finances? The right of a county treasurer to deposit the public money in a bank for safe-keeping is tacitly recognized by our statutes, and prudence and caution dictate that he should do so when, as disclosed in this case, the county fails to furnish him a safe place in which to keep it. It would be gross negligence amounting to recklessness to keep it on his person, or in his office, unless supplied with adequate and safe means for its preservation. For a loss occurring under such conditions he would be clearly liable. And if, under such circumstances, he exercises the strictest care in selecting a bank of unquestioned solvency in which to deposit the public money, and being guilty of no fault in leaving it there, and the money is lost through the unexpected failure

of the depositary, it seems to me unfair, unwise, and unjust to hold him and his sureties liable for the money so lost. As stated by the Chief Justice in the majority opinion, out of the four cases in which this defense has been passed on, in but one—*York Co. v. Watson*, *supra*—has it been upheld. Yet it is also true that in neither of the other three was the decision by a full bench, and in two there was an express dissent. A careful reading of these cases convinces me that the weight of authority is not always determined by the numerical preponderance of decisions. Attention is also directed to section 3778, *Mills' Ann. St.*, as having some bearing upon the question. I cannot see wherein the treasurer's liability is affected by its provisions. If it be true that the county cannot legally collect from the treasurer, or his sureties, moneys lost without his negligence, it follows that to that extent they are "unavailable," within the provision of the statute, and the county is expressly exempted from responsibility therefor. That the defendant Gartley did exercise that high degree of care and caution exacted of him as a bailee of the public money in the matter of the deposit in question is shown by the averments in the special answer. The motion for judgment on the pleadings admits the truth of those averments. In my opinion, they constitute a complete defense to the action. I think, therefore, the judgment ought to be reversed upon both grounds.

PHILLIPS et al. v. CORBIN et al.

(Supreme Court of Colorado. May 17, 1897.)

APPEAL—SPECIAL PROCEEDINGS.

Mills' Ann. St. § 1085, providing that appeals may be taken "from all final judgments and decrees of the county court," does not authorize an appeal from the county court from the determination of annexation proceedings, as empowered by a special statutory act, which makes no provision for such appeal.

Error to court of appeals.

Action by Llewellyn E. Corbin and others against John J. Phillips and others, contesting the validity of an election. From a judgment for plaintiffs, defendants bring error. Reversed.

This is a proceeding under the act "to provide for contiguous towns and cities to become annexed." *Sess. Laws 1893*, p. 451. On October 1, 1894, a petition signed by John J. Phillips and 37 others, who were electors and taxpayers of the town of Colfax, was filed in the county court of Arapahoe county, asking for an order requiring the board of trustees of the town of Colfax to call an election to determine the question whether such town should be dissolved, and the territory included therein be annexed to the city of Denver. The county court made the order, and, in pursuance thereof, the board passed an ordinance calling an election. Notice was given in conformity with the requirements of

the statute, and the election held on November 6, 1894. The result reported to the court showed 77 votes for annexation, and 64 against. The defendants in error contested the validity of the election, and, upon trial in the county court, the following decree was rendered: "The above-entitled matter coming on to be heard this day by the court, upon the report of John L. King, mayor, attested by Maggie Ramsden, town clerk and recorder for the town of Colfax, Colorado, and filed herein, the same being a report of certain proceedings had in pursuance of the order of this court made on the 1st day of October, A. D. 1894, in said matter; and it appearing from said report that, in pursuance of said order, a special election was called and held in the town of Colfax aforesaid on the 6th day of November, A. D. 1894, for the purpose of submitting and determining the question whether the town of Colfax aforesaid should be dissolved, and the territory included therein annexed to the city of Denver aforesaid, and that at said election seventy-seven ballots were cast 'For Annexation,' and sixty-four ballots were cast 'Against Annexation,' and that the returns of said election were duly made and canvassed as required by law with the above result; and it further appearing from the certificate of the town clerk and recorder of the town of Colfax aforesaid that due notice of said election was given, as by law provided; and that the court having heard and considered the evidence now submitted concerning the regularity or irregularity of said proceedings, and being now sufficiently advised in the premises: It is therefore ordered, adjudged, and decreed that all proceedings in pursuance of said order of this court were and are regular, and said proceedings and report should be, and the same are hereby, approved; and that, by virtue of said proceedings and of this order and decree, the town of Colfax aforesaid is dissolved, and the territory included within the boundaries of the town of Colfax aforesaid is annexed to and a part of the city of Denver." From this decree contestants prosecuted an appeal to the district court, and upon a trial *de novo* in that court the following judgment was rendered: "This cause coming on to be heard this day by the court upon the report of the mayor and clerk of the town of Colfax, showing the result of the special election held in the town of Colfax on November 6, 1894, upon the question of annexation of the said town to the city of Denver, and upon the evidence and upon the protest heretofore made by the protestants therein, and the several amendments thereto, and the several answers of the original petitioners and of the town of Colfax aforesaid, and upon the evidence heretofore produced in open court, and upon the arguments of counsel, and the court being now sufficiently advised in the premises, it is ordered, adjudged, and decreed that the proceedings in the matter of said election were and are

irregular, and that said report should be, and the same is hereby, disapproved by the court." To this judgment the petitioners prosecuted a writ of error from the court of appeals, which court affirmed the judgment of the district court. 46 Pac. 224. To review this latter judgment, the petitioners prosecute this writ of error.

F. A. Williams and George Q. Richmond, for plaintiffs in error. George N. Hurd, for defendants in error.

GODDARD, J. (after stating the facts). The first and principal ground of error relied on for reversal of the judgment of the district court in the court of appeals, and also in this court, is that the judgment is void, because that court was without jurisdiction to entertain the appeal from the county court. In our opinion, this objection presents the controlling question in the case. Its solution depends upon the effect to be given to section 5, c. 22, Gen. Laws 1877, appearing as section 499, Gen. St. 1883, as amended in section 1, p. 158, Sess. Laws 1885 (section 1085, Mills' Ann. St.), which reads as follows: "Appeals may be taken to the district court of the same county, from all final judgments and decrees of the county court, except judgments by confession, by any person aggrieved by any such final judgment, or decree: provided, that no appeal shall be taken from a judgment by default, or of non suit," etc. It is contended by counsel for defendants in error, and this view was adopted by the court of appeals, that this provision confers the right of appeal from a judgment of the county court, rendered in proceedings of this character, while counsel for plaintiffs in error insist that the appeals provided for thereby are from judgments rendered by the county court in civil actions. To ascertain the true meaning and intent of this provision, it is necessary to construe it in connection with other provisions in the act of 1877, wherein it originally appears. By section 1, concurrent jurisdiction with the district court was conferred upon county courts "in all civil actions, suits, and proceedings whatsoever, where the debt, damage, or claim, or the value of the property involved, shall not exceed \$2,000." By section 14 (section 1097, Mills' Ann. St.) express provision is made for taking appeals to the district court from judgments and orders entered in probate proceedings. It is evident, therefore, that, by the enactment of this section, the legislature had not intended to provide, by section 5, for appeals in such proceedings, but that it had reference only to appeals from judgments which were rendered by the county court in the exercise of the jurisdiction conferred by section 1; that is, a "civil action, suit, or proceeding." In *Lusk v. Kershow*, 17 Colo. 481, 30 Pac. 62, this court had these two sections under consideration, and, in speaking of section 5 as amended in 1885, said: "An examination of the act of 1885 shows con-

clusively that it relates exclusively to appeals from judgments of the county court, rendered in the exercise of its ordinary civil jurisdiction. We are therefore of the opinion that at the time this appeal was taken, as at present, two methods of taking an appeal, at least, were provided for by our statutes. One relating to and fixing the procedure in appeals in ordinary civil cases; the other, prescribing the manner of perfecting appeals from judgments and orders entered in probate proceedings." By section 8 of the annexation act of 1893, original jurisdiction is conferred upon the county court to determine the regularity of the annexation proceedings. After providing for the filing of a report of such proceedings with the clerk of the county court, it enacts: "The court shall examine the report, and hear any evidence that may be offered concerning the regularity or irregularity of the proceedings, and, if satisfied that the proceedings are regular, shall approve the report. From and after the approval of the same, such town or city previously existing under general laws shall be dissolved, and the territory then included within the boundaries thereof shall thereby be and become annexed to and part of the city existing under special charter." While the county court is thus designated as the tribunal to hear any contest that may arise over the regularity of the proceedings, and its determination constitutes a final judgment that may be reviewed by this court, as held in *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092, it does not follow from the doctrine of that case that a trial de novo may be had in the district court upon appeal from such judgment. As was said in that case: "The proceeding which the statute requires shall be instituted, carried on, and consummated as the means of dissolving one municipality, and annexing the same to another, is unquestionably a special statutory proceeding, as distinguished from an ordinary action at law or suit in equity." No appeal from such judgment is provided for in the act itself, and there is no constitutional right to an appeal from the county court to the district court. Such right exists only when the legislature has expressly, or by clear implication, declared in its favor. *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1055. Being, therefore, a special proceeding, it does not fall, as we have seen, within the class of cases over which appellate jurisdiction is conferred upon the district court by the act of 1885. We think, therefore, that the court of appeals erred in holding that the district court had jurisdiction to render the judgment complained of. As this view is decisive of the case upon this review, we are precluded from noticing the other questions presented. The judgment of the court of appeals is reversed, and the cause remanded, with direction to reverse the judgment of the district court, and direct a dismissal of the appeal. Reversed and remanded.

PADDACK v. STALEY et al.

(Supreme Court of Colorado. June 1, 1897.)

SUPREME COURT—JURISDICTION—SUIT INVOLVING
FREEHOLD—STATUTORY PRIVILEGE
AND FRANCHISE.

1. Even if Mills' Ann. St. § 2548, gives a general judgment creditor a preference of redemption from judgment sale, over persons whose judgments are statutory and specially decreed liens on the debtor's property, it is not therefore obnoxious to Bill of Rights, art. 2, §§ 11, 25, as conferring a special statutory privilege and franchise.

2. An action to determine priority of right of judgment creditors to redeem land from sale on judgment does not relate to or involve a freehold, so as to give the supreme court jurisdiction of an appeal from judgment therein.

Appeal from district court, Summit county.

Action by Joseph Staley and others against Simon D. Paddack to determine rights of parties to redeem from judgment sale. Plaintiffs had judgment, and defendant appealed to the court of appeals. Plaintiffs had case transferred to supreme court, and defendant moves to remand to court of appeals. Remanded.

Teller, Orahood & Morgan and C. M. Kendall, for appellant. C. A. Wilkin, for appellees.

GODDARD, J. This case was transferred from the court of appeals on motion of appellees. Appellant now moves to remand, upon the ground that this court is without jurisdiction to entertain the appeal. The action was originally instituted in the district court of Summit county to determine the priority of right as between junior judgment creditors to redeem certain real property from sale under a prior judgment. The facts, in brief, are as follows: The Oro Mining & Milling Company was the owner in fee of certain mining property situate in Summit county, Colo. In 1892 one Christ Kaiser recovered a judgment against the company for the sum of \$2,044.29, which was affirmed by the court of appeals in 1894 (35 Pac. 677). On April 4, 1894, he procured the property aforesaid to be sold by the sheriff of said county in satisfaction of said judgment, and, as judgment creditor, bid off the property at such sale for the amount of his judgment, interest, and costs, amounting then, in the aggregate, to \$3,108.77, and received the sheriff's certificate of sale of that date, recorded the same in the office of the county clerk and recorder of said county. Pending that appeal, and during 1893, the company became indebted to appellees for work and labor performed upon said mining property; to appellee Staley and sundry others in the sum of \$3,273.35. To secure this amount, he, for himself and his assignors, filed a statement of lien, and on July 17, 1893, commenced his action in the district court of Summit county to foreclose the same, and on December 8, 1893, obtained a miner's lien

judgment against said property for the sum of \$3,553.60. In a suit in attachment, appellee Morrison, on January 16, 1894, obtained a judgment in the district court of Summit county against said company for \$4,328.45, which was decreed a lien upon said property as of the date of July 18, 1893. Appellee Stouffer recovered two judgments against the company in the district court of Arapahoe county, aggregating \$10,076.53, on April 16, 1894, transcripts of which judgments were filed in the office of the county clerk of Summit county May 3, 1894. Paddack, the appellant, recovered a judgment against the company in the district court of Arapahoe county on July 7, 1894, for the sum of \$9,279.61, a transcript of which judgment was also filed on September 29, 1894. On October 5th, the statutory period for redemption by the company from the Kaiser judgment sale having expired, and no redemption having been made by the company, the appellant, Paddack, paid the amount of that judgment to the sheriff of Summit county, and caused an execution to be issued upon his judgment, and the property in question to be advertised for sale thereunder. On the 24th day of October, 1894, the appellee Staley sued out a writ of execution upon his judgment, placed the same in the hands of the sheriff, and tendered to said sheriff the amount of the Kaiser judgment, together with interest. The sheriff refusing to accept the tender, or to execute the writ, Staley commenced action to enjoin the sale under the Paddack execution, and to procure an adjudication as to the rights of the respective parties to redeem said property from the sale under the Kaiser judgment. Morrison and Stouffer having instituted like actions, the same were consolidated with the action instituted by Staley, and the rights of the parties heard and determined in the consolidated action. This action was tried to the court, and judgment rendered in favor of plaintiffs, and decreed to Staley the right to refund to Paddack the amount paid by him upon redemption from the sale under the Kaiser judgment, and thereupon to become vested, in lieu of Paddack, with the benefit of that redemption, and ordered the property sold, and the proceeds applied in satisfaction of the respective judgments, in the order of their date. From this judgment Paddack prosecuted an appeal to the court of appeals, which finally reached this court, as above stated.

In resistance to the motion to remand, counsel for appellees insist that this court has jurisdiction to review the judgment, because the action not only relates to a freehold, but also to a franchise, and involves a construction of sections 11 and 25 of article 2 of the bill of rights. His argument in support of the last two grounds, as we understand it, is that Paddack claims that the judgment sale statute (section 2548, Mills' Ann. St.) accords to him, as a judgment creditor of the

common judgment debtor, a preference of redemption from the Kaiser judgment, as against the appellees, whose judgments are statutory and specially decreed liens upon the judgment debtor's property, and the right to have full satisfaction of his judgment, to the exclusion of them, because of his having made the earliest redemption; and that, if such be the effect and meaning of the statute, then it is obnoxious to those constitutional provisions, because it confers a special statutory privilege and franchise. We are unable to perceive the force of this reasoning. Without in any way intending to indicate whether we think the statute is or is not susceptible of that construction, we cannot see that, if it were, it would be in derogation of these constitutional provisions any more than an act that gave a preference to an attachment, or judgment lien first acquired, over those subsequently attaching. The only ground possibly debatable upon which our jurisdiction can be predicated is whether the action relates to or involves a freehold; and we think, under the doctrine of our former decisions, that this claim is not tenable. *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445; *Harvey v. Insurance Co.*, 18 Colo. 354, 32 Pac. 935; *McCandless v. Green*, 20 Colo. 519, 39 Pac. 64; *Scheeren v. Strammann*, 24 Colo. 111, 48 Pac. 966. In the last case the right to an appeal to this court in an action brought to set aside a conveyance of real property, upon the ground that it was fraudulent as to creditors, was denied, following several Illinois decisions based upon a similar statute to ours. In *McClellan v. Hurd*, supra, this language is used: "In the case of *Railroad v. Watson*, 105 Ill. 217, the action was for the purpose of subjecting certain real estate to the payment of judgments held by the plaintiffs, and the supreme court of that state held that the case did not involve a freehold so as to give that court jurisdiction by appeal. This is because the ultimate object of such suits is to obtain satisfaction of the claim, and the suit may be defeated at any time by the payment of the same, the real estate at most being only collaterally or incidentally involved. In all such cases the courts have uniformly held that a freehold is not involved in the sense that the word is used in the statute." The case at bar clearly falls within the class of cases referred to. The object of the suit and the effect of the judgment are to give to appellees the right to have their claims satisfied out of the common debtors' property, in preference to appellant's judgment; and hence the freehold may or may not be ultimately affected. Certainly the title to the property is not the direct object of the action, and is only incidentally or collaterally involved. In these circumstances, this court is without jurisdiction to entertain this appeal, and the motion to remand the cause to the court of appeals must be sustained. Remanded.

(24 Colo. 199)

POSEY v. DENVER NAT. BANK.

(Supreme Court of Colorado. June 1, 1897.)

AGREEMENT TO PAY DRAFT—LIABILITY OF DRAWER.

1. One who writes to another, in reply to a request for funds to enable him to leave the city where he was when he made the request, "If you are still there, and need the money yet, you can make draft on me for \$500, and I will pay it," without indicating the city to which the letter is addressed, is liable to a bank which, relying on the letter, accepts the addressee's draft, though drawn in another city.

2. A delay of 17 days after the date of the letter before drawing the draft was not so unreasonable as to put the bank on inquiry.

Error to court of appeals.

Action by the Denver National Bank, of Denver, Colo., against Oliver P. Posey, to recover on a draft. A judgment for plaintiff was affirmed by the court of appeals (42 Pac. 684), and defendant appeals. Affirmed.

This action was originally instituted against appellant and one L. A. Dunham, to recover the sum of \$500, with interest and protest fees upon a draft drawn by Dunham upon appellant, Posey, which draft was cashed by appellee, the Denver National Bank. No service was had upon Dunham, and he did not appear. On October 27, 1892, Dunham, the drawer, was in Chicago, and on that date wrote a letter to appellant, Posey, from that city, in which he represented that he was sorely in need of money to pay certain expenses, and that it was important for him to go at once to Denver, but that he could not leave Chicago until he could procure funds with which to pay his pressing debts, etc. In this letter Dunham requested authority to draw upon Posey for money to pay the above-mentioned indebtedness. In answer, appellant wrote the following letter: "Whitewater, Wis., Oct. 31, 1892. Dear Dunham: On my return from the lake to-day, where I have been shooting, I found your letter of the 27th. You have, no doubt, gone before this time; hence I write you, instead of wiring, as requested. Of course, I could raise a small amount of money on short notice, but am using my banks for all they will stand; but if you are still there, and need the money yet, you can make draft on me for \$500, and I will pay it. I am very sorry, indeed, that you have been placed in such an embarrassing position, and ordinarily I could help you out, but to-day am really hard up myself. I am now struggling to raise \$50,000 for the smelter, that has come on me unexpectedly. Yours, truly, O. P. Posey." On the 17th day of November, 1892, Dunham presented this letter, with the following draft, to the Denver National Bank, of Denver, appellee: "\$500. Denver, Colo., Nov. 17, 1892. On demand, pay to the order of Denver Nat'l Bank five hundred dollars, value received, and charge to the account of L. A. Dunham. To O. P. Posey, Whitewater, Wis., Citizens' Nat. Bank." The officers of the bank knew at the time that Dunham was without property or

funds, but the draft was immediately cashed, upon the promise of Posey contained in the letter, as his credit was good. After paying the draft, the bank forwarded it to White-water, Wis., where it was presented to Posey, who refused to honor the same, and it was accordingly protested. On May 24, 1893, this action was brought to collect the amount from Posey. A trial in the county court resulted in a verdict and judgment for plaintiff. Upon appeal to the court of appeals, this judgment was affirmed. 42 Pac. 684. The case having originated in the county court, the jurisdiction of the supreme court to entertain this appeal is unquestioned.

Charles H. Toll, William R. Barbour, and C. M. Garwood, for plaintiff in error. S. D. Walling, for defendant in error.

HAYT, C. J. (after stating the facts). The principle of law is well established by which one is held who accepts a draft, and thereby induces another to pay the same. It is founded upon sound morality, and is supported by all the authorities. And where a third party advances money upon authority given to draw generally, or for a definite sum, the promise to pay, whether expressed in positive terms, or implied from the authority, is held to move directly to the third party who has been induced to part with his money upon the faith of such promise. The letter by which the bank was induced to pay Dunham's draft contains a conditional promise to pay, the only question in dispute being upon the effect of the conditions upon which such payment was made to depend. The conditions are expressed in the following language: "If you are still there, and need the money yet, you can make draft on me for \$500, and I will pay it." Counsel say that Posey only intended to pay a draft drawn in Chicago. It is a sufficient answer to this contention to say that there is nothing upon the face of the letter which indicates that the draft was only to be drawn in Chicago. The letter was not addressed to Dunham in Chicago, and there was nothing in the language to indicate to appellee that the draft was to be drawn in Chicago, and not in Denver. If Posey intended to limit the promise to pay to a draft drawn in Chicago, he should have used some appropriate words to have expressed such limitation. After the bank had paid the draft, it is too late for Posey to escape liability by reason of some secret intent not made known to the payor. It is true that the acceptor of a draft may impose any condition upon his liability, whether such condition be founded upon good reason or mere caprice, but it is equally true that, to escape liability, the condition must be clearly expressed. After a third party has parted with his money, upon the faith of a writing, and a condition is relied upon to relieve from liability, such condition must be something more than a mere inference from the terms of the

instrument upon which the liability of the acceptor depends. All such writings are regarded in law as commercial instruments, to be liberally interpreted for the protection of those who have given faith or credit to them. *Lawrence v. McCalmont*, 2 How. 426; *Bank v. Recknagel*, 109 N. Y. 482, 17 N. E. 217. If Posey wished to limit his promise to pay to a draft drawn in the city of Chicago, he should have expressed such limitation in terms that could not have been misunderstood. Not having done so, we must hold, with the court of appeals, that the bank was not responsible for the unexpressed purpose or hidden intention of Posey.

The second claim relied upon by counsel to defeat a recovery is based upon the word "yet," as it appears in the following connection in the letter, "If you * * * need the money yet;" the contention of counsel being that the letter did not authorize the payment of a draft upon the 17th day of November, or 17 days after the date of the letter. We do not think that this contention of counsel should be upheld. Posey's letter to Dunham not only indicates the closest friendship between the parties, but is well calculated to inspire others with confidence in Dunham's integrity. It shows that Posey was willing to assist him to the extent of \$500, if he still needed that sum. The letter does not in terms limit the acceptance of a draft to be drawn within a definite period. The most favorable view that can be taken for Posey is that it should be drawn within a reasonable time, and a delay of 17 days was not unreasonable or sufficient to put the bank upon inquiry. Dunham alone could determine, at the time the draft was made, whether or not he needed the money. This was a matter which it was impossible for the bank to ascertain, other than from the representations of Dunham, and when he presented the draft with the letter, the bank was authorized to infer that he then needed the money.

The two questions considered are the controlling questions in the case. It is unnecessary to elaborate the principles upon which our conclusions are based. They are set forth with great perspicuity in the very able opinion of Judge Thomson, of the court of appeals. See *Posey v. Bank*, 7 Colo. App. 108, 42 Pac. 684. With that opinion we are entirely satisfied, and the judgment of the court of appeals is accordingly affirmed. Affirmed.

WAKEMAN v. NORTON.

(Supreme Court of Colorado. June 1, 1897.)

PLEADINGS — MINES — EVIDENCE OF TITLE AS AGAINST TRESPASSER — RIGHTS TO LODES EXTENDING BEYOND CLAIM — BURDEN OF PROOF — PRESUMPTIONS.

1. The defense that plaintiff is not the real party in interest must be specially pleaded.

2. In an action to recover the value of ore alleged to have been wrongfully taken from plain-

tiff's claim, it appeared that a location certificate of said claim was filed in 1880 by one M.; that plaintiff purchased from one D., and took possession in 1885; that he held the same till he sold the property, in 1894, having done during that period 110 feet of work; and that amended certificates were filed by him in 1890 and 1891. Defendant asserted no title to the claim, but justified his intrusion on his right to follow a vein whose apex was outside the surface boundaries. *Held*, that plaintiff was prima facie entitled to maintain the action, notwithstanding his omission to produce written conveyances from the original locator.

3. The locator of a mining claim is presumed to own all the deposits within his surface lines until one disputing his right to certain deposits therein shows that the deposits so claimed are in a vein whose apex is within the surface lines of a claim belonging to said claimant.

4. The prima facie presumption that a lode whose course and strike are substantially parallel with, and run in the same direction as, the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved.

Appeal from district court, Dolores county.

Action by William B. Norton against Fenno Wakeman to recover the value of ore wrongfully taken from plaintiff's claim. From a judgment for plaintiff, defendant appeals. Reversed.

On February 21, 1893, William B. Norton commenced this action against Fenno Wakeman in the district court of Dolores county. On May 16, 1893, an amended complaint was filed, upon which the cause was tried, wherein it is inter alia averred that from March 1, 1887, until January 4, 1893, the plaintiff was the owner and in the actual occupation and possession of the Zona K lode mining claim, situate in the Pioneer mining district, county of Dolores, state of Colorado, describing the same by metes and bounds; that during that time the defendant wrongfully and secretly broke, extracted, and removed therefrom silver, lead, and gold bearing ores, to the amount and value of \$30,000. The defendant, in his answer, denies each and every allegation of the complaint not thereafter admitted or qualified, and admits that between April 1, 1891, and October 15, 1892, he, as owner in and lessee of his co-owners of the Ethlena lode mining claim, situate in the same mining district, and adjoining the Zona K claim on the west, in following the Ethlena lode on its dip, entered the ground in controversy, and took and removed ore therefrom of the aggregate value of \$2,500, and, as an affirmative defense, in substance avers that there exists a certain lode and vein within the surface boundaries of the Ethlena claim, which extends on its course and strike lengthwise through said claim, in the same general direction as its sidelines; that said lode and vein is in rock in place, and extends downward with a dip and trend to the eastward, and departs so far from a perpendicular in its downward course that it passes through and beyond the eastern sideline of said claim, drawn vertically downward, and into ground within the surface boundaries of the Zona K claim; that he, as

a co-owner in and lessee of the other owners of the Ethlena claim, commenced work on said vein and lode below its apex, and within the surface boundaries of the Ethlena; that, in exploring the same on its dip, he ran drifts, stopes, and levels beyond and to the east of the eastern sideline of the Ethlena, into the ground in controversy; that all of said work was done upon and in said vein; and that no other entrance was made by him upon the Zona K claim, and whatever ore he may have taken was taken in the exercise of his right to follow said vein on its dip. Plaintiff, by his replication, traversed the allegations of the answer. The cause was tried to a jury. Upon the conclusion of plaintiff's evidence in chief, a motion for nonsuit was interposed and overruled. Thereupon evidence was introduced by the defendant on his part, and evidence in rebuttal by the plaintiff. Verdict and judgment rendered in favor of plaintiff for \$3,000 and costs. To reverse this judgment, Wakeman prosecutes this appeal.

John Kinkaid and H. M. Hogg, for appellant. Morrison & De Soto, for appellee.

GODDARD, J. (after stating the facts). The specifications of error are numerous, but the important objections they present may be included in the following questions: First. Was the action rightly prosecuted in the name of the plaintiff? Second. Was the evidence introduced by plaintiff sufficient to show a valid location of the Zona K claim, and prima facie ownership by him of the ground from which the ore was taken? Third. Did the court err in giving and modifying certain instructions defining the law relative to apex rights?

Upon the trial of the cause, the defendant undertook to show that the plaintiff was not the real party in interest, by inquiring of plaintiff, upon cross-examination, if he had not, in parting with his title to the Zona K claim prior to the commencement of suit, transferred to his grantee the right of action for the trespass complained of. We think the objection to this inquiry was properly sustained. Aside from the reason that it was not proper cross-examination, it was clearly inadmissible under the pleadings, such defense not having been pleaded. The defense that a plaintiff is not the real party in interest, to be available, must be specially pleaded. *Pom. Rem. & Rem. Rights*, § 711, and cases cited.

It is urged in support of the second objection that the evidence introduced by plaintiff was insufficient to show a valid location of the Zona K claim, or title thereto in the plaintiff, and that it also failed to show that the vein from which the ore in controversy was taken had its top or apex within the surface boundaries of that claim, but that it did disclose the fact that such apex was not so included. It appears from the evidence that a location certificate of the Zona K claim

was filed in 1880, by one McKenzie. Plaintiff testifies that he purchased the claim from one Dumont, and entered into possession in 1885. At that time he found a notice posted at the point of discovery that the claim was staked, without specifying in what manner; that the discovery disclosed good ore at the outcrop of the Zona K vein; that he was in possession of the claim from the date of his purchase until he sold the same, in 1894; and that he did 110 feet of work on the claim. It further appears that an amended location certificate made by him was recorded on September 15, 1890, and that he also made and filed another amended location certificate on October 2, 1891. The defendant asserts no claim to the Zona K claim itself, but justifies his intrusion within its surface boundaries upon his right to follow on its dip a vein which has its top or apex outside such surface boundaries. Notwithstanding his omission to produce the written conveyances showing the transfer of the title from the original locator to him, we think the evidence sufficiently shows a valid and subsisting location, in the actual and lawful possession of the plaintiff, which, *prima facie* at least, entitles him to maintain the present action. But, assuming that the validity and ownership of the Zona K claim was sufficiently established for this purpose, appellant still contends that the evidence introduced on the part of appellee was wholly insufficient to entitle him to a recovery, since it failed to show that the vein from which the ore in question was taken had its top or apex within the boundaries of that claim, and insists that the burden rests upon appellee to establish the fact that the ore was taken from a vein or lode whose top or apex is within the surface lines of his claim, to entitle him to a recovery therefor. In other words, that, so long as the intruder does not interfere with a vein whose top or apex is within the surface boundaries of plaintiff's claim, he has no right of complaint, regardless of the fact that ore is taken from within his ground, by one who neither has nor claims the lawful right to take the same. With this contention we cannot agree. While it is true that the locator of a mining claim takes it subject to the right of others to follow and take ore from any vein on its dip through his ground the top or apex of which is included within another valid lode location, yet we think he is entitled to the presumption that what is contained within his surface boundaries is his, until the conditions upon which such extralateral right depends are shown to exist, by the one who seeks to avail himself of such right. In *Mining Co. v. Fitzgerald*, 4 Morr. Min. Rep. 380, Fed. Cas. No. 8,158, Judge Hallett thus conclusively states what we believe to be the correct rule in such cases: "Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it

as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and, within his own lines, he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere." To the same effect are *Doe v. Mining Co.*, 54 Fed. 935; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. 540; *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887; *Cheesman v. Shreve*, 16 Morr. Min. Rep. 79, 37 Fed. 36; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U. S. 193, 6 Sup. Ct. 1177; *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267, 20 Pac. 513. In this view the plaintiff's evidence was *prima facie* sufficient to show his ownership of the ore taken from within the ground of the Zona K claim, and it devolved upon the defendant to show his right thereto by a preponderance of evidence. The motion for nonsuit was properly denied.

From this conclusion it follows that, in meeting the burden imposed upon him to show his right to the ore in question by reason of the ownership of a vein or lode the apex of which was included within the surface boundaries of the Ethlena claim, the defendant was entitled to have the jury correctly informed as to the law defining the rights of the owner of such a vein, and prescribing the conditions under which he is entitled to extralateral rights. Appellant claims that the law in this respect was not correctly given; that the court erred in its general instruction No. 6, wherein the jury were informed that "the apex must pass through both lines claimed as end lines. If the apex of the vein does not so pass through both the lines claimed as end lines, such lines can be considered only as side lines, and no location which has not end lines within the intent of the law can give any rights beyond its surface boundaries." And also in modifying instructions Nos. 5 and 6, asked by him, which in substance requested the court to instruct the jury that if they found from the evidence that the owners of the Ethlena lode, or their grantors, had prospected and determined the course and direction of the Ethlena lode, and had found the course and strike of the lode as far as developed to be substantially parallel with, and running in the same direction as, the side lines of said claim, that they were entitled, *prima facie*, to the presumption that such vein continues throughout the length, and passes through the end lines, of said claim. The court added a modification to the effect that such presumption obtained only for the purpose of rights over the surface of the claim, and within the surface boundaries thereof, extending downward vertically, thereby depriving defendant of the benefit of such presumption so far as extralateral rights were

concerned. In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should on its course pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases. It has never been expressly decided by the supreme court of the United States that if a vein enters one end line, and while its course and strike is more in the direction of the side than the end lines, yet at some point crosses a side line, that such vein may or may not be followed on its dip. Nor do we regard that question as involved in this case. Neither the pleadings nor the evidence present that issue. The theory of defendant, as disclosed by the allegations of his answer and proof, is that the apex of the Ethlena lode is entirely within the Ethlena location, and passes through both end lines; while the plaintiff claims, and attempts to show, that if the lode from which the ore was taken has an apex, in the meaning of the statute, it is within territory to the north of the Ethlena claim, and runs parallel with its end lines. It is manifest, therefore, that the question whether a locator of a mining claim has a right to follow a vein on its dip, when its top or apex passes through one end line, and on its strike departs from one of the side lines of his claim, is not presented in this case. The theory of defendant being that the Ethlena vein passes through both end lines, and having predicated his right to follow it into the ground in controversy because of the existence of that fact, he is not in a position to complain because the court gave the law applicable to such a theory. And since, therefore, the facts disclosed by the record do not require it, we are not at liberty to determine whether the extralateral right conferred by the statute is incident to a lode or vein the top or apex of which does not pass through both end lines. But we are of the opinion, however, that, under the testimony, defendant was entitled to have properly submitted to the jury the question whether the Ethlena lode did have an apex within the Ethlena claim, and, if so, whether, in its course, it extended through both end lines. If he and his grantors had prospected and developed the lode sufficiently to ascertain that, so far as developed, its course and strike was substantially parallel with, and ran in the same direction as, the side lines, he was entitled to the prima facie presumption that it continued in the same direction throughout the length of the claim. *Armstrong v. Lower*, 6 Colo. 398, 581. And this presumption obtains where extralateral, as well as surface, rights are involved. We think, therefore, the court erred in modifying the instructions referred to in this respect, and that such error was probably prejudicial to defendant's rights. We deem it unnecessary to notice the other errors assigned. We think, aside

from the objections above considered, that the court correctly announced the law governing the case. For the reasons given, the judgment is reversed, and the cause remanded. Reversed and remanded.

PEOPLE ex rel. JEROME v. REGENTS OF UNIVERSITY OF COLORADO.

(Supreme Court of Colorado. June 1, 1897.)

STATE UNIVERSITY—QUO WARRANTO—PARTIES—REMOVAL FROM UNIVERSITY SEAT.

1. Const. art. 9, § 12, makes the regents of the state university a body corporate. Section 14 confides to them the general supervision of the university and exclusive control of the university funds and appropriations. Mills' Ann. St. § 4595 (Gen. St. § 3449), provides that the university shall include certain designated departments, and such others as the board of regents may determine necessary. Held that, though the board of regents is a public corporation, its various functions of administration, affecting the public, are franchises.

2. The objection to the right of a private person to maintain a proceeding in the nature of quo warranto to exclude the regents of the state university from the exercise of a franchise alleged to be usurped by them cannot be raised on appeal, where defendants made no objection in the district court, but filed an answer, and the court heard the evidence of both parties, and decided the cause on its merits.

3. Such proceeding should be in the control of a private party, subject to the supervisory power of the court, since Mills' Ann. St. § 4610 (Gen. St. § 3464), makes the attorney general the legal adviser of the board of regents, and, though the proceeding in the lower court would be properly instituted by the district attorney (Civ. Code, § 289), the attorney general would be entitled to control the cause (Mills' Ann. St. § 1783; Gen. St. § 1344) whenever it reached the supreme court, and could not properly represent both parties.

4. Under Const. art. 8, § 5, providing that the state university shall be located at Boulder, the board of regents cannot authorize the faculty of a certain department to conduct their lectures at Denver, though providing that appropriations for that department shall not be increased, and that all graduating exercises shall be held, the business office kept, and the first year's instruction of the department be given, at Boulder.

Appeal from district court, Arapahoe county.

Proceeding by the people in the nature of quo warranto, on the relation of Frank Jerome, against the regents of the university of Colorado. From a judgment in favor of defendant, relator appeals. Reversed.

A. E. Pattison, Oscar Reuter, and L. W. Hoyt, for appellant. B. L. Carr, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., George H. Thorne, Asst. Atty. Gen., W. L. Murphree, Moses Hallett, Hugh Butler, and W. H. Bryant, for appellee.

CAMPBELL, J. This is a proceeding in the nature of quo warranto, under section 289 of the Civil Code of 1887, and is prosecuted in the name of the people of the state of Colorado, on the relation of Frank Jerome, a private citizen of the state, and a resident freeholder and taxpayer of Arapahoe county. Its object is to exclude the defendant corporation (the regents of the university of Colorado) from the

exercise of a franchise alleged to be unlawfully usurped by it. The material facts are not in controversy. By section 5 of article 8 of our constitution the state university is located at Boulder, and under the decision of this court (*In re State Institutions*, 9 Colo. 626, 21 Pac. 472), its location cannot be changed except by constitutional amendment. Under section 12 of article 9 the regents of the university are constituted a body corporate, to be known by the name of the "Regents of the University of Colorado." To this corporation section 14 of the same article confides the general supervision of the university, and exclusive control of the university funds and appropriations. Chapter 128 of Mills' Annotated Statutes (Gen. St. 1883, c. 112) is but an enactment in these particulars of the constitutional provisions, and, of course, adds nothing thereto. By section 4595, Mills' Ann. St. (Gen. St. § 3449), the university shall include certain designated departments, and such other departments as the board of regents may determine; but the board is not required to establish these departments (except the normal and preparatory) until such time as, in their judgment, the wants and necessities of the people require it. Pursuant to this authority, the regents, several years prior to 1892, established at Boulder a medical department of the university, consisting of a three-years course with a full and complete system of instruction; but, as they claim, owing to lack of clinical facilities at that town, the department was not a success. After a thorough consideration, the regents concluded that it would be best for the university to have the last two years of the medical course conducted in Denver, about 30 miles from Boulder, the constitutional seat of the university. To this end, at a meeting of the board on April 6, 1892, the following resolution was unanimously adopted: "Resolved, that the medical faculty may conduct their lectures in Denver for said two years [i. e. the last two years of the course], with the understanding that the appropriation heretofore granted to the medical department shall not, on that account, be increased, and this resolution is with the further understanding that all graduating exercises shall be held at the university proper, and that the instruction for the first year of the course shall be given at the university; that this resolution shall remain in force until satisfactory clinical advantages can be had at the university." Acting under this vote of the board, the last two years of the medical course have since that time been conducted at Denver, and not at Boulder, and the teaching and other instruction therein have been done at Denver, without increased cost to the university. The graduating exercises are held, the degrees conferred, the business office kept, and the entire first year's course conducted, at Boulder. It is claimed by the relator that such resolution of the board, and its subsequent conduct in giving effect thereto, were unauthorized, and constituted an usurpation

by the board of a franchise which it did not lawfully possess. Upon the foregoing facts being presented to the district court of Arapahoe county, it dismissed the proceedings at the cost of the relator, and he thereupon brought the case by appeal to this court.

The main questions in the case are: Does the manner of teaching medicine in Denver practically amount to the conducting of a medical department of the university at Denver, and the removal thereof from Boulder? And, if so, do the right and power, undoubtedly existing, of establishing a medical department at Boulder, include or imply the authority to teach medicine at Denver as an incident of the former power? Two preliminary questions are urged upon us by the appellee: First. The relator has no right to institute or prosecute this proceeding. Second. This court has no jurisdiction to entertain this appeal. These propositions are considered in their inverse order.

1. Confessedly, unless the determination of a constitutional question is necessary to the decision of the controversy, or a franchise is involved, jurisdiction does not attach. Possibly the two grounds might be considered together, but the former may be left until the main question in the case is reached. The appellee strenuously contends that there is no such question as a franchise in the case, and cites a large number of authorities in support of its position. Some of these authorities are not in point, because they relate merely to the acts of public officers, engaged as agents of the government, and acting as individuals, in the conduct of state affairs. Under the constitutional provision already cited, the regents of the university of Colorado are expressly made a body corporate. It is true that defendant is a public, and not a private, corporation, and that its rights and franchises are not vested, in the sense that they may not be altered or altogether taken away by the general assembly, except in so far as limited by the constitution; yet its various functions of administration affecting the public are franchises conferred by the constitution and the general assembly, just as much as though the corporation was a private one, and are franchises in the same sense, subject to alteration, that the various functions of a private corporation are franchises. The right of the defendant to be a corporation is a franchise; and, while the grant in the one case to a private corporation is attended with the incident of inviolability by the state, if the grant includes a contract, and in the other case of a public corporation no such results follow, nevertheless, the rights and privileges conferred in both cases are grants by the sovereign authority, and, when accepted and exercised by a corporation, public or private, are franchises. While it is also true that many, if not most, of the things which the defendant corporation may do in and about the supervision of the university may be done by private individuals with respect to private

schools or colleges conducted by them, and if done by the latter are not franchises, yet when done by the defendant in its public corporate capacity are franchises. 4 *Thomp. Corp.* §§ 5335, 5338; *Regents of Nebraska University v. McConnell*, 5 Neb. 423; *Regents of Michigan University v. Board of Education of Detroit*, 4 Mich. 212; *People v. Trustees of Geneva College*, 5 Wend. 211; *State v. Regents of University*, 55 Kan. 389, 40 Pac. 456.

2. We have been favored with an elaborate treatise upon some of the phases of the law of quo warranto, and a long list of authorities is called to our attention to the points that this relator cannot file an information without leave of court, and that he has not shown sufficient interest to maintain the proceeding. We appreciate the diligence and learning of counsel in these particulars, but in our view much of the discussion is not relevant. Counsel concede that, under the provisions of our Code, leave of court is not required at all when the district attorney acts upon his own responsibility. If, upon request, he refuses to act, a private person, as relator, may institute the proceeding, without obtaining leave of court in the first instance. But, after the complaint is filed, the court may then determine, and it is its duty to determine, whether the private relator has the right to institute the proceeding at all, or the right further to maintain it. In the case at bar, the facts are that the district court permitted the relator to file his complaint; at least, we must assume that such permission was given from its conduct of the case. No objection was made by the defendant in any form, either by motion, demurrer, or answer, to the right of the relator either to bring or prosecute the proceeding. Upon the contrary, it filed its answer, and upon the issues of fact thus joined the court proceeded to a hearing of evidence of both parties, and decided the cause upon its merits. This conduct of the defendant operates as a waiver, so far as a party may waive such a question, of the objection it now makes for the first time upon appeal to the right of the relator to bring and maintain this proceeding. While it may be true that in this state the general doctrine is established (*People v. Grand River B. Co.*, 13 Colo. 11, 21 Pac. 898) that a purely private person may not, as a matter of right, prosecute an information under our Code to correct wrongs done to the public, but is confined to cases where the injury peculiarly affects him, yet the authorities seem to be unanimous that, when once the discretion of the court in which the proceeding is brought has been exercised, and permission given to relator to file an information, such discretion is exhausted, and may not be recalled, but, on the contrary, the court must then proceed to determine the controversy, the same as any other, upon the law and the facts. High, *Extr. Rem.* § 606. But, under our practice, whatever the general rule may be in other cases, where the unlawful

assumption of a franchise is charged against the regents of the university, there is manifest propriety, if not necessity, in holding that a proceeding to correct the wrong should be in the control of a private party, subject to the supervisory power of the court. For, by section 4610, *Mills' Ann. St.* (Gen. St. § 3464), the attorney general is made the legal adviser of the board of regents, and it is his duty to institute, prosecute, and defend all suits in its behalf; and though, under our Code (Civ. Code, § 289), the district attorney, and not the attorney general (*Atchison, T. & S. F. R. Co. v. People*, 5 Colo. 60), is the proper officer to institute proceedings in quo warranto in the inferior courts, and he may also, under *Mills' Ann. St.* § 1551 (Gen. St. § 1056), follow the case into the supreme court, still, whenever the cause reaches the supreme court, the attorney general, under *Mills' Ann. St.* § 1783 (Gen. St. § 1344), would at once be entitled, from that time, to control its further progress. Unless, therefore, the proceeding may be maintained by a private party, it will be readily seen that there might be a miscarriage of justice; for, if the attorney general, with the inconsistent duties imposed by law upon him of representing both parties to the controversy, should conclude to act in the double capacity, or for any reason conclude that the regents should not be disturbed, there would be no practical way of correcting the wrong, however flagrant might be the conduct of which the regents were guilty.

3. Coming, now, to the principal question, we do not find much difficulty in its determination. Counsel for appellee with plausibility argue that the question is not so much one of power as of expediency, and that in all questions of administration the regents are given a discretion, with which a private person may not interfere, and over which the courts have no control. In many, if not in most, of the great universities, the policy is to concentrate at one central seat every part of all their departments. Whether, in the case at bar, the regents have acted wisely, and for the best interests of the university and of the public, is not a matter for our consideration. As we regard it, the question before us is whether, under the constitution and statutes of this state, the regents have the power, or the franchise, to teach medicine, or conduct the medical school of the university, at any place outside of Boulder. While the resolution hereinbefore set out contemplates the teaching for the last two years of the course at Denver as a temporary expedient, and only until suitable hospital and clinical facilities are furnished at Boulder, the record abundantly discloses that no such facilities exist there now, or are likely ever to exist, so as to call for a change from this so-called temporary arrangement. That the conducting of the last two years of the course in Denver is practically a removal of the medical department from Boulder scarcely admits of a reasonable doubt. The first year's course is still pur-

sued at Boulder, but the instruction there given is chiefly such as might be imparted in the other departments of the university. Indeed, provision is made whereby, upon certain conditions, one may receive a degree without ever having taken the first year's course at Boulder; so that, practically, one may be graduated from the medical department without ever having been present at the university at Boulder, except, possibly, upon commencement day, to receive his diploma, and even this is not a positive requirement. The defendant, therefore, having substantially removed the medical department to Denver, the question recurs, has it the power so to do? So far as we are advised, there is no precedent exactly in point; that is, where such an attempt was made by a public corporation, or by the managing board of a state educational institution. In the case of *People v. Auditor General*, 17 Mich. 161, the legislature had provided for the payment of a tax to the regents of the university upon condition that they carried into effect a prior law of the state providing that there should always be at least one professor of homeopathy in the department of medicine. The regents claimed to have complied with this provision by adopting resolutions organizing in the department of medicine a school called the "Michigan School of Homeopathy," which, however, was to be located at some suitable place, to be selected by the regents, other than Ann Arbor, which was the seat of the university, and where the medical department of the university had previously been organized and still existed. In a proceeding by mandamus, brought by the regents to compel the auditor general to pay the tax, the supreme court held that, considering the legislation of that state, it was fairly within the contemplation of the legislature, in providing for this tax, that the new professorship should be established at the same place, viz. at Ann Arbor, where the university and the medical department were located. Therefore the regents, not having complied with the conditions imposed by the donor of the tax, were not entitled to the gift. The precise question here raised was not there decided, but in the separate opinions of three members of the court much light is thrown upon the principle which should control the decision here. Mr. Justice Campbell was in favor of granting the writ upon the broad ground that the regents had the power to locate any department of the university at any place in the state where they saw fit; while Mr. Justice Christiancy was of the opinion that, the university having been located at Ann Arbor by the legislature, it was beyond the power of the regents to establish any part of any department elsewhere without legislative permission to that effect. The reasons given in Mr. Justice Graves' opinion are to the same purport, although the writ was refused upon the ground that the regents had not complied with the condition imposed by the legislature. The case of *People v. Trustees of Geneva College*,

supra, if the same rule applies to public as to private corporations, as we think it does, is, as to the question we are now considering, in point. Geneva College was incorporated under the laws of New York, and by its charter was located at the village of Geneva. It established a medical school in New York City, and there conducted a school of medicine. Whereupon the attorney general filed an information in the nature of quo warranto, charging that the trustees were exercising, or usurping, franchises without authority of law. In an able opinion by Chief Justice Savage it was held that the college was unlawfully usurping a franchise in the appointment of a medical faculty for the purpose of giving instruction in medicine in the city of New York. The entire opinion is interesting and instructive upon this and other branches of the case before us. Upon the principal question in the case the chief justice said: "This corporation, by the very terms of its charter, is restricted as to place, as much so as is the Bank of Geneva. Suppose the Bank of Geneva were to establish an office of discount and deposit in the city of New York; could they justify such a proceeding? It may be answered that the charter of this bank contains an express prohibition against carrying on business elsewhere; but without such prohibition there would be no question on the subject, and it would be no answer to say that the bills are signed in Geneva. And yet the cases would be precisely parallel. The signing of the degree gives no more locality to the business of instruction than the signing of a bank bill does to the operation of discounting a note. It is at Geneva, if anywhere, that the defendants have an existence, and the capacity to appoint professors and give instruction, as well as to sign the diploma. Corporations take nothing by implication. Certain powers are indeed incidental to the principal business to be carried on, but the instruction of youth at Geneva by no means requires or justifies the establishment of a branch in the city of New York. If one branch of the business may be carried on out of the village of Geneva, the whole may, and Geneva College may locate herself anywhere in the state; nay, in every town in the state. Such a claim would be preposterous and absurd, yet equally well founded in legal right with the claim we are now examining. * * * The information in this case is not against certain persons assuming to exercise corporate powers without authority, but against a corporation claiming the exercise of powers not conferred upon it by its charter. That the college does not possess the power claimed, seems to me most manifest."

In principle we see no distinction between that case and the one at bar. Our constitution confirms the location of the university of Colorado at Boulder, and our statute but reaffirms it. The location of the university includes all its departments, and every part thereof. With the wisdom of this policy, we

repeat, we are not now concerned. It is conceded to be a part of our state history that the location of the university was not "solely the result of a selection of the fittest place for such an institution, but was largely the result of the claims made and enforced by that particular section of the state to have one of the great institutions of the state located in its midst." This has its bearing, and should have its influence, upon the interpretation to be given to the language of the constitution, if of doubtful import; but in this case the meaning is so plain and clear that it needs not the aid of contemporaneous history to interpret it. In *Re State Institutions*, supra, this court recognized that the location of these institutions, including the university, was confirmed by the constitution. If the regents have the power to remove a part of any of the departments of the university, it follows that they have the power to remove the entire department. If they have the right to remove an entire department, they also have the power to remove all, or such of the departments as they may determine. To say they have any such power would be equivalent to declaring that they might remove the entire university from Boulder, and thus override the constitution itself, and render nugatory the efforts of those by whom the location was secured. The fact that the regents keep their business office at Boulder, that commencement exercises are held there, and diplomas awarded, and fees received, and accounts kept, is not a compliance with the mandate of the constitution that the university located at Boulder is the university over which they have supervisory power. To retain the shell at Boulder, while the real work of the university, or of any of its integral parts, is done elsewhere, would be an evasion of the letter and spirit of the statutes and the constitution. That instrument, indeed, gives to the regents the general supervision of the university; but this does not include the power to establish the university, or change its location, in whole or in part, as previously fixed by the constitution and statutes of the state. Their supervision must relate to, and be confined to, the university, and all its departments, as located at Boulder, and not elsewhere.

The judgment of the district court, therefore, is reversed, and the cause remanded, with instructions to grant the writ prayed for by the relator, excluding the defendant corporation from exercising the franchise of teaching medicine at Denver. Reversed.

(15 Utah 401)

ROYCE v. SALT LAKE CITY.

(Supreme Court of Utah. June 19, 1897.)

MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS OF OFFICERS—FALSE IMPRISONMENT—CONVICTS.

1. Plaintiff was arrested by a police officer of defendant for vagrancy, without warrant, no

public offense being shown to have been committed in his presence. Plaintiff was tried on a verbal charge of vagrancy in the police court, without any written complaint being filed against him, was convicted, and sentenced to imprisonment, but not to hard labor, and held without commitment from the police court. By order of the chief of police, plaintiff was put at work upon the stone quarry, where he received from a fellow prisoner the injury complained of. *Held*, that the acts of the chief of police, requiring him to work breaking stone, when not sentenced to hard labor, at the time of the injury, were ultra vires; that the officers were not acting as agents of the city government, but were trespassers, and the corporation is not liable to the action for damages.

2. Authority granted by resolution of a city council, directing the marshal to work prisoners, does not confer the right to require those in custody, but illegally imprisoned, and not sentenced to hard labor, to be thus employed.

3. All torts or wrongful acts of an agent or officer of a municipal corporation, not resting upon contract, but which are "ultra vires," in the proper sense and meaning of the term, will not create an implied liability on the part of the corporation.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by Guy C. Royce against Salt Lake City for false imprisonment. From a judgment for plaintiff, defendant appeals. Reversed.

W. A. McKay and D. B. Hempstead, for appellant. Powers, Straup & Lippman and L. M. Armstrong, for respondent.

MINER, J. Plaintiff was arrested by a police officer of defendant for vagrancy, without a warrant, no public offense being shown to have been committed in his presence. He was tried on the verbal charge of vagrancy, under the city ordinances of Salt Lake, in the police court, without any written complaint being filed against him. Plaintiff interposed a plea of not guilty, was tried, and convicted of the offense charged, and sentenced to imprisonment in the city jail for a period of 60 days. He was afterwards held by the jailer of the city jail without any commitment from the police court. Through the direction of the chief of police and jailer, he, with other prisoners, was placed in the custody of guards, and set at work breaking rock for Salt Lake City, under sheds prepared for that purpose by the city marshal, and for the protection of city prisoners. These sheds were located near a stone quarry, which was in charge of the street supervisor. The broken rock was used for repairing sidewalks in the city. While so engaged in breaking rock, plaintiff was injured by being struck in the eye by a piece of rock broken by a fellow prisoner, which injury caused the loss of the sight of his eye. Under objection, a resolution of the city council was introduced in evidence, recommending that the city marshal be directed to employ city prisoners on such work as, in his judgment, may be for the best interests of the city. The city marshal did not know of this resolution at the time plaintiff was set at work. This

action was brought to recover damages for wrongfully, unlawfully, and negligently compelling plaintiff to perform said work, whereby the sight of one of plaintiff's eyes was destroyed, and that of the other greatly injured, through the negligence and unlawful acts of the defendant. The defendant appeals from the judgment obtained by the plaintiff.

Appellant contends that the conviction and imprisonment of the plaintiff were illegal; that the act of the chief of police in requiring the plaintiff to work was illegal and wrongful; that the city is not liable for the ultra vires acts of its officers and servants, even though attempted to be authorized by the city; that the city could not ratify a void act, and is not liable for the unlawful acts of its officers and agents. Section 5305, Comp. Laws Utah 1888, contemplates that a written complaint, on oath, shall be filed, except in specific cases, and then a sworn complaint must be immediately filed with the magistrate, or an accusation made, and entered in the minutes of the court, specifying the charge against any person arrested for an offense. Section 5350, Comp. Laws Utah 1888, requires that a certified copy of the judgment, or an order of commitment, shall be delivered to the proper officer after judgment, as a warrant for the execution of the judgment. These requirements of the statute were not complied with. The plaintiff was sentenced to 60 days' imprisonment. There is no provision in our statute, under such a sentence, whereby he could be compelled to work or labor. To require work from him under such circumstances would be, in effect, the imposition of an additional sentence by the police officers over and above the sentence imposed by the police magistrate. The city ordinances were not pleaded or placed in evidence, and therefore cannot be considered. *Estee, Pl. & Prac.* § 188; *Shanfelter v. Mayor of Baltimore (Md.)* 31 Atl. 439; *City of McPherson v. Nichols (Kan. Sup.)* 29 Pac. 679. It therefore appears that the plaintiff was wrongfully and illegally imprisoned, and that he was wrongfully and illegally required to work breaking rock at the time he received the injuries complained of, and these illegal acts were done and authorized by the chief of police, acting as city marshal and jailer of the city, and three guards appointed to watch over the prisoners. To create a liability on the part of the city, it is necessary that the act done which was injurious to the plaintiff was within the scope of the corporate powers of the city as prescribed by its charter; that is, the act must not have been ultra vires in the sense that it was not within the power or authority of the corporation to act with reference to it. If such act complained of was wholly outside of the general or special power of the corporation as conferred by statute, the corporation cannot be made liable to an action for damages, whether it commanded and directed the act to be done, or whether it was done by its officers without its direction; for no municipal

corporation can be impliedly liable to a greater extent than it could make itself by express corporate action. But, if the wrongful act was not ultra vires, it might be the basis of an action of tort against the corporation, whether done by its officers under direct authority, or ratified by it, or whether done by the officers of the corporation in the execution of its corporate powers and duties of a ministerial nature, if done so negligently or unskillfully as to injure others, in which case the corporation would be liable for the carelessness and want of skill of such officers in the course of their authorized employment, without expressly ratifying or adopting the act. So, where a corporation appoints or elects its officers, and has power to control them in the discharge of their duties, can continue or remove them from office, and hold them responsible for the manner in which they discharge their trust, with reference to the corporate powers, and which are for the corporate benefit in its local interest, then such officers are agents of the corporation, and the maxim respondeat superior applies. But, if the officers are elected or appointed by the city government in obedience to a statute or chartered power to perform a public service not particularly local or corporate in its nature, but because the mode of selection is deemed expedient by the legislature in distributing the powers of government, if they are independent of the corporation as to tenure of office and the manner of discharging their duties, then they are not to be regarded as servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but they would be regarded as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable. So that, in order to make the corporation impliedly liable for the wrongful acts of an officer, it must not only be shown that the officer was its officer, either generally as respects the particular wrong complained of, and not an independent public officer acting under his own discretion as to the manner of discharging his duties, nor as a public agent, but also that the wrong was done by such officer in the legitimate exercise of some duty of a corporate nature which was devolved upon him by law, or by the express direction or authority of the corporation, and within the scope of its chartered powers.

Within the principles mentioned, it is held that police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties, and that the city is not liable for assaults and batteries committed by its police officers, although done in an attempt to enforce an ordinance of the city, or for an arrest made by a police officer which is illegal for want of a warrant, or for unlawful acts of violence in the exercise of his official duties. The municipal corporation, in all these and like cases, represents the state or the public,

The police officers are not, in such cases, the servants of the corporation. The principle of respondeat superior does not apply, and the corporation is not liable, unless the statute expressly creates the liability. 2 Dill. Mun. Corp. §§ 968-980; Jones, Neg. Mun. Corp. §§ 172, 173; Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Smith v. City of Rochester, 76 N. Y. 506; Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614; Town of Odell v. Schroeder, 58 Ill. 353; 1 Shear. & R. Neg. § 300; Mechem, Ag. §§ 111, 112; Alamango v. Board of Sup'rs, 25 Hun, 551; Curran v. City of Boston, 151 Mass. 505, 24 N. E. 781; Mayor of Albany v. Cunliff, 2 N. Y. 165; Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. 490. In Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614, it is held that police regulations of a city are not made and enforced in the interests of the city in its corporate capacity, but in the interests of the public, and that a city is not liable for acts of its officers in attempting to enforce such regulations. Nor can it be made liable for or ratify torts of police officers. Town of Odell v. Schroeder, 58 Ill. 353. Curran v. City of Boston, 151 Mass. 505, 24 N. E. 781, is a case where an inmate of a work house belonging to the city, convicted of a misdemeanor, and legally sentenced to confinement, was injured by the negligence of its agents while he was in the exercise of due care. It also appeared that the city derived a revenue from the proceeds of the work house. The court held that the city could not be held liable in damages, and said: "Nor do we perceive any reason why the city should be held responsible because some revenue is derived from the labor of the inmates. It is required that these inmates should be kept at work, by the statute, but the institution is not conducted with a view to any pecuniary profit. It is not suggested that the expenses of maintaining the work house are met by what is derived from the labor of the inmates, or that any profit above them is made. Even if the entire expense is not met by taxation, by reason of the profit thus derived, such profit is purely incidental." In Mayor of Albany v. Cunliff, 2 N. Y. 165, the city of Albany built a bridge under an unconstitutional statute. The bridge fell in consequence solely of the negligent and improper manner in which it had been constructed by the city. It was held that the city was not liable to an action for damages at the suit of a person injured by the accident. In Ball v. Town of Woodbine, 61 Iowa, 83, 15 N. W. 846, it was held that a city was not liable for the consequences of a violation of the city ordinances by the mayor and common council any more than it would be if the illegal act was committed by a private person. It may safely be asserted that torts or wrongful acts of an agent or officer of a municipal corporation, not resting upon contract, but which are "ultra vires," in the proper sense

and meaning of the term, will not create any implied liability on the part of the corporation. 2 Dill. Mun. Corp. § 969. In this case the plaintiff was illegally imprisoned by the chief of police and jailer. He was sentenced to 60 days in jail. When the officers required him to work, they undertook to impose a burden upon him that the sentence did not warrant, and which the law did not justify, even if the sentence was valid. When the city council passed the resolution directing the city marshal to employ city prisoners on such work as, in his judgment, would be for the best interests of the city, they gave no directions to the marshal to require work from those in jail who were not prisoners. A prisoner is a person deprived of his liberty by virtue of a judicial or other lawful process. Nor did the resolution require the marshal to compel prisoners to work who were not sentenced to hard labor, and therefore could not be required to work. The resolution did not direct the chief of police or marshal to do an illegal act. The jailer had no mittimus with which to retain the plaintiff. The law has not vested police magistrates and policemen with power to arrest and imprison men at pleasure, without complaint, warrant, or commitment, except as provided by law. The liberty of a citizen cannot be so far disregarded and trifled with that any policeman or jailer may, at his own volition, commit, and hold him in custody, and compel him to work until it suits their convenience to release him. The constitution of this state prohibits such acts except by due process of law. The liberties of the people depend upon a broader and firmer foundation than the mere will and pleasure of such officers. All legal imprisonment arises from the sentence and act of law, and such imprisonment must be reached through such proceedings as the law directs. The chief of police had no authority to require the plaintiff to break stone, any more than he had authority to impose an additional sentence upon him, or to require the same work from a total stranger. The authority given by the city referred only to those legally imprisoned under legal sentence to hard labor, and no others. The plaintiff was not a prisoner meant or referred to by the order. The chief of police and jailer, in imprisoning the plaintiff, and in requiring him to work breaking stone at the time he was injured, were acting ultra vires. They were not acting as the agents of the city government, but were mere trespassers, acting without authority, and outside of any general or special authority or power of the corporation as conferred by its charter; and the corporation is not liable to the action for damages, although the officers, the authors of the injury, may be liable therefor. The court erred in refusing to grant the nonsuit asked by the defendant, and in refusing to give the defendant's request to return a verdict for the defendant. The judgment of

the court below is reversed, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

(15 Utah 389)

THOMPSON v. HYNDY et al.

(Supreme Court of Utah. June 14, 1897.)

MONEY LOST BY AGENT—RECOVERY BY PRINCIPAL.

This was an action brought by plaintiff to recover certain moneys which she had confided to her husband as her agent for the purchase of mining stocks, and which the husband had gambled away to the defendants. *Held*, that the husband was acting in the capacity of agent, and, if an agent gambles away the money of a principal, such transaction gives no title to the winner, and the principal can recover back the money.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by Margaret Thompson against Harry P. Hynds and Thomas McDermott. Judgment for defendants, and plaintiff appeals. Reversed.

Moyle, Zane & Costigan, for appellant. Powers, Straup & Lippman, for respondents.

PER CURIAM. This action was brought by the appellant to recover from the defendants certain moneys which had been by her confided to her husband for the specific purpose of investing in mining stocks, which moneys her husband had gambled away to defendants. The case was tried before a jury, and a verdict was rendered in favor of the defendants. A bill of exceptions was settled upon the judgment, and an appeal taken to this court from the judgment within 60 days from its rendition. At the close of the evidence counsel for plaintiff asked the court to instruct the jury as follows: "As to the \$1,000.00, less \$33.20, confided by the plaintiff to her husband as her agent on and after August 23, 1894, there is no competent evidence to contradict plaintiff's proof that it was her money, and was gambled away at faro to the defendants, and as to that amount she is entitled to recover in this action. This was the money received from the McGurrian mortgage." The court refused to give the instruction asked for, and the plaintiff excepted. The testimony on the part of the plaintiff tends to show that \$1,000, less \$33.20, of the money referred to, was played into the defendants' gambling house by plaintiff's agent, lost on a gambling game. The defendants introduced testimony tending to show that Thompson lost some money at the gambling table, but that he also won considerable amounts at different times, and that he also won and lost considerable sums of money at another gambling house during or about the same period of time, but no testimony was offered denying the fact testified to by Thompson that the \$1,000 less the \$33.20, was lost at defendants' gambling ta-

ble, and that the plaintiff owned the money, and gave it to Thompson, as her agent, for the purpose of buying mining stocks. This testimony being uncontradicted, the plaintiff was entitled to the instruction asked for. Thomas R. Thompson, husband of plaintiff, testified that he gambled away the proceeds of 10 shares of stock in the defendants' gambling house. He was then asked by plaintiff's counsel if that was while he was acting as his wife's agent, and replied that it was. Counsel for defendants then moved to strike out the answer. The answer was stricken out, and an exception taken by plaintiff. We think this testimony was proper. If the witness was acting as the plaintiff's agent, for the purpose of investing this money in stocks at that time, it was a proper matter to go before the jury. If a servant or agent gambles away money of the principal, such transaction gives no title to the winner, and the principal can recover back the money. *Pierson v. Fuhrmann* (Colo. App.) 27 Pac. 1015; *Huffcut*, Ag. pp. 183, 185, §§ 169, 172; *Mason v. Waite*, 17 Mass. 56; *Corner v. Pendleton*, 8 Md. 337; *Burnham v. Fisher*, 25 Vt. 514; *Keener*, Quasi Cont. 183, 188. Many other errors are assigned in the record, but we do not consider it necessary to discuss them. The judgment is reversed, and a new trial ordered.

(15 Utah 142)

STATE v. KESSLER.

(Supreme Court of Utah. June 18, 1897.)

HOMICIDE—FORMER JEOPARDY—CHALLENGE OF JUROR—EVIDENCE—IDENTIFICATION BY DECEASED—INSTRUCTIONS—PRESUMPTIONS.

1. Defendant was tried on an indictment upon which he might have been convicted of murder in the first or second degree, or of voluntary or involuntary manslaughter, and found guilty of murder in the second degree. Upon appeal a new trial was granted. *Held*, that defendant could be tried again for murder in the first degree after the verdict of guilty of murder in the second degree had been set aside on his motion.

2. A challenge may be properly sustained when a juror entertains conscientious scruples against the death penalty.

3. The identification of defendant by deceased may be admitted in evidence when made by deceased under a belief of impending death, although in making it he refers to a former identification,—a part of a statement made by him, and excluded, because defendant was told to keep still when he undertook to deny an accusation made by the deceased.

4. After retiring, the jury may return, and ask to be instructed as to the punishment for voluntary and involuntary manslaughter, and it is not error in the court to read them the law on the subject.

5. When an oral charge has been given, the presumption is, in the absence of any statement in the record to the contrary, that the reporter took it down as required by statute.

Miner, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Daniel Kessler was convicted of voluntary manslaughter, and appeals. Affirmed.

Taylor & Root and Goodwin & Van Pelt, for appellant. A C. Bishop, Atty. Gen., and Benner X. Smith, for the State.

ZANE, C. J. The defendant was tried on an indictment upon which he might have been convicted of murder in the first or second degree, or voluntary or involuntary manslaughter, and the jury found him guilty of murder in the second degree. He entered a motion for a new trial, which the trial court overruled, entered judgment on the verdict, and then sentenced him to imprisonment in the penitentiary for the term of 14 years. From this judgment the defendant appealed, and this court reversed the judgment (44 Pac. 97), and ordered the verdict set aside, which was done. The defendant was then tried a second time on the same indictment and plea of not guilty, and on the further plea of former jeopardy of murder in the first degree, and former acquittal of that offense, and the jury found him guilty of voluntary manslaughter. The court overruled his motion for a new trial, and sentenced him to confinement in the state prison for the term of six years. From this judgment he has appealed.

On the trial of persons charged with capital crime, the law permits 15 peremptory challenges to each, and 3 to each in prosecutions for offenses of a lower grade. The court permitted the prosecution on the trial, over the objection of the defendant, to make more than three, and the defendant excepted. The court also sustained plaintiff's challenge to one juror, against the objection of the defendant, because he entertained conscientious scruples against the death penalty. To this ruling the defendant also excepted. The defendant offered in evidence the verdict returned on the first trial, and set aside by the court on plaintiff's motion. The court sustained the objection of the prosecution to its admission, and the defendant excepted. These rulings the defendant assigns as error. These errors raise the question, could the defendant be tried again for murder in the first degree, after the verdict of guilty of murder in the second degree had been set aside on his motion? A description of murder in the first degree in the indictment upon which the defendant was tried included a description of murder in the second degree and the crime of manslaughter; and his plea of not guilty made an issue on all those charges. Upon his trial he was in jeopardy as to each offense. And the verdict of guilty of murder in the second degree, while allowed to stand, was a bar to another prosecution on either charge, for the constitution of this state declares that "no person shall be twice put in jeopardy for the same offense." But the further question is, did he, by obtaining a new trial on his own motion, waive his right to rely upon his jeopardy on the former trial or on the verdict of murder in the second degree, as a bar to a conviction of murder in the first degree upon his new or second trial? The statute declares

that: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in the bar of any conviction which might have been had under the indictment." 2 Comp. Laws, Utah, 1888, § 5093. This section declares: (1) That the granting of a new trial places the parties in the same position as if no trial had been had; (2) that all the testimony must be produced anew on the new trial; (3) that the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment. Unless this section is repugnant to the state constitution adopted after its enactment, the defendant was rightly put upon his trial for all the offenses charged in the indictment, and the jury had the right to convict of either offense, as the evidence might warrant. And as the constitution does not, in express terms or by reasonable implication, determine what the effect of a new trial on the defendant's motion shall be when the conviction was for an offense lower than the highest charged, we must hold that the statute is not repugnant to that instrument, and that it is therefore valid. But upon the general proposition, without taking into consideration the statute, it appears more reasonable to hold, when a defendant is found guilty of a lower grade of crime than the highest charged in the indictment, and a new trial granted on his motion, that its effect is to set aside the whole verdict, and leave the case for trial upon the same issues as upon the first trial. On the first trial of this defendant the jury found that he shot Niebergall as charged, and thereby inflicted upon him a wound from which he died; that the shooting was unlawful, and with an intent to kill him, and that it was done with malice aforethought; but did not find the further fact that it was done with such deliberation as made it murder in the first degree. The jury did not actually find a want of deliberation. From the facts found by the jury a want of deliberation was inferred.

In legal effect, the verdict consisted of two parts: First, an actual finding of murder in the second degree; and, second, by construction and inference, not guilty of murder in the first degree. But the defendant claimed that the finding of the jury was erroneous and illegal, and the court agreed with him, and set the verdict aside, and held that it should not be considered as a finding of the facts essential to guilt. That being so, how could the inferential finding of not guilty of murder in the first degree stand, after the finding of facts from which it was inferred, and upon which it depended, was set aside and vacated? To hold that a verdict of not guilty of murder in the first degree may be inferred from a verdict of guilty of murder in the second degree that has been set aside and remains to be found or not found on a new trial, is to de-

clare that such inferences may be drawn from an unknown finding—from unknown facts. We are aware there is a great conflict in the authorities on this proposition of law, and that the greater number of the earlier authorities support the proposition that when a defendant has been found guilty of an offense of a lower grade than the highest charged in the indictment, and a new trial is granted on his motion, the verdict operates as an acquittal of the higher offense, and stands as such, notwithstanding the new trial. The weight of authority in support of or against a legal proposition does not always depend upon their number alone, but upon the reasoning by which their conclusions are reached as well. There are a large number of well-considered cases holding, if a verdict of guilty of a lower offense included in a higher described in the indictment is set aside on defendant's motion, he may be retried for both offenses. *Bohanan v. State* (Neb.) 24 N. W. 300; *State v. Behlmer*, 20 Ohio St. 572; *State v. Bradley* (Vt.) 32 Atl. 238; *Com. v. Arnold*, 83 Ky. 1; *Veatch v. State*, 60 Ind. 201; *People v. Keefer*, 65 Cal. 232, 3 Pac. 818; *People v. Palmer* (N. Y. App.) 17 N. E. 213; *U. S. v. Harding*, 26 Fed. Cas. 139.

On the trial of this case the dying declaration of the deceased, Niebergall, was admitted in evidence, and the defendant moved the court to strike out the following language: "I met a gray-bearded man,—the man I identified the other night, being with Chief Pratt, known as Dr. Kessler." At the time referred to, Pratt had asked Niebergall this question: "Did you ever see this man before?" (pointing to the defendant), and the deceased said "Yes, sir; and he shot me down like a rabbit." Pratt, having the defendant in custody, had immediately before this told him to keep still when he shook his head. For that reason, under the attending circumstances, this court held on the former appeal that the defendant's silence when charged with shooting Niebergall down like a rabbit could not be used as acquiescing in the truth of the statement, and as an admission by him that the statement was true. But the identification the defendant asks may be stricken out of the dying declaration was admitted because it was made by the deceased under a belief of impending death, after the deceased had lost all hope of life. The identification of the man who had inflicted the mortal wound upon him certainly related to the circumstances attending the fatal injury.

After the jury had retired to consider their verdict, they requested the court to inform them as to the punishment prescribed for voluntary and involuntary manslaughter, and they returned into court. The defendant and his counsel being present, the court read to them the statute fixing the punishment for those offenses. To this action of the court the defendant excepted. In this we find no error.

Finally, the defendant insists that his mo-

tion for a new trial should have been granted because the court gave an oral charge to the jury. When this case was tried, the statute authorized such a charge, but required the reporter to take it down. We must presume that was done, in the absence of any statement in the record to the contrary. We find no error in this record. The judgment of the court below is affirmed.

HART, District Judge, concurs. MINER, J., dissents.

(15 Utah 176)

HANDLEY v. DALY MIN. CO.

(Supreme Court of Utah. June 5, 1897.)

FELLOW SERVANT—LIABILITY OF MASTER—CONCURRENT NEGLIGENCE OF SERVANT AND MASTER—INTERVENING NEGLIGENCE—DIRECTING VERDICT.

1. Plaintiff, a miner, was injured by the concurrent acts of a fellow miner, who negligently left an obstruction in the shaft of a mine, and by the engineer, who negligently allowed the cage to strike the obstruction. Evidence was introduced to show that the engineer's incompetency caused the injury complained of, and to further show that for a number of years he had been habitually negligent, and had been guilty of acts of incompetency, and that these acts were known to the defendant, or could have been known by the exercise of due care on its part. At the close of the case, the court directed a verdict for the defendant. *Held*, that as there was some testimony tending to show the incompetency of the engineer, and that defendant was negligent in keeping him in its employ after it had knowledge of his incompetency, and where the negligence of an employer and that of a fellow servant combine to produce the injury of a servant, the employer will be liable in damages to the injured servant.

2. *Held*, also, that it was error in the trial court not to submit the evidence to the jury.

3. Where an injury is the result of two concurring causes, and the master is responsible for or contributed to one of them, he is not exempt from liability because a fellow servant, who is responsible for the other cause, may have been also culpable. The servant assumes the risk and negligence of a fellow servant, but not that of the master.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by William Handley against the Daly Mining Company. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action brought by the plaintiff to recover damages for an injury received by him while at work for the defendant in its mine. The complaint alleged negligence on the part of the defendant; that, by and through its station tender, it negligently left the trips or chairs in the shaft of the mine extended into the shaft, so as to form an obstruction to the descending cage, upon which the plaintiff was descending into the mine; and that the cage struck thereon, and the plaintiff was injured; also negligence on the part of the engineer in operating said cage in a careless manner; also negligence in keeping in its employ the engineer then in charge of the engine, one Adamson, he being an incom-

petent and careless engineer, and that he was kept in the employ of the said defendant after it knew and it was understood that he was careless and incompetent. Due care on the part of the plaintiff was alleged. The answer denied all the allegations of the complaint. The testimony on the part of the plaintiff tended to show that he was a miner, employed in defendant's mine, and had been employed for a month prior to the date of the injury; that defendant had a perpendicular shaft, about 1,000 feet deep, with 10 levels about 100 feet apart, with a station on each level. The shaft had two apartments, known as the east and west apartments. At each station there were trips or chairs built, consisting of four pieces of iron fixed in a frame, so as to extend into the shaft, and constitute a rest or platform for the cage, when lowered for freight. These chairs are so arranged as to be thrown back by a lever, which is controlled by the station tender, whose business it is to indicate, by means of a bell at the top, to the engineer, and direct him when to raise and lower the cages. The station tender adjusts the chairs accordingly. The cages in each department of the shaft weigh a ton, and are connected with the engines by a flat iron rope, up the shaft, over a pulley, and down the reel to the engine. The reels attached to each cage are so arranged that, when one is lowered, the other will rise. A steam engine furnished the power, and was operated by an engineer, and was adjusted to steam power and a system of brakes; the steam being applied by a lever, and the brakes applied by the feet. At the time of the accident, Patrick Breen was station tender, Adamson was engineer, and Quinn was foreman of the mine. Plaintiff was employed as a common miner on the stope below the ninth and tenth levels. Breen, the station tender, was at work on the 700-foot level, filling cars on the cage in the east compartment, and had sent them to the surface. The cage was raised off the chairs in the seventh level, and Breen forgot to throw the lever and draw the chairs out of the shaft, thereby leaving a permanent obstruction in the shaft to any cage coming down from above. Breen then went to the 800-foot level, the west cage was lowered to him, and he waited for workmen, and placed them on the cage on the west compartment, and gave the signal to be raised to the surface. The cages were so constructed that, when the west compartment cage was lifted to the surface, the east compartment cage would go to the 800-foot level, below the 700-foot level, which was obstructed by the chairs. As the west cage went up, the east cage came down, and struck with great force on the protruding chairs. Breen heard them strike, and thought it was a blast from the 1,000-foot level, 200 feet below, not then thinking that he had left the chairs protruding in the shaft. The engineer, after the cage struck the chairs, continued to raise the west cage,

and pay out the cable on the east cage, supposing it had reached the 800-foot level, as shown by the indicator, and did not know that it had met with an obstruction. The west cage in the meantime was filled with workmen on the surface, and the engineer let them down the west compartment by means of the foot brake, which was used when there was a load on one cage, which would overbalance the empty cage going up on the other side. The slack cable which was resting on the east cage, and which weighed about two tons, was taken up until the cage was reached, when it was jerked off the chairs, and brought to the surface, the west cage descending to the 1,000-foot level. The engineer, supposing, as he says, that the east cage was at the 800-foot level, where the station tender was, tried to communicate with him by means of shaking the cable, but received no reply. He then tried to attract his attention by raising and lowering the east cage, but again received no reply. The shift boss opened the cage, and the plaintiff, with other workmen, got upon the east cage, to be carried to their work, the west cage coming from the bottom empty. As the east cage was about to start down, the engineer received a signal to stop the up-coming cage on the 800-foot level, but disregarded the signal, and sent the men down on the east-side cage, as he had sent the men down on the west-side cage a short time before, using the foot brake for that purpose. The east cage, in which plaintiff was, descended at the usual rate of speed until it came to the 700-foot level, where the chairs formed a solid obstruction. The cage struck said chairs, the shock causing the injury to plaintiff, for which this action is brought.

The engineer testified that he did not know the chairs were in the shaft until he let plaintiff down; that, when the cage struck the chairs, he felt a perceptible shock vibrating through the machinery. Testimony was offered tending to show that a competent engineer would know when the east cage descended upon the chairs the first time, that there was an obstruction there; and that, when the cage was raised off the chairs by a sudden jerk, he should have known it. Evidence was also offered tending to show that the general reputation of Adamson, the engineer, was that of an incompetent and careless engineer before this accident, for several years; that he had several accidents in the same mine before, one of which resulted in the death of two or three miners, and that he had been laid off by defendant on account of such accident for a short time; that, five years before the accident, Quinn, who was then shift boss, and at the time of this accident superintendent of defendant's mine, had stated that Adamson was no good, because he was not a good engineer. Adamson was brother-in-law to the chief engineer of defendant, by whom he was hired. Other testimony was offered tending to show that the

engineer did not pay proper attention to bells and signals, and would sometimes run cages to the wrong station, one witness testifying that he had done so about 100 times in 5 years. At other times he would take the cages away without signals. Several accidents happened in the mine while he was engineer. A year prior to this accident, broken chairs were seen at the bottom of the shaft, and the cage was broken. At another time the cable went down the shaft in a bunch. It was also said of him that he would drop or take up the cage too quickly, and was careless in handling it. Testimony was offered tending to contradict and explain plaintiff's testimony with reference to the reputation, competency, and carelessness of the engineer. At the close of the case, the court directed a verdict for the defendant. Plaintiff brings this appeal, and claims: (1) That the testimony tends to show that, but for the incompetency and carelessness of Adamson, the engineer, the accident would not have happened, and that his incompetency and carelessness was a concurring cause of the accident, and without which it would not have occurred. (2) That the testimony tended to show that the carelessness and negligence of the defendant in keeping Adamson in its employ after it had knowledge of his incompetency, and the carelessness of Breen in leaving the chairs protruding into the shaft, were concurrent efficient causes of the injury to the plaintiff. (3) That the defendant is liable for its negligence directly contributing as an efficient cause to the injury, even though the negligence of a fellow servant also contributed thereto.

Brown & Henderson, for appellant. H. J. Dinning and Bennett, Harkness, Howat & Bradley, for respondent.

MINER, J. (after stating the facts). Plaintiff was a miner, taking out ore. Breen was in the same department, loading ore on the cage, and had no control of the plaintiff. Both were under the same foreman, in the same department of labor. They were therefore fellow servants. It is the duty of a master to exercise due and reasonable care in the selection of his servants, with reference to their competency and fitness. He must also exercise the same degree of care in retaining his servants after such employment, for his responsibility is the same. The employer's liability for injuries caused by the incompetency of a fellow servant depends upon such incompetency being established by affirmative proof, and that it was known to the master, or that, if he had exercised due and proper diligence, he would have learned of such incompetency. In exercising this supervision by the master, to ascertain whether the servant is competent, the nature of the service and the dangers attending it should be considered. A closer supervision over the habits, competency, and conduct of an en-

gineer is required than over a common laborer, for the obvious reason that the dangerous consequences of neglect are likely to be so much greater in the one case than in the other; the rule being, the greater the danger, the greater the care. It is the duty of the party charging incompetency and negligence to establish the fact by proof. This may be done by showing specific acts of incompetency, and bringing them home to the knowledge of the master, and by showing such acts of incompetency and negligence of the servant to be of such a character and frequency that the master, in the exercise of due and reasonable care, must have had them brought to his notice. After proof of incompetency of the servant is shown, the fact of incompetency may also be shown by the general reputation; but, when reputation alone is relied upon, it should be so generally known that inquiry would disclose it. When repeated acts of carelessness are shown on the part of the servant, it then becomes proper to leave the question to the jury to determine whether or not they did come to the knowledge of the master, or would have come to his knowledge had he used reasonable care. *Bailey, Mast. Liab.* pp. 47-61; *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228; *Hilks v. Railway Co.*, 55 Mich. 444, 21 N. W. 878; *Laning v. Railroad Co.*, 49 N. Y. 521.

It is apparent from the facts above stated that the injury would not have happened but for the negligence of the station tender in leaving the chairs in the shaft, and of Adamson, the engineer, in not discovering the fact. These two acts contributed to cause the accident. Without these two concurrent acts the accident would not have happened. The question now arises, did the incompetency of Adamson and his carelessness contribute, in a legal sense, to the cause of the injury? *Bailey, Mast. Liab.* p. 433, states the rule to be: "When the injury is the result of two concurrent causes, one party is not exempt from full liability, although another party was equally culpable." *Whart. Neg.* § 144, states the rule to be: "The fact that another person contributed, either before the defendant's interposition, or concurrently with such interposition, in producing the damage, is no defense." Care must be taken in applying the rule to distinguish between concurring causes and intervening causes. "The negligence of each person is a proximate cause where the injury would not have occurred but for that negligence; and it is no answer that the negligence or trespass of a third person contributed to the injury. And this is true although the party contributing by his negligence was acting without concert with, and entirely independent of, the party to whom the cause is attributable in the first instance. The reason of the rule lies in the fact that the effects produced by two or more concurrent causes cannot be separated, and the damages apportioned; that, because such may be the case, the

injured party should not be refused redress. The rule always has been, in case of joint tortfeasors, that either or all are liable." In case the injury is caused by accident, and the defendant's negligence concurs to the extent that the accident would not have happened but for such negligence, he is liable for the consequences. "The distinction between concurring causes and intervening causes lies, not so much in the character of the act done or omitted, but its effect upon the result,—the difference between contribution and cause and effect; and to this it must be added that the concurrent or succeeding negligence must break the sequence of events to make the cause one of intervention. The only available test is, did the intervening cause, whether animate or inanimate, break the sequence of events? If so, it is a case of intervening negligence; otherwise, a case of co-operating, concurring, or contributory negligence." *Bailey, Mast. Liab.* pp. 435, 436; *Illidge v. Goodwin*, 5 Carr. & P. 190; *Cooley, Torts*, 153; *Eaton v. Railroad Co.*, 11 Allen, 500; *Railroad Co. v. Kellogg*, 94 U. S. 474; *Atkinson v. Transportation Co.*, 60 Wis. 141, 18 N. W. 764; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Johnson v. Exchange Co.*, 48 Minn. 433, 51 N. W. 225. In *Wright v. Southern Pac. Co.*, 46 Pac. 374, 14 Utah, 383, this court held "that, when the negligence of the employer and that of a fellow servant combine to produce an injury to a servant, the employer will be liable in damages to the injured servant." *Shearn. & R. Neg.* p. 187; *Bailey, Mast. Liab.* p. 439.

The facts found in the case on the part of the plaintiff must be deemed to be admitted for the purpose of this discussion, as the case was not submitted to the jury. The negligence complained of in this respect was in keeping Adamson in the employ of the defendant after it knew or was chargeable with notice that he was an incompetent and careless engineer, and that his negligence and inefficiency contributed to cause the injury. The first act of negligence was on the part of Breen, who left the chairs in the shaft. The act of Adamson, the engineer, was subsequent in point of time; yet his act of negligence, if it was such, was continuing negligence, which co-operated and acted with the negligent acts of Breen to produce the common result complained of. Although Breen was negligent, yet if the defendant was chargeable with notice of Adamson's incompetency, and, through his negligence, was therefore wanting in ordinary care and prudence in discharging its duties, and such want of ordinary care contributed to produce the injury in question, and the plaintiff did not know of such want of ordinary care and prudence on the part of the defendant, then the defendant would be liable. The mere fact of the concurrence of one who stands in the relation of a fellow servant and the one receiving the injury do not excuse the master from his contributory negligence. The injury was the re-

sult of two concurring causes, and if the defendant is responsible for or contributed to one of these causes, he is not exempt from liability, because Breen, who is responsible for the first cause, may have been also culpable. The servant assumes the risk of the negligence of the fellow servant, but not that of the master. *Railroad Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 991; *Lane v. Atlantic Works*, 111 Mass. 136; *Lake v. Milliken*, 62 Me. 240; *Railroad Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Railway Co. v. Kellogg*, 94 U. S. 474; *Bailey, Mast. Liab.* p. 437. There was some testimony in the case tending to show the incompetency of Adamson, the engineer, and that defendant was negligent in keeping him in its employ after it had knowledge of his incompetency. While we express no opinion upon the weight to be given to this testimony, yet we are of the opinion that, under all the facts shown, the case should have been submitted to the jury. The judgment of the court below is vacated and set aside, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

(15 Utah, 379)

McCLURE et al. v. LITTLE et al. (DESERET SAV. BANK, Intervener).

(Supreme Court of Utah. June 14, 1897.)

PROMISSORY NOTES—MATERIAL ALTERATIONS—REFORMATION—MISTAKE—ATTORNEY'S FEE.

1. Plaintiff brought this action to restrain defendants from foreclosing a trust deed given as security for notes. It appears that Smith, acting for himself and for the bank, the intervener in the case, filled up a blank in the notes by writing after the words "interest payable" the word "semiannually," to make the notes conform to the understanding and contract of the parties when executed. *Held*, that the alteration was a material one, but as it was innocently made for the purpose of correcting a mistake and making the instrument conform to the agreement of the parties, without any fraudulent intent, and it appears that no one was injured by filling in the blank left for that purpose, the instrument is not annulled, nor the debt extinguished.

2. Here the intervener sought to have the notes reformed in accordance with the understanding and agreement of the parties, and the court of equity has the power to so decree, and restore the instrument according to the original intention of the parties.

3. Where the deed of trust provided for the payment of a reasonable attorney's fee, and there is no proof showing what the attorney charged, or what it was agreed should be paid him, and the findings show that no attorney's fee was allowed in the original proceedings, and yet these proceedings were included as the basis for the value of services allowed in the case in intervention, *held*, under chapter 39, p. 25, Sess. Laws 1894, which provides that no greater amount should be allowed or decreed as attorney's fees than the sum which appears by the evidence is actually charged by and paid to the attorney, and only the amount to be retained by the attorney shall be decreed, that the attorney's fee should not be allowed. *Held*, further that this statute was enacted in order to prevent a division of fees provided for in the mortgage between the attorney and the mortgagee; that only those reasonable fees paid or agreed to be

paid for attorney fees could be taxed against the defendant under the contract in the trust deed. (Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Action by William H. McClure and others against James T. Little and Elias A. Smith. The Deseret Savings Bank intervened. From the judgment, plaintiffs appeal. Affirmed.

C. F. & F. C. Loofbourov, for appellants. Moyle, Zane & Costigan, for respondents.

MINER, J. Prior to 1890, defendant Smith and others owned Central Park, in Salt Lake, and sold it to one Andrews. In part payment, Smith took two notes for \$20,000 each, secured by mortgage on the property. Plaintiff McClure bought the property subject to the mortgage. Negotiations afterwards took place between Smith and McClure by which McClure agreed to give his notes, secured by trust deed on the property, to Smith, and take up the incumbrance. The notes and trust deed were drawn up and delivered to McClure for him to take to Colorado for his wife's signature. They were afterwards signed and returned to Smith by mail. The notes and trust deed were drawn upon printed blanks. The notes were all in the following form, except as to date of payment and amount: "\$16,250.00 gold. Salt Lake City, Utah, October 1, 1891. One year after date, for value received, we, or either of us, promise to pay to the order of Elias A. Smith sixteen thousand, two hundred fifty dollars, negotiable and payable at the Deseret National Bank of Salt Lake City, in U. S. gold coin, with interest at the rate of nine per cent. per annum from date until paid. Interest payable ——. [Signed] William H. McClure. Amanda M. McClure." When the notes were delivered to Smith, the word "semiannually" was left out of the blank following the words "Interest payable." When Smith received the notes, October 21, 1891, he showed them to Mr. Young, who discovered that the word "semiannually" was left out of the blank, and suggested the error. Smith remarked that it was a clerical error, and immediately wrote the word "semiannually" in each note, so that they would read, "Interest payable semiannually." Plaintiffs claim the word "semiannually" was not in the trust deed when delivered to Smith, but the testimony is conflicting on this point. The notes and trust deed were made payable to Smith, with James T. Little as trustee, and contained the usual power. Smith was the indorser on the Andrews note. Smith and McClure were indorsing the new notes. Both were procuring the new loan for themselves as well as for the bank. While Smith was acting for the bank he had no authority from the bank officials to alter the notes. In July, 1893, proceedings were begun to foreclose this trust deed, by publication, on account of the non-payment of the semiannual interest falling due April 1, 1893. Thereupon plaintiffs brought this suit against Smith and Little, the trustee,

to restrain the sale, and have the securities canceled and adjudged void on account of the alleged material and fraudulent alteration. Little and Smith answered, and admitted the alteration of the notes so as to conform to the agreement of the parties, by filling in the blank left, and that it was an immaterial alteration, done innocently with the plaintiffs' consent, and that the plaintiffs ratified the same. They denied any alteration in the deed. The Deseret Savings Bank then filed its complaint in intervention, alleging that it became the owner of the notes after their execution, and that at the time the notes were executed the makers agreed to pay interest at 9 per cent. per annum, payable semiannually, until paid, and set out the same in the consideration therefor, but that by a clerical omission of the party making out said notes the word "semiannually" was by mutual mistake and oversight left out of said notes from the blank left for that purpose; that other parties indorsed the notes as indorsers; that Smith was the cashier of the intervener. Alleged that the notes had become due. Claimed \$1,000 attorney's fees. Asked for a foreclosure of the trust deed; that the notes be reformed so as to include the words "semiannually" in the blank left for that purpose in them, following the words "Interest payable"; for judgment, deficiency judgment, and for further relief. It appears from the proof that there was full value moving to the plaintiffs as a consideration for these notes. It clearly appears from the testimony that it was agreed between the parties at the time these notes and trust deed were drawn that they should draw interest at 9 per cent. per annum, payable semiannually, from date until paid, but by a clerical error of the draftsman the word "semiannually" was left out of the printed blank in the notes; that the notes were signed and returned to the payee, the mistake not being discovered until after they were signed and delivered by mail; when Smith saw the mistake, he said it was a mistake, and immediately filled the blank so as to have it conform to the agreement of the parties, supposing he had a right to do so. The change, however, was made without the consent of the makers, except that there was some slight testimony offered tending to show that plaintiffs afterwards ratified the change by making payments of interest, and offering to make part payment on one note. The testimony on all these questions was conflicting, but we are of the opinion that the contention on the part of the intervener is sustained by a strong preponderance of the testimony. The alteration was made innocently, for the purpose of making the instrument conform to the understanding and agreement of the parties. It was not made fraudulently, for the purpose of injuring any one. It does not sufficiently appear that the trust deed was altered in the respect mentioned. The alteration of the notes was a material alteration, but, as it was made under the circumstances mentioned, we are of the opinion that the prayer for reformation should be granted. A fraudulent alteration not only

avoids the instrument itself, but also extinguishes the debt which constitutes the consideration for the instrument. But when the alteration was innocently made for the purpose of making the instrument conform to the agreement of the parties, without any fraudulent intent, and it appears that no one was injured by the filling of the blank left for that purpose, then the instrument is not annulled, nor the debt extinguished. We do not want it understood, however, that we approve of this method of tampering with written instruments for any purpose. This correction could more properly have been made by a court of equity. The alteration made was clearly improper, and should not have been made by Mr. Smith. In this case the intervener sought to have the notes reformed in accordance with the understanding and agreement of the parties, and the word "semiannually" inserted in the notes after the words "Interest payable," and the court so decreed. A court of equity has the power to so decree, and thereby restore the instrument to its original condition. We are of the opinion that under the statute the intervener was entitled to institute the proceedings in intervention, and that the court was correct in decreeing the relief asked, in reforming the notes so as to conform to the express agreement of the parties, and to grant a decree of foreclosure.

In this case the debtor seeks to avoid an honest debt because of the alteration, without offering to pay the same. It is a cardinal principle that equity will not aid a party in doing that which is not equitable. He who seeks equity must be prepared to do equity. A court of equity will hardly permit a debtor to get rid of a debt which he honestly owes, and which is based upon a valid consideration, because his creditor has innocently inserted a word in the contract that he had agreed should be inserted, even if the alteration was such as a court of law would not excuse. *Taylor v. Adair*, 22 Iowa, 279; section 3190, Comp. Laws Utah 1888; *Nickerson v. Sweet*, 135 Mass. 517; *Tied. Com. Paper*, §§ 392-395; *McRaven v. Crisler*, 53 Miss. 542; *Boyd v. Brotherson*, 10 Wend. 93; 2 *Daniel, Neg. Inst.* §§ 1403, 1404; *Rand. Com. Paper*, § 1765; *Ball v. Storie*, 1 Sim. & S. 210; *Goodenow v. Curtis*, 33 Mich. 505; *Bank v. Carson*, 60 Mich. 432, 27 N. W. 589; *Ames v. Colburn*, 71 Am. Dec. 723; *Duker v. Franz*, 3 Am. Rep. 314; *Ryan v. Bank*, 148 Ill. 349, 35 N. E. 1120; *Kountz v. Kennedy*, 63 Pa. St. 187; *Seymour v. Mickey*, 15 Ohio St. 515; 2 *Pars. Notes & B.* p. 572.

Objection is made to the allowance of \$1,000 attorney's fee. The note in suit did not provide for an attorney's fee. The trust deed provides that the trustee may pay out of the proceeds of sale the expenses of this trust, including a reasonable attorney and counsel fee, and compensation to said trustee, or his successor in trust, for his services. The proceeding to foreclose the trust deed by advertisement was enjoined, and the deed was foreclosed through these

proceedings in intervention in equity. A witness was asked what a reasonable attorney's fee would be in the case of McClure against Little and Smith, with the bank as intervener; such services being for the filing of an answer to plaintiffs' injunction in behalf of Little and Smith, and hearing had on the motion to dissolve the injunction, lasting several days, and afterwards a complaint in intervention by the bank, asking reformation of the notes to the original understanding, and foreclosure; involving about \$45,000, the hearing lasting several days; the question being what a reasonable attorney's or solicitor's fee would be in both matters. The witness answered, "\$1,000." No other testimony was offered. No evidence was offered on the subject of what was charged by or retained by the attorney. The objection to the question is that it comprehended more than could be covered by attorney's fees. It included a fee for the defense to the main injunction case, where no attorney's fee could be claimed, and attorney's fee as trustee, who had claimed no fees; also attorney's fee for reformation of the notes in the intervention proceedings by the bank, and is not a proper basis for computation, and no attorney's fee should be charged. The question comprehended more than could be legitimately included in the foreclosure of the mortgage by the trustee. The findings show that no attorney's fee was allowed in the original proceeding, yet that proceeding was included as a basis for the value of the services. The amount allowed was in excess of what should have been allowed for attorney's fees in the case of intervention. Under the proof, much of the expense created is the result of mistakes and errors of the intervener or trustee. Had the original proceedings been brought to reform and foreclose the notes and mortgage, only one proceeding would have been necessary, with a consequent reduction of expense. There is another reason why attorney's fees should not be allowed. Chapter 39, p. 25, Sess. Laws 1894, provides that, when an attorney's or counsel fee is claimed by the plaintiff, no greater amount should be allowed or decreed than the sum which appears by the evidence to be actually charged by and paid to the attorney for the plaintiff, and that only the amount to be retained by the attorney shall be decreed. This statute was enacted to prevent a division of the fees provided for in the mortgage between the attorney and the mortgagee, and to allow only such reasonable attorney's fees to be taxed against the defendant as were actually agreed to be paid, or were paid, for his services. There was no proof showing what the attorney for plaintiffs actually charged, or what the agreement was he should receive from the plaintiffs. Consequently no fees should have been allowed in the decree. No other construction can be placed upon the statute. Attorney's fees, when allowed, go to the

mortgagee or trustee, and become a part of the judgment. The bank is responsible to the attorney for his fees, and will doubtless pay a sum equal to the amount it has asserted was a reasonable fee. We find no other error in the proceedings. The district court is instructed to modify the findings and decree, striking out the \$1,000 attorney's fee. With this modification, the judgment and decree of the district court is affirmed, with costs.

ZANE, C. J., concurs.

(15 Utah 374)

NEPHI IRRIGATION CO. v. VICKERS.

(Supreme Court of Utah. July 1, 1897.)

WATERS—IRRIGATING AND DOMESTIC USES—FINDINGS—CERTAINTY.

1. Where the findings and decree are that the defendant is the owner and entitled to the use of sufficient of the water of two certain natural streams to irrigate a total of 31 acres, and that the plaintiff is the owner and entitled to the use of all the water of the same streams, subject to the rights of the defendant, and the rights of defendant and plaintiff to the water in question are not otherwise specified or determined, *held*, that the findings and decree are not sufficiently certain, and that the same should be modified by finding and decreeing the amount of water necessary, in second-feet, or the fractional part of the streams in question, that will be sufficient to irrigate defendant's 31 acres.

2. A finding that the defendant "constructed a small ditch" at a certain point, over the land of said defendant, and down to his house, and that he has diverted therein "a small amount of water for culinary and domestic purposes," and a decree that the defendant is entitled to maintain said ditch, and to run therein at all seasons of the year sufficient of the waters of said stream for his culinary and domestic purposes, and that plaintiff is the owner and entitled to the use of the waters of said stream, subject to the rights of the defendant, *held* to be uncertain, and that the same should be modified by finding the quantity of water, in second-feet, or the fractional part of the stream in question, that defendant is entitled to for his culinary and domestic purposes, and decreeing the same to him.

(Syllabus by the Court.)

Appeal from district court, First district; E. V. Higgins, Judge.

Action by the Nephi Irrigation Company against Samuel T. Vickers. From a judgment for defendant, plaintiff appeals. Remanded with instructions.

D. D. Houtz, for appellant. Samuel A. King, E. A. Wilson, and W. C. A. Bryan, for respondent.

HART, District Judge. This suit was brought by the plaintiff corporation to quiet title to all of the waters of Salt creek, in Juab county, and its tributaries, Hop creek and Rock springs, and to enjoin and restrain defendant from interfering with any of the waters of said streams. The defendant answered denying all the allegations of the complaint, and by cross complaint set up title in himself to the waters of Hop creek and Rock springs, and prayed that his title be quieted, and the

plaintiff enjoined from interfering therewith. The court found and decreed that the defendant is the owner and has the right to use sufficient of the waters of Hop creek to irrigate 30 acres of land, and that the defendant is entitled to divert at a point named, and to run through a certain ditch, and to pass the house of defendant, at all seasons of the year, sufficient of the waters of Hop creek for his culinary and domestic purposes, and that the defendant is the owner of and has the right to use sufficient of the waters of Rock springs to irrigate 1 acre of land during the irrigating season. Title to said water is quieted in the defendant, and plaintiff is enjoined from interfering with the same. The court found that all of the waters of Salt creek and its tributaries, Hop creek and Rock springs, is sufficient to irrigate at all seasons of the year about 2,700 acres, and the plaintiff is decreed to be the owner of, and entitled to the use of, all the waters of Hop creek and Rock springs, subject to the rights of the defendant as hereinbefore set forth; and defendant is enjoined from interfering with plaintiff's full and free use of that portion of the waters of Hop creek and Rock springs to which it is entitled as decreed. The plaintiff appealed from the judgment and decree, and the principal ground of objection is the uncertainty of the decree.

Some question is made as to the sufficiency of the cross complaint upon which to grant defendant affirmative relief. No demurrer was made to the cross complaint, and testimony was taken and proceedings had thereunder without objection. The proceedings were on the equity side of the court; it had jurisdiction of the subject-matter and of the parties; and, without entering into a detailed discussion of the pleadings in the case, we are of the opinion that the court had authority to ascertain the rights of the parties, and proceed to a final determination of all the matters at issue. Pom. Eq. Jur. §§ 181, 231, 232, 242, 1371; Frey v. Lowden (Cal.) 11 Pac. 338; Harris v. Harrison (Cal.) 29 Pac. 325. In answer to appellant's objection to the uncertainty of the decree, respondent's counsel contend in their brief, and also in oral argument, that the court found that the plaintiff was entitled to irrigate from these streams 2,700 acres, and the defendant 31 acres, and that, therefore, the decree and findings are susceptible of but one construction, to wit, that the entire stream is sufficient to irrigate 2,731 acres, and that plaintiff is entitled to 2,700 parts out of a total of 2,731 parts, and that defendant is entitled to 31 parts or $\frac{31}{2731}$; thus fixing the rights of the litigants with mathematical certainty. An examination of the record, however, shows that no such construction can be placed upon the findings and decree, and that the plain finding is that the waters of the streams in question are sufficient to irrigate 2,700 acres in all, and the judgment roll is silent as to how many acres the plaintiff is entitled to irrigate. The defendant is decreed sufficient water to irri-

gate 31 acres of land, and the remainder of the streams to plaintiff. In the case of *Holman v. Pleasant Grove City*, 8 Utah, 78, 30 Pac. 72, this court affirmed a decree allowing the plaintiff "sufficient water to irrigate 60 acres of land, subject to a diminution pro rata with other appropriations." In that case the defendant city had taken control and assumed and exercised the authority of distribution; and, the acreage of the claimants to the water being determined, a decree for water as represented by acreage, subject to a pro rata distribution and diminution, was upheld. In the case at bar, the acreage of the plaintiff not being fixed by the decree, it is indefinite and uncertain how much water is awarded to the defendant for irrigation, and consequently it is uncertain how much water is awarded to plaintiff. The decree says sufficient water to irrigate 30 acres and 1 acre, but who is to determine how much is sufficient for this purpose? The quantity required would depend upon the season and the kind of crops grown. Irrigators widely differ as to the amount of water necessary for proper irrigation. Unless the total acreage to be irrigated from a stream is determined, and a pro rata division decreed, it is about as uncertain to decree a person sufficient water to irrigate 31 acres as it is to decree him "one good irrigation stream," which was condemned by this court in the case of *Smith v. Phillips*, 6 Utah, 376, 23 Pac. 932. Neither mode of measurement is a compliance with section 2782, Comp. Laws Utah 1888, which provides "that water may be measured by fractional parts of the whole source of supply with a limitation as to periods of time when used or intended to be used; or it may be measured by cubic inches, with a limitation specifying the depth, width and declination of the water at points of measurement, and, if necessary, with a further limitation, as to periods of time when used, or intended to be used," etc. The findings and decree as to the waters for culinary and domestic purposes are equally uncertain. The defendant is found to have "constructed a small ditch" at a certain point, "over the land of said defendant, down to his house," and that "the defendant and his predecessors in interest, for the purpose of conveying to the house and home of said defendant herein, have diverted a small amount of water for culinary and domestic purposes" at all seasons of the year; and it is decreed "that the defendant is entitled to maintain said ditch, and to run at all seasons of the year sufficient of the waters of Hop creek for his culinary and domestic purposes through said ditch." The findings and decree fail to specify the size of the ditch, the amount of water diverted, and the quantity of water sufficient for defendant's culinary and domestic purposes. This case should be remanded, with directions to the trial court to modify the decree by finding and decreeing, either from the evidence taken or from other evidence that may be offered, or from the report of a referee appoint-

ed for that purpose, the amount of water, in miners' inches, or fractional parts of the stream in question, that will be sufficient to irrigate the defendant's 31 acres of land, and for his culinary and domestic purposes. The case is ordered remanded, with instructions to proceed in accordance with this decision, and modify the findings and decree.

ZANE, C. J., and MINER, J., concur.

(15 Utah 149)

STATE v. SPENCER.

(Supreme Court of Utah. June 2, 1897.)

LARCENY — ELECTION — EXCEPTIONS TO CHARGE — CORROBORATION OF ACCOMPLICE — PROOF OF EXAMINATION — ARGUMENTS OF COUNSEL.

1. Defendant and others entered into a conspiracy to steal cattle on the range, and were charged with the larceny of several head of cattle belonging to different persons, in one count of the information. The cattle were picked up on the range and driven to a corral, and there claimed by the defendant, and driven away in accordance with the previous conspiracy to steal them. At the trial, evidence was given of the taking of one roan steer from the corral shortly after others were taken. After the people had rested their case, defendant's counsel requested the court to require the prosecution to elect whether they would rely for conviction upon the charge of larceny of the roan steer or the other stock named in the information. *Held*, that election cannot be required on the ground that distinct offenses are charged, when such offenses are committed by the same acts and grow out of — one and continuous — the same transaction, and the same testimony must be required for conviction; but where it clearly appears that separate and distinct offenses are intended to be charged in an information, or proved on the trial, the proper way in which an objection can be rendered available is by motion to quash before the defendant has pleaded and the jury sworn, or by demurrer, or by calling upon the prosecution to elect in the subsequent proceedings in the case.

2. Exceptions taken to the charge of the court, but which do not appear on the record, cannot be considered.

3. The statute (Comp. Laws Utah 1888, § 5049) requiring the corroboration of the evidence of an accomplice does not require that such a witness should be corroborated in respect to every material fact, but only in respect to such of the material facts as constitute a necessary element in the crime charged, and the corroborating evidence must of itself, and without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense. It need not be sufficient of itself to establish defendant's guilt, but it must tend in some degree to implicate and connect the defendant with the commission of the offense charged. This evidence may be slight, yet the requirements of the statute are fulfilled if it be corroborating evidence.

4. It is not necessary that proof be offered at the trial that the accused was bound over or committed by a committing magistrate for the offense charged. When called upon to plead, if he makes no objection that such examination has not been had or waived, he must be understood to admit that it has been had or waived, or that he now intends to waive it. Having waived this objection, it is too late to review it on appeal. The statute (Sess. Laws 1896, p. 98) simply requires the fact of the examination to be recited in the information.

5. A statement by the prosecuting attorney to the jury that, "after investigating this case, I have become convinced of his guilt, and that he

[defendant] ought to be prosecuted and brought to justice," is improper, but not reversible error, when not called to the attention of the court at the time it was made, and not until after the case was submitted to the jury and they had retired, and when the instructions of the court to the jury were to the effect that they should not consider the arguments of counsel, only so far as they have confined their arguments and discussion of the case as testified to by the witnesses, and that they must make up their minds from the testimony, and not from the statements of counsel, etc.

(Syllabus by the Court.)

Appeal from district court, Sixth district; W. M. McCarty, Judge.

Brigham Spencer was convicted of larceny, and appeals. Affirmed.

D. D. Houtz and M. M. Warner, for appellant. A. C. Bishop, Atty. Gen., and Benner X. Smith, for the State.

MINER, J. Defendant Brigham Spencer, impleaded with Jacob Reese, was jointly informed against by the prosecuting attorney of Garfield county for the larceny of cattle alleged to belong to different parties. Appellant, Brigham Spencer, was tried alone. The complaint was dismissed against defendant Davis, and he was used as a witness upon the trial. It appears that there was a general round-up of cattle to be had at the "gate" in Garfield county, and that many cattlemen, including the defendant, went upon the range and gathered up their cattle, and drove them to the corral or gate, and held them there about a week, and until the round-up was over and each owner had selected his stock from the rest of the herd gathered there. Just prior to this round-up, it was agreed between the two defendants and Davis that as Spencer had been upon the range for years, and knew all the cattle, while Reese and Davis had been in the penitentiary, and were not so well acquainted, Spencer should point out the estrays gathered there at the round-up to Davis, and that Davis should take the estrays so pointed out, and sell them, and divide the proceeds with the other parties. The estrays were brought into the corral by defendants and Davis, with other cattle, in accordance with the conspiracy agreed upon between them. At the round-up the cattle described in the information were pointed out by Spencer to Davis as estrays, and Davis, with the other defendants, cut them out from the herd in the corral, and drove them to the corral of defendant's brother, and these cattle were afterwards sold with cattle belonging to defendant's brother. One witness testified that the roan steer described in the information was taken about a week after the others were taken. Whether this testimony refers to the time this steer was brought into the corral or taken from the corral, does not clearly appear. Other witnesses place the pointing out of the estrays by Spencer, and the taking of them away from the corral by Davis, at about the same time. After the people had rested

their case, defendant's counsel requested the court to require the prosecution to elect whether they would rely for conviction upon the charge of larceny of the roan steer, or of the other stock named in the information. The request was denied, and defendant alleges error upon this ruling. The defendants were charged with the larceny of several head of cattle belonging to several different persons, in one count in the information, on the 26th day of May, 1896. The proofs show that the defendants and Davis entered into a conspiracy by which two of them should drive to a certain corral, at the time of the general round-up, all their stock, including all the estrays that could be found, and that, when cattle were being cut out by different owners, the defendant Spencer, who was well acquainted with all the estrays on the range, should point them out, and that such estrays should be claimed and taken away by Davis in the alleged interest of parties who ran their stock on the Panguitch range; that, after the estrays were selected, they should be sold, and the proceeds divided between the conspirators. In pursuance of this understanding, the cattle in question were taken by the defendants and sold. This being so, it is not important whether the roan steer was taken away at the same time with the other cattle or not. The stealing of all of the cattle was part of one and the same transaction, combination, and conspiracy on the part of the defendants and Davis, in furtherance of their common object and agreement to steal all the estrays they and others would place in the corral. The cattle were driven to the corral from different quarters, and then selected by the defendants, stolen, driven away, and sold. Election cannot be required on the ground that distinct offenses are charged, when such offenses are committed by the same acts and grow out of the same transactions, and the same testimony must be required for a conviction; but, where it clearly appears that separate and distinct offenses are intended to be charged in an information, the proper way in which the objection can be rendered available is by motion to quash before defendant has pleaded and the jury sworn, or by demurrer or by calling upon the prosecution to elect in the subsequent proceedings in the case. *People v. McKinney*, 10 Mich. 95; 1 Chit. Cr. Law, 248; *U. S. v. West* (Utah) 27 Pac. 84. In the case of *People v. McKinney*, 10 Mich. 95, the court said: "As a general rule, in cases of felony, when it clearly appears, from the indictment or otherwise, that several entirely distinct felonies are intended to be charged and proven, the court will, in its discretion, either quash or compel the prosecutor to elect; and the same course is sometimes taken in misdemeanors, where several offenses in no way connected are charged. But there is nothing technical in the rule, and in the exercise of this discretion the court will not be governed simply by the question whether

several different offenses, in point of law, are charged and intended to be proved, but mainly, as a general rule, by the consideration whether the trial of the several offenses would involve the proof of substantially different transactions, and thereby tend to confuse the defendant in his defense, or deprive him of any substantial right. And therefore, where the several offenses charged, though distinct in point of law, spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election. Such would seem to be the principle of the general rule to be deduced from the cases." 1 Chlt. Cr. Law, 252, 254, and note; Rosc. Cr. Ev. 231, 232; *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50; *People v. Johnson* (Mich.) 45 N. W. 1119; *State v. Larson* (Iowa) 52 N. W. 539; *People v. Goodhue*, 94 Ill. 37.

Appellant's counsel, in his brief, makes some objections to the charge of the court; but as no exceptions were taken to the charge, as appears from the record, we cannot consider these objections.

Defendant also assigns as error the fact that the testimony of Davis, the accomplice, was not corroborated by the testimony of any other witness, as provided by section 5049, Comp. Laws Utah 1888. This section reads as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Under this provision of the statute, the corroborating evidence must of itself, and without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense. This corroborating evidence need not be sufficient of itself to establish the guilt of the defendant, but it must tend in some degree to implicate and connect the defendant with the commission of the offense charged. It may be slight, and entitled to but little consideration; nevertheless the requirements of this section are fulfilled if there be any corroborating evidence which of itself tends to connect the defendant with the commission of the offense. The statute does not require that such witnesses should be corroborated in respect to every material fact, but only in respect to such of the material facts as constitute a necessary element in the crime charged. *People v. Thompson*, 50 Cal. 480; *People v. Ames*, 39 Cal. 403; *People v. Josselyn*, Id. 393; *U. S. v. Kershaw*, 5 Utah, 618, 19 Pac. 194. Upon an examination of the record, we are of the opinion that the testimony of the accomplice was sufficiently corroborated by the facts and circumstances

shown, and that the court correctly instructed the jury on that subject.

Defendant's attorney also alleged as a ground of error that no proof was offered upon the trial that the defendant was ever duly bound over or committed by a committing magistrate for the offense charged. The information recites the fact that the accused was duly held to answer the charge made by the committing magistrate, in compliance with chapter 23, p. 98, Sess. Laws 1896. The preliminary examination before a magistrate, under the statute, was designed, to some extent, to accomplish the purpose of a presentment by a grand jury under the law as it existed before, in protecting a party against being subjected to the indignity of a public trial for an offense before probable cause has been established against him by evidence under oath. The law never sanctioned putting any one on his trial until probable cause has been made to appear by responsible testimony. The defendant may, however, waive his right to a preliminary examination before an information is filed against him. Section 1 of the act referred to permits him to do so, with the consent of the state. He may make this waiver as well when called upon to plead to the information as when brought before the examining magistrate. If the defendant intends to insist upon the want of an examination, and that he has not been bound over by a committing magistrate, he should do so by motion to quash the information, or by other appropriate motion, or demurrer before plea. A motion to quash is the more simple course. If, when called upon to plead, he makes no objection that such examination has not been had or waived, he must be understood to admit that it has been had or waived, and that he now intends to waive it. Having waived this objection, it is now too late to review it. *Washburn v. People*, 10 Mich. 372; *People v. Jones*, 24 Mich. 218; *Morrissey v. People*, 11 Mich. 327. The statute does not require the fact of an examination to be averred in the information. It simply requires it to be recited in the information. This fact, if recited, does not constitute any of the elements of the crime required to be averred or charged in the information by section 2 of the act referred to. It is not a matter which goes to the merits of the trial, but to the regularity of the previous proceedings. The statute does not require proof of these facts to be produced upon the trial of the case. *Washburn v. People*, 10 Mich. 372. Upon a review of the record, we do not find that this question was raised in the trial court. It is raised for the first time in this court, so far as appears from the abstract, and, but for other considerations, would not be entitled to the consideration of the court.

Appellant's counsel also contend that the court erred in permitting the attorney for the state, in his argument to the jury, to use the following language: "I am not prosecuting this case to satisfy any feeling I may have in

the case for or against any one, but, after investigating the case, I have been convinced of his guilt, and that he ought to be prosecuted and brought to justice." Counsel for the appellant objected to this statement, but it appears from the record that the trial judge did not hear the objection nor the remarks of counsel, and it was not called to his attention until after the jury had retired; the court being engaged at the time in the preparation of his instructions, and in an examination of requests to charge. The remarks of the district attorney were clearly improper. It is the duty of the public prosecutor to see that an accused person has a fair trial, so far as he has power to control it, and it is also his duty to use his best endeavors to convict the guilty party by fair means. In the discharge of this duty, great zeal is commendable, yet his methods must be such as comport with a fair administration of justice. It is improper for a prosecuting officer to make statements to the jury, of facts, as of his own knowledge, which have not been introduced in evidence under the sanction of an oath, relating to the material issues in the case. *People v. Quick* (Mich.) 25 N. W. 302. It was also the duty and right of defendant's counsel to bring such statement to the attention of the court. Had he done so at the time, the court, doubtless, would have corrected it. The court charged the jury generally with reference to statements of counsel as follows: "You are instructed that you should not consider the arguments of counsel in the case, only so far as they have confined their arguments and discussion of the case as testified to by the witnesses. You are to make up your minds from the evidence, and not from statements of counsel. You are instructed to only consider the arguments in so far as they will assist you in arriving at the truth or falsity of the charge based on the evidence in the case, and you should not, in considering this case, adopt as your own the conclusion of counsel on either side, but are to draw your own conclusions and make up your minds from the evidence in the case." The charge of the court was fair, and naturally tended to correct any erroneous impressions created by the remarks of the county attorney. Upon the whole record, we find no reversible error. The judgment of the court below is affirmed.

ZANE, C. J., and HART, District Judge, concur.

JUNGK et al. v. HOLBROOK et al.

(Supreme Court of Utah. June 16, 1897.)

PROMISSORY NOTES — RELEASE OF SURETIES — CHANGE OF VENUE—CONSTITUTIONAL LAW.

1. Defendants were sureties on a promissory note given by C. & R. to plaintiffs. At the time the note was given, it appears that Scott was a partner and agent of the plaintiffs in the purchase of sheep; that he was also secretly the partner of C. & R. in the sale of the sheep to plaintiffs; that the relationship, at the time the

note in question was given, was known to both plaintiffs and to C. & R., or that the circumstances were such as to give notice to them of the existence of the partnership. The defendants, when they signed as sureties, did not know that Scott was interested as a partner of each firm on the contract concerning which they were sureties, and did not indorse with the knowledge that they were becoming liable for the acts of Scott in the manipulation of the business of the several firms. *Held*, that the intentional concealment of the facts in this case, which, had they been known to the sureties at the time they signed, might have caused them to act differently, constituted such a fraud upon the sureties as to relieve them from liability on the notes. If a material fact connected with a contract of suretyship, and directly affecting the sureties' liability, and which might influence the sureties in entering into the contract, is purposely concealed from the sureties, in the interest of the creditor, such concealment, though no inquiry is made by the sureties, amounts to a fraud upon the sureties, and would discharge them from liability.

2. Plaintiffs were residents of Salt Lake county; defendants of Utah county. The case had already been tried in the First district court of the territory; and under section 3196, Comp. Laws Utah 1888, as amended by Sess. Laws Utah 1896, passed before this case was tried the last time, it was not error in the court to try the case in Utah county, and to deny a change of venue to Salt Lake county.

3. Section 5 of article 8 of the constitution is only prospective in its operation, and does not apply to actions pending when the constitution was adopted.

4. Section 2 of article 24 of the constitution continues in force such territorial laws as were not repugnant to the constitution, and makes them state laws.

(Syllabus by the Court.)

Appeal from Fourth district court; A. C. Hatch, Judge.

Action by Franz Jungk and another against L. Holbrook and others. From a judgment for certain defendants, plaintiffs appeal. Affirmed.

This action was brought against Cropper and Reed, as makers of three promissory notes for \$7,000, and against respondents Holbrook and Duggins, as indorsers. The notes were payable in Salt Lake City, where the plaintiffs resided. Respondents resided in Provo, in the First district, where the action was brought. Cropper and Reed resided in Millard county. Holbrook and Duggins answered separately, and set up failure of consideration, and fraud in obtaining their signatures to the notes, by the defendants Cropper and Reed, and fraud and concealment of material facts from them by the plaintiffs in obtaining their signatures as indorsers. It appears that in November, 1889, Jungk and Fabian, the plaintiffs, were partners, and had been engaged in buying sheep. At this time they entered into a partnership agreement with one S. W. Scott, by which Scott was to be an equal partner, but the business was to be carried on in the name of Jungk and Fabian. Money was to be furnished by them, and Scott was to buy the sheep, and pay in checks signed, "Jungk and Fabian, per S. W. Scott." Checks were afterwards issued to Cropper and Reed signed in this way. Cropper and Reed were partners, doing a stock business. Scott solicited Crop-

per and Reed to enter into a contract with Jungk and Fabian for a large number of sheep, for future delivery, but concealed from them, as they claim, that he was himself interested in the purchase, or that he was a partner with Jungk and Fabian. Scott represented to Cropper and Reed that he could contract with Jungk and Fabian at a price much larger than they could be purchased for. He finally proposed a partnership with Cropper and Reed to furnish the sheep to Jungk and Fabian. The contract was to be in their name, and he was to be a silent partner, and interested in the profits. He was to purchase the sheep at a rate that would make a profit, and advised them where he could get the sheep. Under these inducements, Cropper and Reed entered into an agreement with Jungk and Fabian, December 24, 1889, by which they were to deliver in July, 1890, to Jungk and Fabian, 500 sheep, at a certain price, in certain places in Southern Utah. In February, 1890, another similar contract was made, under similar circumstances. Scott was interested as a partner on both sides. Cropper and Reed claim that they did not know that he was interested with Jungk and Fabian. On the signing of the contracts, \$5,000 was advanced by Jungk and Fabian on each contract, and Cropper and Reed were required to give sureties for due performance on their part. Holbrook and Duggins were offered as such sureties, and, being accepted, Jungk and Fabian directed Scott to go with Cropper and Reed to Provo, as their representative, and get Holbrook and Duggins to sign the guarantees. All these parties went to Provo, solicited and obtained Holbrook and Duggins as sureties for Cropper and Reed, Scott taking an active part in the conversation and in bringing about the result, but his interest in both sides of the contract was not divulged to the sureties. Holbrook and Duggins were old acquaintances of Cropper and Reed. Scott was a stranger. The partnership contract between Scott and Cropper and Reed, of November, 1889, was not placed in writing until March 7, 1890. It reads as follows: "This agreement, made and entered into by and between Cropper, Reed, and Scott, as partners dealing in cattle, sheep, and real estate; they each one agree with each other to buy and sell on commission, and share equally in profits and loss on all real estate and cattle and expenses of handling the same; to share in two contracts of sheep made by Cropper and Reed to Jungk and Fabian. The said Scott is to divide all profits made in selling, and the said Cropper and Reed is to divide all profits made in buying, should there be any, and to work to one another's interest in the entire business as partners. Cropper and Reed. S. W. Scott." Jungk and Fabian had in the meantime made a contract to sell sheep, relying on their contract with Scott, but the market price had risen above the contract price. Scott failed in performing his agreement with Cropper and Reed, and they with Jungk and Fabian, as agreed. After default, Cropper and Reed and Jungk and Fabian met at Deseret

in July, 1890, in the absence of Holbrook and Duggins and Scott; and it was agreed that Cropper and Reed should pay back the \$10,000 advanced, and \$5,000 as damages for breach of contract. This sum was paid back except about \$8,000. Jungk and Fabian then went to Provo, and presented their claim to Holbrook and Duggins, but no disclosure was at any time made to them of Scott's participation on both sides of the contract. This fact was concealed from the sureties. It was agreed that Cropper and Reed should make the three notes for \$7,000, and that Holbrook and Duggins should indorse them as they had indorsed the contract, in continuation, and in pursuance of their liability as sureties. The notes were made and indorsed, and are the notes in suit. Cropper testified that he knew or suspected, before the notes were given, that Scott was interested with Jungk and Fabian. Testimony was offered tending to show that Fabian had notice of Scott's duplicity with his firm, and alleged secret dealings with Jungk, his partner, in July. Testimony was also offered tending to show that Jungk and Fabian, or one of them, knew that Cropper, Reed, and Scott owned sheep that were at Oasis in 1890 or 1891, when Fabian was there, before the notes were given; that Cropper and Reed also knew that Scott was buying sheep for Jungk and Fabian; and that Scott acted as agent for Jungk and Fabian in procuring the signatures of Holbrook and Duggins, as their sureties on the sheep contract. Scott's name does not appear on either of the notes or contract, except that Scott indorsed a note of Cropper and Reed for \$1,500, given in settlement, also a \$600 note, given in settlement, which plaintiffs regarded as equal to Scott's profit in the sheep delivered in the early part of the contract. These notes formed part of the consideration paid plaintiffs at the time of the settlement, outside of the notes in suit. When the three notes fell due, defendants Holbrook and Duggins learned for the first time that Scott was a partner with both Cropper and Reed and Jungk and Fabian, and that he was interested in the contract, to their detriment, and refused payment. A trial was had, and judgment rendered against Cropper and Reed on a former hearing. Plaintiffs appeal.

The court refused to instruct the jury to render a verdict in favor of plaintiffs, but instructed the jury in effect that if the defendants knew that Jungk, Fabian, and Scott were partners, and that Cropper, Reed, and Scott were partners when they signed the note, they would be bound, and that the burden to show that they did not know it was upon defendants; that if the jury found that, at the time the contracts were guaranteed by defendants, Scott was interested on both sides of the contract, and was a partner of Jungk and Fabian for the purpose of buying sheep, and of Cropper and Reed for the purpose of delivering sheep to Jungk and Fabian, and that defendants were ignorant of such relations when they signed the contract and notes, and that Jungk and Fabian, or ei-

ther of them, knew at the time of such signing by defendants as sureties for Cropper and Reed that Scott was a partner, and interested with Cropper and Reed in the two sheep contracts, and that they concealed such fact from the defendants, the jury should find for defendants; that Scott's knowledge that he was a partner in both partnerships for the purposes named would not be knowledge of or notice to Jungk and Fabian; that the knowledge of Scott could not be imputed to Jungk and Fabian; that if Jungk and Fabian, or either of them, knew or had notice before defendants signed the contract of Scott's interest with Cropper and Reed in the sheep contracts, it was their duty to inform the defendants of the same, and their neglect to do so would be a fraud on defendants, and in that case defendants would not be liable, unless they knew of Scott's interest from some other source; that notice does not mean actual and direct information. If a party is put upon inquiry as to a particular fact, then he is charged 'n law with whatever inquiry will disclose. The court gave other instructions with reference to the notes being in continuation of the contract of guaranty; that if, before the contracts were fulfilled, one partner of Jungk and Fabian entered into a partnership with Reed and Cropper, and this fact was purposely concealed from the sureties, and they did not know about it, this would release them upon the guaranty; and, if the notes were simply a continuation of their supposed liability on the original contract, then the defendants are not liable, unless they knew at the signing of the notes of the double relation of Scott to the parties to the sheep contract.

Bennett, Harkness, Howat & Bradley and Williams, Van Cott & Sutherland, for appellants. Brown & Henderson, for respondents.

MINER, J. (after stating the facts). This case was twice before the territorial court prior to this appeal. The cases are reported in 9 Utah, 49, 33 Pac. 236, and 12 Utah, 209, 42 Pac. 292. Upon each occasion the record discloses a somewhat dissimilar state of facts. The case now presents a somewhat different state of facts from those presented on the last appeal, so far as appears from the opinion rendered. The first question arises upon the charge of the court as given, and the refusal of the court to charge as requested. In some respects the testimony bearing upon the question involved is somewhat indefinite and unsatisfactory. The jury were the judges of its weight and conclusiveness, and found against the plaintiffs. There are sufficient facts and circumstances disclosed in the record from which the jury could infer or find that Jungk, Fabian, and Scott were partners for the purpose of purchasing sheep, and that Jungk and Fabian knew at the time, or were chargeable with notice, that Scott was a partner with Cropper and Reed, or at least interested with them in the contracts for the purchase and sale of sheep to them; that Crop-

per, Reed, and Scott were partners in the purchase and sale of sheep to Jungk and Fabian; that Cropper and Reed knew, or were chargeable with notice, that Scott was a partner or interested in the contract for the purchase of sheep with Jungk and Fabian; that defendants Holbrook and Duggins were wholly ignorant of the double relation existing between Scott and the two firms at the time they signed the guaranty contract and the notes given in pursuance of it, and would not have executed the contract or indorsed the notes had the true state of facts been made known to them by either firm; that the concealment of these facts and circumstances immediately affected the liability of the sureties; that Cropper and Reed and Jungk and Fabian fraudulently withheld from the sureties the true state of facts existing between them and Scott when the indorsements were made; that each of these firms knew that Scott was their partner in the transactions with the other firm, and that the sureties were making the indorsement in ignorance of the relation; that Jungk and Fabian sent Scott, as their agent and representative, to obtain the signatures of Holbrook and Duggins to the contract; that Scott was their partner at the time; that Jungk and Fabian knew, or were chargeable with notice, that Cropper, Reed, and Scott owned sheep together at Oasis, and had them there when Fabian was present; that Reed and Cropper and Jungk and Fabian, knowing the facts, induced the sureties to sign the notes, and fraudulently withheld from them the double relation of Scott, as affecting their interest and liability.

If, in obtaining the signatures of these defendants to the contract of suretyship, or as indorsers of the notes made in continuation of their supposed liability, there was any fraudulent concealment on the part of Cropper and Reed and Jungk and Fabian, or either of said firms, of any fact or circumstance within their knowledge, or concerning which they were reasonably chargeable with notice, which materially affected and increased the liability and responsibility of Holbrook and Duggins as sureties or indorsers in those transactions in which they were sureties, and operated to their prejudice, then the sureties should be discharged. "It has been held that the mere noncommunication by the creditor to the surety of material facts within the knowledge of the creditor which the surety should know, although not willful or intentional on the part of the creditor, or with a view to advantage to himself, will discharge the surety." The fraud upon the sureties consists in the situation in which they were placed by the conduct of the other parties, and not on what was passing in their minds, not expressed, but concealed. Upon this subject, Brandt on Suretyship (section 420) says: "It has been held that 'one who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the or-

inary risks attending it; and the party to whom he becomes a surety must be presumed to know that such will be his understanding, and that he will act upon it unless he is informed that there are extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risks will be materially increased, well knowing that there are such circumstances, and having an opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract." It is also held that, in order to discharge the surety, the undisclosed information should relate to business which is the subject of suretyship. Story says: "The contract of surety imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety." Story, Eq. Jur. § 324; *Bank v. Cooper*, 36 Me. 179; *Brandt*, Sur. §§ 410-421; *Comstock v. Gage*, 91 Ill. 328; *Bank v. Stevens*, 39 Me. 532; *Jungk v. Reed*, 9 Utah, 49, 33 Pac. 236; *Peck v. Durrett*, 9 Dana, 486; *Pidcock v. Bishop*, 1 Law Lib. 87; *Doughty v. Savage*, 28 Conn. 146; *Railton v. Mathews*, 10 Clark & F. 934; *Warren v. Branch*, 15 W. Va. 21. It is said that that "test as to whether the disclosure should be voluntarily made is whether there is a contract between the debtor and creditor to the effect that his position shall be a different one from that which the surety might expect." *Hamilton v. Watson*, 12 Clark & F. 109.

These sureties did not know that Scott was a partner of each firm on the contract concerning which they were sureties, and did not indorse with the knowledge that they were becoming liable for the acts of Scott in the manipulation of the business of the several firms. They signed as sureties for Cropper and Reed, relying upon their integrity, and not as sureties for Cropper, Reed, and Scott. When they signed, they were not informed that a member of both firms had laid plans with each, by which the sureties should be robbed, and Cropper and Reed ruined, for the benefit of one member of the several firms. Nor did the sureties know that Cropper and Reed and Jungk and Fabian were either passive or active agents in such resulting dishonesty. Neither did the sureties know that Jungk and Fabian knew that Scott was interested with Cropper and Reed in the sale of sheep, nor that Cropper and Reed knew that Scott was interested with Jungk and Fabian in the purchase of sheep. If a material fact connected with the contract of suretyship, and directly affecting the sureties'

liability, which might influence the sureties in entering into the contract, is concealed from the sureties, or, if knowing the fact, such information is purposely concealed from the sureties, in the interest of the creditor, such concealment, though no inquiry is made by the sureties, amounts to a fraud upon the sureties, and would discharge them from liability. Under all the facts and circumstances shown for the consideration of the jury, they have found the facts against the appellants. We find no reversible error in the instructions of the court, nor is there any error in refusing to give the instructions asked by the plaintiffs.

Prior to the trial, plaintiffs moved the district court of Utah county for an order transferring said cause for trial to Salt Lake county. The motion was based upon an affidavit showing that plaintiffs owned the notes, and had resided in Salt Lake county since they were given, and that they were payable at Salt Lake. The motion was overruled, and an exception taken. The motion is based on section 7 of article 24, and section 5 of article 8, of the constitution. Plaintiffs resided in Salt Lake City when they commenced this action in the first district court in Utah county, January 10, 1891. This case had been tried in that county three times prior to the last trial, which occurred October 9, 1896. The defendants resided in Provo, Utah county. Section 5 of article 8 of the constitution provides, among other things, that all civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law. Section 7 of article 24 of the constitution provides, among other things, that all actions and cases pending in the district and supreme courts of the territory at the time the state is admitted into the Union shall, except as otherwise provided, be transferred to the supreme court and district courts of the state. Section 2 of article 24 of the constitution provides that all laws of the territory now in force, and not repugnant to the constitution, shall remain in force until they expire of their own limitation, or are altered or repealed by the legislature. Section 5 of article 8 of the constitution is only prospective in its operations, and therefore does not apply to actions which were commenced and pending in the territorial district courts when the constitution went into effect. A constitutional provision should not be construed with a retrospective operation, unless that is the unmistakable intention of the words used. *Black*, Const. Law, p. 70; *End. Interp. St.* § 506; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Gurnee v. Superior Court*, 58 Cal. 83; *People v. County Com'rs of Grand Co.*, 6 Colo. 204; *Lehigh Iron Co. v. Lower Macungie Tp.*, 81 Pa. St. 484. Section 2 of article 24 of the constitution continues in force, under the state, such territorial laws as were not repugnant to it, and thereby makes them state laws. This court so held in *Whipple v. Hen-*

derson, 45 Pac. 274, 13 Utah, 484; Pleasant Val. Coal Co. v. Board of Com'rs, 48 Pac. 1032, 15 Utah, 97. Among the laws of the territory then in force with reference to the place of trial were sections 8193 to 8201, Comp. Laws Utah 1888, which were amended (Sess. Laws 1896, p. 90) by making these sections conform to the new condition of things under the constitution. The territorial act was substantially re-enacted after striking out the words "judicial district," and substituting the word "county." The act was approved and took effect February 17, 1896, before this motion was made. This act provides where cases shall be commenced and tried, and when and where they may be removed for trial. Section 3196 provides that "in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." When this action was commenced, the plaintiffs resided in Salt Lake, and the defendants in Utah, county. The First district formerly comprised Utah and several other counties. Under the new constitution, Utah county is made distinct by itself. The action was brought in pursuance of law in the proper county under the statute as it then existed. This statute was continued in force until changed by the act of 1896. We are of the opinion that the district court of Utah county properly assumed jurisdiction in this case. We find no reversible error in the proceedings. The judgment of the district court is affirmed, with costs.

ZANE, C. J., concurs. HART, District Judge, concurs in the result.

(15 Utah, 421)

WRIGHT v. SOUTHERN PAC. CO.

(Supreme Court of Utah. June 24, 1897.)

EXPERT TESTIMONY—REVIEW ON FORMER APPEAL
—INJURY TO EMPLOYEE—EVIDENCE.

1. Whether a witness is shown to be qualified to testify as to matters of opinion is a preliminary question for the trial judge to pass upon at the trial, and his discretion is conclusive unless manifestly erroneous as a matter of law, and the running and management of locomotives is so far a part outside of the experience and knowledge of ordinary jurors as to render expert testimony proper and admissible.

2. It is not necessary or usual for the supreme court to pass upon each and every question raised on appeal when the case is reversed. It is sufficient to pass upon and determine such questions raised on the appeal as are necessary to the final determination of the case.

3. The population of the place where the injury happened, the proportion of the population that were railroad employes, and the danger of those not engaged in or immediately connected with the making up of trains, were questions not relevant to the case as presented.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by James Alfred Wright against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Marshall & Royle, for appellant. Richards & Macmillan and A. E. Pratt, for respondent.

MINER, J. This action was brought to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in failing to furnish a fireman in addition to the engineer to operate its engine, and in the engineer negligently failing to obey the signals given, while acting in the double capacity of engineer and fireman. The record shows that the plaintiff was a switchman in the employ of the defendant at the time of the accident. On the morning of the 11th day of August, 1892, about 1:15 o'clock, he was performing his duties as switchman, and, for the purpose of uncoupling them, went in between two cars of a freight train, which was standing upon a slight grade, so that the links were drawn tight. Being unable to uncouple them on account of the grade, he came out from between the cars, and with his lantern signaled the engineer, who performed the duties of fireman as well as engineer, to back up slowly, and then stepped in again between the cars to pull the pin the moment the slack came, and stood with his back towards the engine and one hand upon the rung of the ladder on the car in front of him. The engineer saw and obeyed the signal, but the train came back with a jerk, and plaintiff's right heel was caught and held by the brake beam. He immediately grasped the rung of the ladder with his other hand, and signaled the engineer with his lantern to stop, throwing his lantern out to one side. This signal was not seen by the engineer, who at this particular moment was necessarily engaged in shoveling coal into the fire,—a duty which should have been performed by a fireman,—and the plaintiff was dragged for some distance until his hands were jerked from their hold upon the ladder, and he was thrown under the wheels of the car, which passed over his leg, necessitating its amputation at a point about seven inches above the knee.

On the trial of the case Mr. Doughty was called as a witness for the plaintiff, and gave testimony tending to show that he was the engineer operating the engine at the time of the accident, and had been so employed for about one year; that he had been in the employ of the defendant company since 1885; that he was car inspector for the defendant the first year at Carlin; had worked as helper in the machine shops for several months; worked as fireman on the road for three years; again as repairer for several years at different points on the road; that it was his duty as helper to take care of the engines and fix them up, and prepare them to go out; since July, 1891, had charge of the switch engine, and run it at night; that his duty was to run the engine as engineer, and do the firing when needed. No fireman was furnished on the engine at the time of the accident. Thereupon the plaintiff asked the witness the following question: "Now, Mr. Doughty, I want to ask you, in your

opinion, in view of the work that had to be done in the Carlin yard, and was done there every day, and that was being done at the time of the accident, whether, in your opinion, it was necessary, for the safety of the employes,—switchmen and others,—that there should be a fireman and engineer upon the engine when she was in motion and at work." The question was objected to "as immaterial and irrelevant, and the witness is not shown to be competent." The objection was overruled, and an exception taken by defendant. Appellant now insists that this ruling was prejudicial error, and that the respondent had no right to substitute the opinion of the witness for that of the jury. The respondent insists that this question was passed upon on the former hearing, reported in 46 Pac. 374, and that such decision has become the law of the case. Upon this question we find the same character of evidence was given at the preceding trial, but it does not appear from the abstract in the case that there was any objection to the testimony, although there was an assignment of error upon the admission of the testimony. It is evident that this court did not pass upon this question upon the former appeal. It is not usual or necessary for the supreme court to pass upon each and every question raised on appeal when the case is reversed. It is sufficient to pass upon and determine such questions raised upon the appeal as are necessary to the final determination of the case. This was done in that case.

As to the other question, it does not appear that the question was objected to as incompetent. Nor was there any objection made that the question did not embrace or embody all the facts upon which the question was predicated. It appears that the witness was shown to be competent to testify as an expert. Whether a witness is shown to be qualified to testify as to matters of opinion is a preliminary question for the trial judge to pass upon at the trial, and his discretion is conclusive unless manifestly erroneous as a matter of law. *Railway Co. v. Novak*, 9 C. C. A. 629, 61 Fed. 580. It also appears that the subject about which the witness was called upon to give his opinion was not a matter of such common knowledge that the jury could judge as intelligently as one skilled in the use and management of an engine. In *Railroad Co. v. Bailey*, 11 Ohio St. 335, the court said: "That the running and management of railroad locomotives and trains is so far an art outside of the experience and knowledge of ordinary jurors as to render the opinions of persons acquainted with the running and management of such locomotives and trains, as experts, admissible and proper testimony in proper cases, is very clear on principle, and is so recognized in *Quimby v. Railroad Co.*, 23 Vt. 394; *Railroad Co. v. Reedy*, 17 Ill. 580; and *Railroad Co. v. Smith*, 22 Ohio St. 227." See, also, *Rice*, Ev. p. 364; *Railway Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742; *Rog. Exp. Test*, pp. 236, 237, § 104; *Howland v. Railway Co.*, 110 Cal. 518, 42 Pac. 983;

Mammerberg v. Railway Co., 62 Mo. App. 563; *Lau v. Fletcher* (Mich.) 62 N. W. 358; *Frace v. Railway Co.* (Sup.) 22 N. Y. Supp. 958; 2 Jones, Ev. § 383; *Lawson*, Exp. Ev. p. 86; 3 Phil. Ev. (1885) p. 270. We are of the opinion that no error was committed in admitting the testimony under the objection made.

Counsel for defendant asked a witness for the defendant the following questions: "What is the population of Carlin? What proportion of the population of Carlin are railroad employes? Was there any special danger to any one other than those immediately connected with the making up of trains?" Each question was objected to as immaterial and irrelevant. The objections were sustained, and the defendant excepted. It is difficult to see wherein these questions were material or relevant. The first two had reference to the time of the trial. The hazard and danger to the plaintiff did not depend upon the population of Carlin. What danger others not operating the train were in was not important to this inquiry. An answer to either question would not necessarily refute the plaintiff's testimony that a fireman was necessary to operate the locomotive. We see no error in the ruling of the court. All other questions raised by the appellant in its brief and discussed in the argument of the case were passed upon adversely to the appellant's contention at the former hearing of this case, reported in 46 Pac. 374, 14 Utah, 383. Upon the whole record, we find no reversible error. The judgment of the court below is affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur.

(15 Utah, 410)

EASTMAN v. GURREY.

(Supreme Court of Utah. June 22, 1897.)

TAXATION—SALE—EJECTMENT—PLEADING AND PROOF—APPEAL—SETTING ASIDE FINDINGS.

1. In the case of a tax sale of land in Salt Lake City, where it appears the description of the deed does not correspond with all its immediate antecedents, where the recitals in the deed are not true, and do not correctly describe the land referred to in the notice of sale upon which the deed depended, and where the description in the notice of sale is erroneous, and does not correctly describe the property of the defendant, nor the property described in the tax sale, and it does not affirmatively appear from the notice of sale that notice was given defendant of the amount of the taxes assessed against him, or when or where the same were payable, as provided by section 8, p. 276, Rev. Ord. Salt Lake City, and section 2030, p. 53, Sess. Laws 1890; and where it appears the property was sold for \$10.20 more than the amount of the taxes, but nowhere appears what the \$10.20 was for, or what became of it, and it nowhere appears how much the costs of the sale were, except that the deed recites the fact that the land was sold for \$59.20,—*held*, that such tax sale is illegal. Expressly overruling *Hamer v. Weber Co.*, 37 Pac. 741, 11 Utah, 1, and holding that the dissenting opinion in that case states the law of the case. The case of *Ogden City v. Hamer*, 42 Pac. 1113, 12 Utah, 337, is overruled in so far as it conflicts with this opinion and the opinion in *Olson v. Bagley*, 37 Pac. 739, 10 Utah, 492.

2. When the findings and judgment are not supported by the undisputed testimony in the case, as shown by the bill of exceptions, and are without any testimony to support them, it is the duty of the court to set aside the judgment on the exception to the findings.

3. Under a general denial and claim of title in an action of ejectment, when the plaintiff does not set out the source of title, but on the trial relies on a tax title, it is competent for the defendant to introduce in evidence any fact which might show or tend to show that the plaintiff had no right of entry when the suit was brought, and which might tend to defeat the title of plaintiff, or show a want of consideration for the deed under which plaintiff claims title and right of entry.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Ejectment by May Eastman against A. R. Gurrey. From a judgment for plaintiff, defendant appeals. Reversed.

T. Ellis Browne and Bennett, Harkness, Howat & Bradley, for appellant. Rice H. Jones, C. S. Varian, and Moyle, Zane & Costigan, for respondent.

MINER, J. This action in ejectment was brought to recover possession of property in Salt Lake City, described in the complaint as commencing 5 rods north of the southwest corner of lot 5, block 33, plat B, Salt Lake City survey; thence north $4\frac{1}{2}$ rods; thence east 10 rods; thence south $4\frac{1}{2}$ rods; thence west 10 rods, to the place of beginning,—which plaintiff alleges she is the owner of, and entitled to the possession thereof, together with rents and damages. The answer denies all the allegations of the complaint; denies title in the plaintiff; and claims title and right of possession in defendant. The plaintiff bases her right and title to the land in question upon a tax deed executed by the recorder of the city of Salt Lake to Olivia Widdeborg, August 30, 1892, for taxes, and special assessments for water mains, assessed upon the property for 1889, amounting to \$49. The sale was made to P. O. Perkins, August 27, 1890, for \$59.21, and by him the certificate of sale was, on October 6, 1890, assigned to Olivia Widdeborg, who obtained a deed, and conveyed the premises to plaintiff. The property is valued at \$5,000. The property assessed to the defendant, A. R. Gurrey, and which was sold and conveyed by tax deed, was described in the assessment roll as follows: "74 $\frac{1}{4}$ x165, lot 5, block 33, plat B;" and this appears to be the only description. The plat of the block required by ordinance to be kept shows the lot to be 10x20 rods, and defendant's land is marked $4\frac{1}{2}$ x10. The assessment notice does not refer to the plat, and the points of the compass are not designated on the plat. Nor is the block, including the lot, given in the plat. The property conveyed by the tax deed is described as beginning 5 rods north of the southeast corner of lot 5, block 33, plat B, Salt Lake City survey; running thence west 10 rods, north $4\frac{1}{2}$ rods, east 10 rods, south $4\frac{1}{2}$ rods, to the place

of beginning. The notice of sale described the property to be sold as part of lot 5, block 33, plat B, Salt Lake City survey; beginning 5 rods north of the southeast corner of said lot 5, running thence west 10 rods; thence north 5 rods; thence east 10 rods; thence south 5 rods, to the place of beginning; and that the assessor would sell the same or so much thereof as would be necessary to pay the tax of \$49 and costs at public auction. This notice was published in the newspapers. It does not appear what the costs of the sale amounted to. The property sold was sold for \$59.20, but it does not appear what became of the sum paid over and above the amount of the taxes assessed at \$49.

The statute (section 2013, p. 51, Sess. Laws 1890) provides that, in assessing real estate, it should be referred to with reasonable certainty as to locality and quantity. In cities it shall be sufficient to give the number of the lot, block, plat, etc. In describing the land assessed as 74 $\frac{1}{4}$ x165, lot 5, block 33, plat B, without any other description, when lot 5 had an area of 10 by 20 rods, the assessor was in error. This description was too indefinite and uncertain to amount to reasonable certainty. If the whole lot is assessed, it is sufficient to describe it by number and block; but, when only a portion of the lot is assessed, it should be described with reasonable certainty, so that the owner will know what land is assessed. The plat in evidence only gives a portion of the block, and the points of the compass are not designated thereon. Nor does the assessment notice refer to the plat in any way to identify it. These are material defects. Neither the purchaser nor owner would know from this description where the land assessed was located. It could not be ascertained from the assessor's roll whether the land assessed was on the north, south, east, west, or middle of the lot. A deed issued on sale of the property with this description would be defective. *Olsen v. Bagley*, 10 Utah, 492, 37 Pac. 739, and cases cited; *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042. The notice of sale described a different piece of property from that named in the assessment roll, and more than was owned by the defendant. This notice included 5x10 rods, instead of 74 $\frac{1}{4}$ x165 feet, as described in the assessment roll. The tax deed described as sold $4\frac{1}{2}$ x10 rods,—less land than was described in the notice of sale, and more than was described in the assessment roll. The plat designated as belonging to the defendant a different piece of land from that assessed in the assessment roll. In *Stout v. Mastin*, 139 U. S. 151, 11 Sup. Ct. 519, it is held that if the description in a deed of land sold for nonpayment of taxes departs from the description contained in the assessment roll, and the prior tax proceedings upon which it is based, it is void; that each act in the tax proceedings must substantially correspond with its immediate antecedent. The purchaser is entitled to a deed to correspond

to the notice of sale, and to the description in the assessment roll. If there was no definite parcel of the land assessed, there was no lien; and, if there was no lien, there could be no legal sale. In this case the description in the deed did not correspond with all its immediate antecedents. The recitals in the deed were not true, as it did not correctly describe the land referred to in the notice of sale upon which the deed depended. The description in the notice of sale was erroneous, and did not correctly describe the property of the defendant, nor the property described in the tax deed. Nor does it affirmatively appear from the notice of sale that the property is located in Salt Lake City. It does not appear that notice was given the defendant of the amount of the taxes assessed against him, or when or where the same were payable, as provided by section 8, p. 276, Rev. Ord. Salt Lake City, and section 2030, p. 53, Sess. Laws 1890.

The property was sold for \$10.20 more than the amount of the taxes. It nowhere appears what this \$10.20 was for, or what became of it. It does not appear how much the costs of the sale were, except that the deed recites the fact that the land was sold for \$59.20. Section 2030, p. 53, Sess. Laws 1890, requires that only sufficient land of the delinquent be exposed for sale to pay the tax. It does not appear that only sufficient of the defendant's land was offered to pay the tax, but that the whole was offered, and that \$10.20 was obtained for it more than the amount of the tax. Had less than all the land been offered, it might have been sufficient to pay the tax. It is evident that these proceedings were irregular, and ineffectual to pass title. *Olsen v. Bagley*, 10 Utah, 497, 37 Pac. 739; *Wiggin v. Temple*, 73 Me. 382; *Carpenter v. Gann*, 51 Cal. 193; *Bucknall v. Story*, 36 Cal. 67. Many of these questions arose and were decided in the case of *Olsen v. Bagley*, 10 Utah, 492, 37 Pac. 739. In that case the court held that "tax sales are made exclusively under statutory power, and, unless all the necessary prerequisites of the statute are carried out, the tax sale becomes invalid. If one of the prerequisites fail, it is as fatal as if all failed. The power vested in a public officer to sell land for the nonpayment of taxes is a naked power, not coupled with an interest, and every prerequisite to the exercise of the power must precede its exercise. The title to be acquired under statutes authorizing the sale of land for the nonpayment of taxes is regarded as stricti juris, and whoever sets up a tax title must show that all the requirements of the law have been complied with."

The property sold is valued at \$5,000. The tax amounts to \$40. This is a large demand for so small an investment. The purchaser at a tax sale relies on the letter of his bond, and he has a legal right to do so. But, under such circumstances, he must rest alone on the letter; he has no overpowering equity to justify a large and liberal interpretation of statutory proceedings in his favor. *Cooley, Tax'n*, §§ 470,

471; *Black, Tax Tit.* §§ 154, 184; *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508; *Seymour v. Peters*, 67 Mich. 415, 35 N. W. 62; *Houghton Co. v. Auditor General*, 41 Mich. 38, 1 N. W. 890; *Greene v. Lunt*, 58 Me. 518; *Wilkins v. Tourtellott*, 28 Kan. 825; *Black, Tax. Tit.* §§ 38, 48, 49, 82, 112, 124, 405; *Cooley, Tax'n*, p. 282; *Bidwell v. Webb*, 10 Minn. 59 (Gil. 41); *Prindle v. Campbell*, 9 Minn. 212 (Gil. 204); *Treon's Lessee v. Emerick*, 6 Ohio, 391; *Stewart v. Aten's Lessee*, 5 Ohio St. 237; *Head v. James*, 13 Wis. 641; *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042. Upon the hearing, the case of *Hamer v. Weber Co.*, 11 Utah, 1, 37 Pac. 741, has been referred to. We are of the opinion that the decision of the court in that case does not state the law of the case, and therefore we expressly overrule it. The dissenting opinion of Justice Barch in that case, commencing at page 16, 11 Utah, and page 745, 37 Pac., correctly states the rule of law governing the case, and should stand as the controlling opinion in the case. In so far as the case of *Ogden City v. Hamer*, reported in 12 Utah, 337, and 42 Pac. 1113, conflicts with this opinion and the case of *Olsen v. Bagley*, 10 Utah, 492, 37 Pac. 739, the same is hereby overruled. In this case it was the duty of the plaintiff, as purchaser and holder of the tax deed, to show the regularity of all the proceedings. *Bucknall v. Story*, 36 Cal. 67; *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508.

The errors herein pointed out appear from the undisputed documentary and other testimony offered on the part of the defendant, and over which there is no dispute. In such case, when the findings and judgment are not supported by the undisputed testimony in the case, as shown by the bill of exceptions, and are without any testimony to support them, it is the duty of the court to set aside the judgment on the exception to the findings. *Ottison v. Edmonds* (Wash.) 46 Pac. 399; *Agency Co. v. McClelland* (Tex. Sup.) 23 S. W. 1101; *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366; *Tuller v. Arnold*, 93 Cal. 166, 28 Pac. 863; *Bank v. Newton* (Colo. Sup.) 22 Pac. 445; *Arnold v. Hosliery Co.*, 148 N. Y. 392, 42 N. E. 980; *Assurance Co. v. Scammon*, 126 Ill. 355, 18 N. E. 562; *Johnson v. Bailey* (Colo. Sup.) 28 Pac. 81; *Whitman v. Winchester Repeating Arms Co.*, 55 Conn. 247, 10 Atl. 571; *Reynolds v. Snow*, 67 Cal. 498, 8 Pac. 27; *Railroad Co. v. Watson* (Ind. Sup.) 15 N. E. 824. We are of the opinion that the findings and judgment were not supported by the undisputed testimony in the case, and that the court erred in its findings and judgment.

Upon the trial of the case, the defendant introduced testimony tending to show that the tax deed was obtained through fraud, and was conveyed to plaintiff without any consideration. The court, on motion, struck out all of the defendant's testimony, including testimony offered showing that defendant obtained the deed to the property in question through foreclosure proceedings instituted by the mortgagee,

wherein the plaintiff in those proceedings claimed a decree for the taxes paid out of which the tax title in question originated, on the ground that no equitable defense or cause of action had been set up in the answer or by way of cross complaint, and that the plaintiff had no notice thereof, to which defendant excepted. No specific equitable defense was set up in the answer. The answer consisted of a specific denial of all the allegations of the complaint, and an assertion of title and right of possession in the defendant. The complaint does not set out the source of plaintiff's title. We are of the opinion that the court erred in striking out this testimony. Under a general denial in an action of ejectment, when the plaintiff does not set out the source of title, but at the trial relies upon a tax title, it is competent for the defendant to introduce in evidence any fact which might show or tend to show that the plaintiff had no right of entry when the suit was brought, and which might tend to defeat the title of the plaintiff, or show want of consideration for the deed under which plaintiff claims title and right of entry. In the case of *Parker v. Dacres* (Wash.) 24 Pac. 192, it is said: "When, as in this case, a defendant is not at all advised as to the source of the plaintiff's title, he can content himself with a general denial, and thereunder introduce any legal evidence that tends to defeat the title of the plaintiff, as shown by his proofs. Any other rule would work great hardship on a defendant, while the enforcement of said rule cannot work hardship to a plaintiff, as he can, if he so desires, so shape his complaint as to compel defendant to fully disclose his defense in his answer. Said rule is not only in accord with our ideas of propriety and justice, but is also abundantly sustained by the authorities. *Sparrow v. Rhoades*, 76 Cal. 208, 18 Pac. 245; *Pom. Rem. & Rem. Rights*, § 679; *Semple v. Cook*, 50 Cal. 26; *Marshall v. Shafter*, 32 Cal. 177; *Roberts v. Chan Tin Pen*, 23 Cal. 260; *Kirk v. Hamilton*, 102 U. S. 68; *Mather v. Hutchinson*, 25 Wis. 27; *Hall's Heirs v. Dodge*, 18 Kan. 277; *Hyde v. Mangen*, 88 Cal. 319, 26 Pac. 180; *Parker v. Dacres* (Wash.) 24 Pac. 192; *Smith v. Hobbs* (Kan. Sup.) 31 Pac. 687; *Henderson v. Wannamaker*, 25 C. C. A. 181, 79 Fed. 736; *Armstrong v. Brownfield* (Kan. Sup.) 4 Pac. 185. The judgment of the court below is set aside, and the complaint dismissed, with costs.

ZANE, C. J., and BARTCH, J., concur.

O'FARRALL v. KENNEDY et al.

(Supreme Court of Idaho. June 24, 1897.)

FORECLOSURE OF CHATTEL MORTGAGE—FUTURE ADVANCES.

K., desirous of starting a newspaper in Boise, requested a loan, to be repaid in one year, with interest. A subscription was gotten up, and \$5,500 subscribed. A mortgage was executed to secure the repayment of the same. But \$3,050 of said sum was paid by the subscribers. *Held*, under the evidence, that said mortgage was given to secure future advances, with full knowl-

edge on the part of the mortgagor that the loan to him of said entire sum of \$5,500 was contingent upon the collection of the same from said subscribers.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; Alex E. Mayhew, Judge.

Action by John Andrew O'Farrall against Jacob M. Kennedy and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John R. McBride, for appellants. W. B. Heyburn, for respondent.

SULLIVAN, C. J. This is an action to foreclose a mortgage. The complaint contains the usual allegations. The answer admits the execution of the mortgage; denies that any payments had been made on the note secured by said mortgage, and that any sum whatever is due thereon; and, as a further defense, states the history of the transaction as viewed by defendants, and alleges failure of consideration, breach of contract, and fraud and misrepresentation in procuring said mortgage. A trial was had, and the court made findings of fact and conclusions of law in favor of the plaintiff; and judgment and decree for the sale of the property described in the mortgage were rendered and duly entered. A motion for a new trial was made and denied, and the appeal is from the order.

The facts necessary to an intelligent understanding of this case are as follows: It appears that defendant J. M. Kennedy, of Anaconda, Mont., a newspaper man, was anxious to publish at Boise City, Idaho, a Democratic newspaper, and in March or April, 1892, addressed a letter to one J. M. Miller, then a resident of Boise City, in regard thereto, and on April 4th of that year Miller replied to said letter. After stating that the Democrats of Boise City to whom he had shown said first-mentioned letter were pleased with it, and that the outlook was good for procuring aid in the establishment of such newspaper, he says: "With your knowledge of journalism, and thorough training in everything connected therewith, and with my rustling, we can get there, if we can only get money put up to start on a good basis." It appears: That further correspondence was had between said Miller and defendant Kennedy, which resulted in Kennedy coming to Boise City to look the field over. That he was introduced to the leading Democrats, and represented that he was desirous of starting a Democratic newspaper in said city, and thereafter said Kennedy presented a written proposition, addressed "To the Democrats of Boise City and Vicinity," in regard to establishing such newspaper. He proposed that any number of members of said party should advance him \$10,000 as a loan for a period of one year, on which he would pay interest; said money to be advanced on the promissory note of said Kennedy, secured by first mortgage on certain unincumbered real estate (describing it), and, if that was not

deemed sufficient security therefor, he would give a good indorser on said promissory note. That said \$10,000 should be placed in the bank of Boise City to the credit of said Kennedy, to be applied on the purchase of all necessary material for the establishment of said newspaper; and, with a view of harmonizing conflicting interests, said Kennedy proposed to purchase the entire plant of the newspaper known as the "Idaho Democrat," if that could be done as set forth in said proposal; if not, then to establish and conduct a newspaper independently of that journal. Said proposition was dated at Boise City, May 11, 1892, and was good for five days. Thereafter certain gentlemen of Boise City started a subscription for the purpose of raising money to assist said enterprise. Said subscription list is dated May 14, 1892. It was thereafter ascertained that the \$10,000 asked for by Kennedy could not be raised, and that no larger sum than \$5,500 was subscribed. Appellant Kennedy was fully advised of that fact, and subsequently withdrew that part of his proposition whereby he had offered to give an indorser on said promissory note. He was advised on August 8, 1892, that said \$5,500 was in subscriptions, and not then collected. He thereupon executed his promissory note for \$5,500, and signed the mortgage to secure the payment thereof, but did not acknowledge the execution of said mortgage until September 21, 1892. On August 8, 1892, \$1,500 was advanced to Kennedy; and thereafter other sums, amounting in all to \$3,050, were collected from said subscribers and paid to him. That, at the times of signing and acknowledging the execution of said mortgage, appellant was fully advised that all of said \$5,500 had not been collected from the subscribers, and as to the probability of the subscriptions not being paid. With full knowledge of these facts, he signed said mortgage and note on August 8th, and acknowledged the execution of the mortgage on September 21, 1892. He also executed a chattel mortgage on said newspaper plant to secure the money so advanced, some time after the execution of said promissory note, and after he was fully advised that all of the subscriptions had not been collected. The record fails to show that any one guaranteed the collection of the \$5,500 so subscribed, and it does show that Kennedy himself collected at least \$200 of it. The sixth fact found by the trial court is as follows: "I further find that the sums of money advanced on behalf of the said committee to said Kennedy were derived from a subscription offered in evidence by the plaintiff, and attached to the deposition of S. H. Hays, and marked 'Exhibit B,' which said subscription list contained the names of a number of subscribers to the fund for the purpose of starting said paper, and the subscriptions on said list amounted in the aggregate to \$5,500; that, because of said subscription amounting to said sum, the amount of the note and mortgage given by the said Kennedy to the said Regan as trustee for the committee was fixed at said sum of \$5,500. And I further find

that only \$3,050 of the said sum of \$5,500 so subscribed as aforesaid was ever paid in to the hands of the committee, and for that reason said Kennedy only received the said sum of \$3,050, but I find from the evidence that the said Kennedy was thoroughly conversant with the method and means by which said money which the said committee had undertaken to furnish him was to be received; that during the month of June, 1892, the said Kennedy saw the said subscription list, and knew from what source the said money was expected to be derived. I further find that at the time of the making of the payments on August 8 and September 1 and September 26, 1892, the said Kennedy was fully advised of the fact that no more than the sum of \$3,050 on account of said subscriptions was received by said committee. And I further find that, with full knowledge of the condition of said subscriptions, as to their payment, and of the fact that the moneys received by said Kennedy were to depend upon the payment of said subscriptions, the said Kennedy on the 21st day of September, 1892, made, executed, acknowledged, and delivered the mortgage herein sought to be foreclosed to the said Regan as trustee for the said committee, and that about the said 21st day of September, 1892 (the date not being definitely fixed), the said Kennedy, with a full knowledge of the facts aforesaid, made, executed, and delivered to the said Regan, as trustee of the said committee, a chattel mortgage upon the printing plant and outfit procured by him for the purpose of starting the paper under the agreement with said committee as aforesaid, to further secure the payment of the said sum of \$5,500 expressed in said note." We have not only carefully examined, but re-examined, the evidence in this case, and think that it clearly warrants said finding of fact, and all the facts found by the court. We have no doubt that the defendant had full knowledge of the fact that the payment by the committee to him of the sum named in the promissory note and mortgage was contingent upon the collection of the various sums subscribed by those signing said subscription list. We think the findings of fact and conclusions of law are amply sustained by the record, and that no error was committed in the refusal to grant a new trial. The judgment of the court below is sustained, with costs in favor of the respondent.

HUSTON and QUARLES, JJ., concur.

VERMONT LOAN & TRUST CO. v. HOFFMAN et ux.

(Supreme Court of Idaho. June 10, 1897.)

CONTRACTS—CONSIDERATION—ACT IN VIOLATION OF STATUTE—COMPOUND INTEREST—USURY.

1. To the general rule that an act in violation of a statute forbidding it is void, there is an exception when the statute is for the protection of the public revenue, does not make the act itself

void, and the act is not *malum in se*, nor detrimental to good morals.

2. The statutes of Idaho requiring all persons engaged in the business of loaning money at interest to pay a license tax and obtain a license before commencing such business, make it a misdemeanor to fail to obtain such license, and provide that suit may be instituted to recover the license tax, with stated damages. Plaintiff engaged in such business without obtaining the required license, loaned money at interest to H. et ux., and took notes secured by mortgage. *Held*, that plaintiff could recover, the act of loaning money being neither *malum in se* nor *malum prohibitum*.

3. Coupon notes given for the interest of the principal debt, which, by their terms, draw interest after maturity, are in contravention of section 1263, Rev. St., forbidding compound interest, and are usurious, and in such case no recovery can be had for any interest or cost.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action by the Vermont Loan & Trust Company against Ross Hoffman and another. From a judgment for plaintiff, defendants appeal. Reversed.

James E. Babb, for appellants. A. E. Gallagher and Forney, Smith & Moore, for respondent.

QUARLES, J. The plaintiff, a foreign corporation, brought suit to foreclose a certain real-estate mortgage executed by the defendants, Ross Hoffman and his wife, Bell Hoffman, to secure to plaintiff four promissory notes dated November 1, 1892, for \$700 each, payable November 1, 1897, with coupon notes for the annual interest on said respective notes attached thereto, said coupon notes being by their terms payable, each series, as follows, to wit: No. 1, payable January 1, 1893; No. 2, January 1, 1894; No. 3, January 1, 1895; No. 4, January 1, 1896; No. 5, January 1, 1897; and No. 6, November 1, 1897; and each of said coupon interest notes, by its terms, drawing interest from the maturity thereof. The defendants, Hoffman and wife, answered, raising only one question, the answer alleging as follows, to wit: "That at all times in the complaint mentioned the plaintiff was a corporation organized and created as such under the laws of the territory of Dakota, for the purpose of loaning money and other purposes; that at all said times said plaintiff was engaged in the occupation of loaning money at interest in the counties of Latah and Nez Perces, in the state of Idaho, and had a known, and its principal, place of business in Idaho at Moscow, in Latah county, Idaho; that the consideration of the principal note and mortgage described in the complaint was a loan of money at interest; that said loan was made by said plaintiff in said Latah county, Idaho, while engaged in the business of loaning money at interest in said county, as aforesaid; that the plaintiff never at any time procured any license to engage in the occupation of loaning money at interest, either in Latah or Nez

Perces county, Idaho, and never paid for any license to engage in any such occupation in either of said counties. By reason whereof plaintiff, in making said loan, and taking said note and mortgage, was violating the laws of the state of Idaho, and the same are null and void." To the said answer the plaintiff filed a general demurrer, which was sustained, and said defendants declined to further plead, but elected to stand on their said answer, whereupon the court rendered a judgment and decree of foreclosure in favor of plaintiff for the sum of \$3,491.18 and the ordinary costs of the action in the sum of \$17.95. The plaintiff, in the complaint, alleged that the defendants had paid all of said coupon interest notes numbered Nos. 1, and 2, but had failed and refused to pay the other coupon interest notes, and had refused and failed to pay said principal notes. It will thus be seen that the defendants had paid in interest the sum of \$364 on said indebtedness. The demurrer to said answer admitted the facts pleaded in the answer, and those facts are to be regarded by this court as established.

The first question that arises is this: Was the transaction void, or is the plaintiff precluded from recovering on said contract by reason of its failure to procure a license to do the business of loaning money? Section 1636, Rev. St., provides: "A license must be procured immediately before the commencement of any business or occupation liable to a license tax from the tax collector of the county where the applicant desires to transact the same, which license authorizes the party obtaining the same in his town, city, or particular locality in the — county to transact the business described in such license. * * * Section 1644, Rev. St., requires "persons, associations, or corporations engaged in the occupation of banking, loaning money at interest," etc., to pay a license tax, the amount of such tax varying according to the classification enumerated in said section. Section 6983, Rev. St., is in the following language, to wit: "Every person who commences or carries on any business, trade, or profession or calling for the transaction or carrying on of which a license is required by any law of this territory (state), without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." The appellants contend that under the statutes, *supra*, the consideration for the notes and mortgage in question was illegal; that the respondent was prohibited from doing such business; that the contract of the parties was made in violation of law, and therefore void; that owing to the illegality of the consideration of said contract, the same having been made in violation of law, the court could grant no relief to the respondent. Counsel for appellants has spent much time in research, and has cited many authorities in support of his position. The general rule, as urged by appellants, that a contract found-

ed on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so, is correct, and well established by authority. But in applying the rule many courts have excepted from its operation one class of cases, viz. when the statutory prohibition is found in a statute enacted for the purpose of raising revenue or the regulation of traffic or business, when, unless it is manifestly the intention of the statute to make the contract void, the court will treat the contract as valid. Mr. Sutherland, in his admirable work on Statutory Construction, at section 366, in treating the question under consideration, very aptly says: "When a statute is for revenue purposes, or is a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest, the contract will be valid." And in support of the rule Mr. Sutherland, in a footnote, cites many authorities among the following which support the text, as we have seen by a careful examination of the cases, to wit: *Harris v. Runnels*, 12 How. 79; *Insurance Co. v. Bledsoe*, 52 Ala. 538; *Niemeyer v. Wright*, 75 Va. 239; *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & C. 93; *Parton v. Hervey*, 1 Gray, 110; *Bly v. Bank*, 79 Pa. St. 453; *Pangborn v. Westlake*, 36 Iowa, 546; *Bemis v. Becker*, 1 Kan. 226; *Lindsey v. Rutherford*, 17 B. Mon. 245; *Strong v. Darling*, 9 Ohio, 201; *Watrous v. Blair*, 32 Iowa, 58; *Foster v. Railway Co.*, 13 C. B. 200; *O'Hare v. Bank*, 77 Pa. St. 96; *Vining v. Bricker*, 14 Ohio St. 331. The following are other authorities supporting the rule laid down by Mr. Sutherland, cited above, which we have examined, to wit: *Fackler v. Ford*, 24 How. 322; *Mandlebaum v. Gregovich* (Nev.) 28 Pac. 121; *La France Fire Engine Co. v. Town of Mt. Vernon* (Wash.) 37 Pac. 287; *Larned v. Andrews*, 106 Mass. 435; *Bowditch v. Insurance Co.* (Mass.) 4 N. E. 798; *Dearborn Foundry Co. v. Augustine* (Wash.) 31 Pac. 327; *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260; *Trust Co. v. Dorsey* (Cal.) 12 Pac. 49; *Id.*, 13 Pac. 148; *Bank v. Matthews*, 98 U. S. 621; *Mill Co. v. Bartlett* (N. D.) 54 N. W. 544; *Wright v. Lee* (S. D.) 51 N. W. 706; *Lumber Co. v. Thomas* (W. Va.) 11 S. E. 37; *Dillon v. Allen*, 46 Iowa, 299; *Penny-packer v. Insurance Co.* (Iowa) 45 N. W. 408; *Ruckman v. Bergholz*, 37 N. J. Law, 437; *Cornling v. Abbott*, 54 N. H. 469; *Alken v. Blaisdell*, 41 Vt. 655; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.* (Ark.) 31 S. W. 157; *Rahter v. Bank*, 92 Pa. St. 393; *Insurance Co. v. McMillen*, 24 Ohio St. 67; *De Mers v. Daniels* (Minn.) 39 N. W. 98; *Machine Co. v. Caldwell*, 54 Ind. 270; *U. S. v. Martin*, 94 U. S. 400. In *Lindsey v. Rutherford*, supra, the court said: "The dealing in bills of exchange, in view of the statute, is

neither *malum in se* nor *malum prohibitum*. Contracts for their sale and purchase are not prohibited by the statute. They are neither evil in themselves nor evil because forbidden by the statute. The statute strikes no blow at the business itself, but simply declares upon this subject that, 'if any person shall carry on, conduct, or engage, directly or indirectly, in the business of a broker or exchange dealer, by the purchase of bills of exchange, etc., without a license besides the tax imposed, he shall forfeit and pay to the commonwealth one thousand dollars.' The business may be carried on. The business itself is not prohibited. It is lawful to deal in bills of exchange. But, if carried on without a license, the person doing so shall forfeit and pay to the commonwealth one thousand dollars. We conclude, therefore, that our statute in this regard is essentially a revenue measure, designed to raise revenue from a business esteemed by the legislature as very profitable, and authorizing the requisition of a tax from him who thinks proper to engage in the business." In *Pangborn v. Westlake*, supra, the court said: "We are, therefore, brought to the true test, which is that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." A statute in California made eight hours a legal day's work on public works, and required a stipulation to that effect to be incorporated in all contracts for public work. The supreme court of that state (*Babcock v. Goodrich*, 47 Cal. 488,—where such stipulation had been, in violation of the statute, omitted) held the contract valid, and, among other things, said: "It is not made a consequence of an omission to insert this stipulation that the contract shall be void, and the omission, therefore, does not operate a forfeiture of the rights of the parties under the contract. If a county shall contract directly with the laborer, it will not be contended that the former may refuse to pay the latter his hire because he had worked too many hours, or had not, by express stipulation, limited the time which should constitute a day's work. The law was passed for the protection of the laborer. An officer of the county cannot refuse to carry out a contract because of an omission which renders the contract more favorable to the county." And in *U. S. v. Martin*, supra, the supreme court of the United States said, in a case similar to the one in California: "We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contract shall be

based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest. * * * We are of the opinion, therefore, that contracts fixing or giving a different length of time as the day's work are legal, and binding on the parties making them." In *Larned v. Andrews*, 106 Mass. 437, the court said: "It is to be observed that the act does not expressly declare that sales by a wholesale dealer who neglects to pay the tax shall be illegal. The tax is not laid upon each sale, but upon the business or calling. The illegality does not attach to the sale, but consists in not paying the tax imposed upon the business. * * * These and other considerations lead us to the conclusion that it was not the intention of congress to prohibit and make unlawful each sale made by a wholesale dealer who neglects to pay his tax. The object of the tax was to provide internal revenue to support the government, and not to regulate domestic trade in the states. It imposes a tax upon wholesale dealers, and provides a penalty if they neglect to pay such tax. We think this was designed to operate upon the person, and not upon the business. If congress had intended to subject the dealer neglecting to pay his tax to the additional liability of having all his sales rendered illegal, we think they would have so declared in unequivocal terms." The same line of reasoning was adopted by Judge Hawley in *Mandlebaum v. Gregovich*, supra.

From a careful study of all of the authorities, we think that the better class of authorities and the better reasoning leads to the conclusion that, where the prohibition is implied from a penalty imposed, as in the case at bar, the prohibition being for the protection of the public revenue, and no declaration in the statute making the prohibited act void, the doing of such act is not illegal. There is nothing in our statutes which makes it unlawful to loan money at interest. There is nothing in our statutes which says that it is unlawful to follow the business of loaning money at interest. Such business is not *malum in se*, nor is it *malum prohibitum*. Any one may conduct the business, but, under our statutes, if he does so, he must obtain the license; and if he carries on such business without paying the license tax and obtaining the license, he is guilty of a misdemeanor. The offense consists, not in doing the business, for that is not prohibited, but in failing to pay the license tax. The statute was passed, not to protect the public, not to protect the borrower, nor to prevent the loaning of money at interest, but for the purpose of raising the revenue to be derived from the license taxes to be collected from those persons who should engage in the business of loaning money at interest. Section 6983 of our Statutes, supra, was enacted to protect the public revenue, not for the purpose of making void any contract made in violation of it. Take the case at bar. The respondent loaned \$2,800 to the appellants.

The respondent was doing the business of loaning money at interest, in violation of law, without the license. This was a fraud upon the public revenue, but was no injury to the appellants. For such failure the legislature has said to respondent: "You are guilty of a misdemeanor. The assessor and collector may direct suit against you, and recover the license tax imposed by statute, together with twenty dollars damages." But the legislature has not further said that "you shall not recover back any money which you may loan at interest before paying such license tax." It is the duty of the court to construe all of our statutes which relate to the subject in question in *pari materia*, and ascertain what the intention of the legislature was as to the validity of the contract in question. A careful consideration of the said statutes, of the subject-matter and object to be obtained, convinces us that it was not the intention of the legislature that a violation of section 6983, supra, should be attended with any penalty other than those prescribed by the statutes. If the act of loaning money at interest was injurious to morals or good society, or prohibited by law, we could not come to this conclusion. The legislature may, within the limits of the constitution, prescribe traffic regulations, and may impose upon a business a tax, and require persons intending to engage in such business to obtain, before doing so, a license; and we think the legislature might go one step further, and say that whoever should engage in any business upon which a license tax is imposed without first paying such license tax, should not only be fined and imprisoned, one or both, but that such person should not recover upon any contract made by him while engaged in such business without a license. But the legislature has not done so, nor has it shown any intention to attend such forfeiture upon a person violating the statute. Having specified the penalty for a violation of the statute, and further provided for the collection of the license tax with damages, we are authorized to and do conclude that the legislature did not intend that any further punishment should be inflicted. This conclusion is strengthened by the well-known principle that forfeitures are not favored in law; nor does this court favor the idea of giving one's goods to another without compensation. We think that the respondent clearly has the right to recover back the money which it loaned to the appellants.

But another serious question arises in this case, which we will now consider. The interest coupon notes attached to each of the four principal notes, and numbered from 1 to 6 in the respective series, by their terms draw interest from their maturity. Sections 1264-1266, Rev. St. Idaho, are as follows:

"Sec. 1264. Parties may agree in writing for the payment of any rate of interest on money due or to become due on any contract, not to exceed the sum of one and one-half per cent. per month; any judgment rendered on such

contract bears interest at the rate of ten per cent. per annum until satisfied.

"Sec. 1265. Compound interest is not allowed, but a debtor may agree in writing to pay interest upon interest overdue at the date of such agreement.

"Sec. 1266. If it is ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or in property, such contract works a forfeiture of ten cents on the hundred by the year, and at that rate upon the amount of such contract, to the school fund of the county in which the suit is brought and the plaintiff must have judgment for the principal sum less all payments of principal or interest theretofore made and without interest or cost. The court must render judgment in said action for ten per cent. per annum upon the entire principal in said contract, against the defendant in favor of the state for the use of the school fund of the county, whether the unlawful interest is contested or not; and in no case where unlawful interest is contracted for, must the plaintiff have judgment for more than the principal sum less the payments already made, whether the unlawful interest be incorporated with the principal sum or not. But no indorsee in due course of negotiable paper, is affected by any usury exacted by any former holder of such paper unless he has actual notice of the usury previous to his purchase; but in no such case the judgment above provided in favor of the school fund must be entered against the drawer or maker, if a party to the action, and he may recover back the usury paid from the party who received the same."

Section 1265, supra, limits the right of the parties to contract under section 1264, supra, and forbids the agreeing to pay compound interest, except in one case only, to wit, when interest is past due, a party may, in writing, agree to pay interest on such overdue interest. The appellants contend that the judgment in this case, which gave to respondent the amount of the principal notes, the amount of the unpaid interest coupon notes, with interest on the latter, was erroneous, and that the respondent is not entitled to recover on said mortgage indebtedness anything more than the original principal less all payments heretofore made in principal or interest, and we agree with the appellant in this particular. We are aware that the supreme court of the United States, in *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, and in other cases, has held that the interest coupons of municipal bonds draw interest after maturity according to the law of the place where such coupons are, by their terms, payable. In Wisconsin it was repeatedly held that where, by the terms of an instrument, interest became due at certain specified times, compound interest was allowable upon each installment of interest after the maturity of such installment. And

in Texas it was held in *Lewis v. Paschal*, 37 Tex. 315, that compound interest was allowable. In the latter case the rule was justified on the ground that it was not prohibited by the statutes of Texas. We apprehend that it will not be questioned but that the legislature can regulate the matter of interest, and may prohibit altogether compound interest. It is no answer to the statute in the case at bar to say that the compound interest provided for in the coupon notes when added to the simple interest falls below the legal and contractual rates provided by our statutes. When no rate is agreed upon, our statutes fix the rate, and at the time the contract in question was made, the legal rate was 10 per cent.; and where the parties were not satisfied with this rate they could, by agreement in writing, fix any rate desired with these restrictions. They could not agree upon a rate higher than $1\frac{1}{2}$ per cent. per month, or provide in advance for compound interest. The coupon notes in question were usurious, providing as they did for interest upon interest which was not overdue at the time they were made. It appears from the allegations of the complaint that the coupon notes Nos. 1 and 2 of each of the series, amounting in all, as we gather it from the complaint, to the sum of \$364, were paid by appellants before this action was commenced. The respondent cannot be entitled under the statutes, supra, to judgment for more than the principal sum loaned by it to the appellants, less said interest payments, and without interest or costs, and to this extent only its mortgage security is good. The interest being forfeited under the statutes, supra, and the principal debt not due by the terms of the contract, no interest being past due, and the principal not yet due, the query suggests itself, was not this suit prematurely brought? And an affirmative answer also suggests itself. Probably the appellants waive such question if they fail to raise it. It is the duty of the trial courts to see that the provisions of section 1266, supra, are carried out, and to inflict the penalty therein provided, without suggestion so to do from any source. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. Costs of appeal awarded to appellants. Reversed and remanded.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(July 6, 1897.)

HUSTON, J. We have had occasion heretofore to say that the proposition that the court in its consideration of a case has not been limited to the briefs or oral arguments in the case, will not be considered as a ground for rehearing. We are permitted, whenever we deem further argument, either written or oral, essential to the proper presentation of any question, to call for it; but this does not involve or include the right of counsel, whenever

they think they have not said enough, to insist upon a rehearing. Although somewhat lengthy, we have, in view of the importance of the case, and the fact that the questions involved are new in this jurisdiction, given the petition in this case a more than ordinary consideration. We find but two questions or contentions presented by the petition. The first is as to the interest coupons, and it is contended that they do not come within the prohibition of our statute. We cannot recognize the contention of petitioner in this regard. The statute is plain and unequivocal, and to permit its evasion through such a flimsy pretext as that presented in the petition in this case would be inexcusable at least. Counsel cite many authorities which he claims are definitive of what usury is. It is only necessary, in answer to them all, to say that what is usury within any state or jurisdiction is what the law of such state or jurisdiction declares to be such, and the courts thereof, in the administration of the law, must be governed thereby. The other contention of petitioner, that the notes which the mortgage sought to be foreclosed in this case were given to secure were made payable in the state of Vermont, and that, therefore, the contract must be construed by the laws of that state, is not only utterly untenable, but not one single authority of the multitude cited by counsel in his petition supports the contention. The proposition simply states this: A foreign corporation, having a resident agent in this state, engaged in the business of loaning money upon interest, may avoid the laws of this state in regard to such business, and especially in regard to usury, by simply making the evidences of indebtedness payable in some other state, where the laws against usury are less onerous. The monstrosity of the proposition is too apparent to require comment, and in support of it we have cited to us the following authorities: "A bill of exchange may even be drawn in another state to take advantage of a higher local rate of interest, and be governed by the law of such state; but, if a note is void for usury where made, it will be void everywhere, although it may have been made payable elsewhere as a cover for the usury." 1 Rand. Com. Paper, § 28. Again: "Of course, the note being payable at the residence of the payee, and having been delivered there for goods sold there, must be deemed and taken to be a West Virginia contract." *Tenant v. Tenant* (Pa. Sup.) 1 Atl. 532. Again: "The notes were made and payable in this state, and in determining their validity and effect they must be regarded as New Hampshire contracts." In *Bank v. Wood* (Mass.) 8 N. E. 753, the note was executed in Kentucky, and made payable in Kentucky. The court said: "Under our decisions, these various circumstances determine the place where the contract was executed, and where it was to be consummated. It was clearly a Kentucky contract, and is to be governed by the laws of that commonwealth." Without a sin-

gle exception, the authorities cited in the petition are to this effect, and are all cases arising upon commercial paper and in transitory actions, and how they can be said to uphold the contention that a corporation in the state of Vermont can loan money upon mortgages upon land situated in Idaho, by and through an agent, necessarily a resident of Idaho, the debtor being a resident of Idaho, and the contract made in Idaho, and may, in attempting to enforce a claim only enforceable in Idaho, insist that the laws of Vermont shall be the rule of construction of such contract, when the corporation is organized in the state of North Dakota, simply because, for the palpable purpose of evading the usury laws of Idaho, the notes were in terms made payable in Vermont, is a proposition we cannot entertain. This being purely an action in rem, and the enforcement of the claim being only maintainable in Idaho, how can it be contended that the intention of the parties was that the laws of Vermont should obtain in the construction of the contract? The matter of usury is peculiarly statutory. It has no recognition in the common law, and the legislation in regard to it in the various states of the Union has been as diversified as the ever-conflicting interests of greed on the one hand, poverty on the other, have been dominant. As to the policy of usury laws in the abstract it is not our province to discuss that subject. We are simply called upon to administer the law as we find it. It is no part of the duty of the court to make law by construction to suit a given case, or serve a persistent contention, backed though it may be by whatever influence predicated upon an assumed policy. Judge-made law is becoming daily more obnoxious to deserved criticism, and is pernicious in its tendency, as being destructive of the elementary principles of our government.

The very able and energetic efforts of counsel to do away with the plain and unambiguous provisions of the statute cannot avail. We have examined the statutes of, we think, all of the states upon the subject of usury and interest. We find but one state in which a similar statute to that of Idaho exists, and that is the state of Minnesota. Our statute would seem to have been taken almost literally from that of Minnesota, and we have been unable to find any decision from the supreme court of that state recognizing the construction contended for by the respondent. The rule of the statute is not novel. In *Van Benschoten v. Lawson*, 6 Johns. Ch. 313, Chancellor Kent lays it down as a principle of equity that "compound interest is not allowed, unless on a special agreement in writing after the lawful interest has become due," and the learned chancellor declares it to be a "well-settled rule," citing *Lord Manners*, 1 Ball & B. 430; *Lord Hardwicke* in *Thornhill v. Evans*, 2 Atk. 330, note 1; and this principle has been recognized and maintained by various decisions of the court of last resort in New York. *Mowry v. Bishop*, 5

Paige, 98; Young v. Hill, 67 N. Y. 162, and cases there cited. Our statute is but the recognition and embodiment of that principle, and for the courts to attempt to abnegate or abrogate it by construction would be an assumption as wicked as unwarrantable.

Counsel's contention that the several sections of a statute relating to one subject should be construed separately, and not in *pari materia*, not only is not supported by any authority, but is in conflict with the elementary rules of statutory construction. Section 1265, Rev. St., declares in words, "Compound interest is not allowed, but a debtor may agree in writing to pay interest upon interest overdue at the date of such agreement." By section 1266, Rev. St., whenever it appears that unlawful interest has been contracted for, "whether the unlawful interest is contested or not," it is provided that "in no case where unlawful interest is contracted for must the plaintiff have judgment for more than the principal sum less the payments already made, whether the unlawful interest be incorporated with the principal sum or not." The contention of counsel that we should ignore the universally recognized rules of construction for the purpose of evading the plain, unambiguous provisions of the statute has all the persistency of Bassanio's plea with-out the merit arising from the circumstances.

Since the filing of petition for a rehearing, appellant has applied for a restitution of premises under the provisions of section 4825, Rev. St. The appellant is entitled to restitution, and the district court is directed to issue an order to that effect, it appearing from the record that the premises have been sold under the decree of the district court, and have been purchased by plaintiff. Rehearing denied.

SULLIVAN, C. J., and QUARLES, J., con-cur.

(5 Kan. A. 451)

SELDERS v. BOYLE.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

HOLIDAYS—JUDGMENTS—ENTRY—NOTICE—DORMANCY—REVIVAL—PRACTICE.

1. There is no statute in this state precluding the courts or judges of this state from discharging the duties of their offices upon Thanksgiving Day.

2. In a proceeding to revive a dormant judgment in the name of the executor of the deceased judgment creditor, a notice properly entitled in the case, containing the matters required to be contained in a notice of an application of revivor, signed by the clerk of the court, and attested by the seal of the court, and containing a command to the sheriff to serve the same upon the defendants therein named, is a sufficient notice, and is sufficiently signed.

3. In a proceeding to revive a dormant judgment in the name of the executor of a deceased judgment creditor, the defendants cannot attack the validity of the judgment for the reason of any irregularity in the proceedings of the court rendering the same, it appearing that the court had jurisdiction of the parties defendant and the subject-matter.

4. In an action upon a promissory note, tried to a jury, and in which the jury returns a verdict for the plaintiff for a certain amount, it is the duty of the clerk, under the provisions of section 409 of the Civil Code, to immediately enter judgment upon the journal of the court for the amount of the verdict, unless otherwise directed by the court; and if he fails so to do he may thereafter enter the same, the form thereof being approved by the court, without notice to the defendants, at any time before the rights or interests of third parties intervene which may be affected by such entry without notice.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Application by Ellen Boyle, executrix of the last will of John Boyle, deceased, against George V. Selders, to revive a dormant judgment. The judgment was revived, and defendant brings error. Affirmed.

Kennett & Peck, for plaintiff in error. Pulsifer & Alexander, for defendant in error.

MAHAN, P. J. The testator of the defendant in error recovered a judgment in the district court of Cloud county for \$450 on the 11th of September, 1890, but no entry thereof was made on the journal of the court. December 1, 1891, execution was issued, and returned nulla bona. January 9, 1893, an alias execution was issued. On the 30th of September, 1893, John Boyle died, and the defendant in error was duly appointed as executrix under his will, and qualified as such on the 12th of December, 1893. On the 10th of March, 1894, the clerk entered the judgment of the court that should have been entered on the verdict of the jury on September 11, 1890. Upon the 29th of November, 1894, which was Thanksgiving Day, the application of the defendant in error, as executrix of John Boyle, to revive the judgment in her name, came on to be heard before the judge of the district court of Cloud county, at chambers, who made an order reviving said judgment on that day. The plaintiff in error presented a bill of exceptions which was duly allowed by the court, and filed with the cause, and the case is here for review upon the proceedings in revivor only. There are six assignments of error: First. That the judge erred in proceeding to hear the motion to revive upon Thanksgiving Day, claiming that it was not a day upon which judicial proceedings could be had under the statutes of Kansas. Second. That the judge committed error in proceeding to hear the application on the notice served, contending that the notice was not sufficient under the statute. The third is that the judge erred in admitting in evidence the record of the judgment on the journal of the court. The fourth assignment is to the same effect. The fifth is that the judge erred in his findings of fact, and the sixth is that the judge erred in reviving the judgment at all.

There is no statutory prohibition against judicial proceedings on Thanksgiving Day. By the common law, a holiday was a day

upon which judicial proceedings could be had. In the absence of statutory provisions forbidding the judges of courts to hear and determine matters upon a holiday, a judicial proceeding upon that day is not void, and the judge committed no error in this case in proceeding to hear the motion to revive.

Under the second assignment the contention is that the notice is not signed by any one having authority to sign the same. The notice is entitled in the case properly. In the body of the notice there is sufficient, in substance, to conform to the statute. About this there is no contention. At the conclusion of the notice, on the opposite side of the paper on which it is written, the clerk of the court adds a command to the sheriff to serve the foregoing notice upon the defendant in error, and make due return thereof; and this is attested by the signature of the clerk of the court, with the seal of the court attached. This notice was served by the sheriff in the ordinary manner of serving summons, which is sufficient under the statute. The notice, in substance and form, is sufficient; and, even if it were not, the plaintiff in error made a general appearance, and contested the notice upon the merits; and, having done so, cannot now question the sufficiency thereof or the jurisdiction of the court to hear the same.

The third assignment of error is based upon the fact that the journal entry was not absolutely spread upon the records of the court,—that is, the judgment of the court was not recorded until after the death of the plaintiff, the judgment creditor,—and that the entry upon the journal was made without notice to the defendant, and is not, in effect, a nunc pro tunc entry. It was assumed by the counsel for the plaintiff that the judgment of the court had been recorded, and execution had been issued thereon, but, discovering that there was upon the journal of the court no record of the judgment, one was prepared, and sent to the judge who tried the case, during his term; and by his direction, the form having been approved by him, the clerk recorded the same. The action was upon a promissory note for the recovery of money. There was a verdict for the plaintiff for the amount of the judgment disclosed by the record. There was a motion for a new trial, which was overruled. A memorandum of the judgment was entered upon the appearance docket at the time by the clerk, giving its date. The judgment was also entered upon the judgment docket as prescribed by the statute. The only omission was the clerk's failure to record it upon the journal, as the statute required him to do upon the incoming of the verdict. Civ. Code, § 409; Pleasant View Tp. v. Shawgo, 54 Kan. 742, 39 Pac. 704; Church v. Goodin, 22 Kan. 527; Franklin v. Merida, 50 Cal. 293. The provision of the Code of California in this regard is the same as that of Kansas, and the same as the Ohio Code, from

which last Code ours was copied. The supreme court of Ohio, in *Young v. Shallenberger*, 41 N. E. 518, construes this provision the same as our own supreme court in the cases cited, supra. In addition to the authorities above cited, that the judge and the clerk of the court had a right to complete the record without notice to the defendant, see *Freem. Judgm.* (3d Ed.) 64. The court had acquired jurisdiction in the first instance, and, having acquired jurisdiction of the person of the defendant, and having jurisdiction of the subject-matter, it had jurisdiction to direct the journal entry to be recorded without notice. *Walden v. Craig's Heirs*, 14 Pet. 147. But, even if this were not so, if the judge or clerk, or both together, had not the authority to make this record speak the truth without committing error, as the judge and clerk did in this case, without notice to the defendant, there being no intervening rights of other parties, yet the result must be the same, because the attempted attack upon the regularity of this judgment is a collateral attack, and the record in this case was not open to the attempted attack made upon it by the defendant, plaintiff in error. Upon the suggestion that this judgment was not open to collateral attack in this proceeding, see *Freem. Judgm.* §§ 135, 455; *Terry v. Sharon*, 131 U. S. 40, 9 Sup. Ct. 705; *In re Watson*, 30 Kan. 753, 1 Pac. 775; *Waggoner v. Dubois*, 19 Ohio, 67; *Vredenburg v. Snyder*, 6 Iowa, 39; *Cooper v. Reynolds*, 10 Wall. 318.

The contention under the fourth and fifth assignments of error are covered by this conclusion. The fourth is based upon the admission in the record of the judgment. It importing absolute verity, and not being open to impeachment or attack in this proceeding, was competent evidence, and the admission thereof by the court was not error, and the finding of the court based thereon was not error.

The sixth assignment is based upon these contentions, and falls with them.

There was no injustice done in this case. The court did that which ought to have been done. The contentions of plaintiff in error have no merit, being purely technical. The judgment is affirmed. All the judges concurring.

(5 Kan. A. 423)

CHICAGO, R. I. & P. RY. CO. v. CAMPBELL.

(Court of Appeals of Kansas, Northern Department, C. D. March 22, 1897.)

APPEAL—JURISDICTION—CONSTITUTIONAL LAW—JUDGMENTS OF SISTER STATE—ATTACHMENT.

1. In proceedings in error in this court based upon a judgment for less than \$100, we will only consider the principle involved in the exception certified by the court below.

2. In determining the faith and credit to be given to proceedings of a sister state under the federal constitution and acts of congress, the question of jurisdiction of the court of the sister state is always open to inquiry.

3. In attachment proceedings, in order to give a court jurisdiction to condemn the property attached or garnished, and appropriate the same to the payment of the claimant's debt, it is necessary that the court acquire jurisdiction of the principal defendant, either by actual service or constructive service, conformable to the rules prescribed by the statute of the sister state.

4. Under the provisions of the Iowa Code introduced in evidence in this case, in order to give the Iowa court jurisdiction to condemn the fund garnished, the publication notice must be preceded by an affidavit filed in the case by the plaintiff, that service of summons cannot be made in the state.

5. Giving to the proceedings of a sister state the same faith and credit that are given to like proceedings by the courts of such sister state is a compliance with the provisions of the federal constitution and the act of congress requiring each state to give full faith and credit to the judgments and judicial proceedings of the sister state.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Action by David Campbell against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

M. A. Law and W. F. Evans, for plaintiff in error. V. D. Bullen and Thos. Dever, for defendant in error.

MAHAN, P. J. In this case there was a judgment below for less than \$100, and the case comes here upon appeal, upon the certificate of the district judge that the case involves the construction of the constitution of the United States and the acts of congress. Under the decision of the supreme court in the case of *Railway Co. v. Kimball*, 48 Kan. 384, 29 Pac. 604, we are limited in our investigation of the case to this one question. The contention is that the court below did not give that faith and credit to the proceedings of the courts of Iowa which is guaranteed to the plaintiff by the provisions of the constitution of the United States and the acts of congress in pursuance thereof. Where a party relies upon the proceedings or judgment of the courts of one state as a cause of action or ground of defense, the question of jurisdiction is always open. The supreme court of the United States has so decided in *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Thompson v. Whitman*, 18 Wall. 457; *Board of Public Works v. Columbia College*, 17 Wall. 521. The jurisdiction of the Iowa court, the proceedings of which are pleaded as a defense in this case, is attacked upon two grounds. The first is that the Iowa court never obtained jurisdiction of the subject-matter or res; that is, the indebtedness of the plaintiff railway company to the defendant in error. And, second, that the proceedings disclose a fatal defect in the jurisdiction of the court, in that the statute of Iowa was not complied with in such a manner as to give the Iowa court jurisdiction to conclude the defendant in error by any judgment rendered in the case.

The first question has been settled by our supreme court in the case of *Railway Co. v. Sharitt*, 48 Kan. 375, 23 Pac. 430. The facts in this case are the same as in the *Sharitt Case*, with this exception: In the *Sharitt Case* the claim attempted to be subjected to garnishment proceedings was exempt under the laws of Missouri, while in the case before us, under the laws of Iowa, the claim was not exempt to the defendant in error. However, I cannot see that this makes any difference in the applicability of the principle decided by the court in the *Sharitt Case* to this case. However, it is not necessary or proper that we should express any opinion upon the correctness of that decision, or determine the question in this case, and indeed we do not, because, in our view of the case, the proceedings offered in evidence and pleaded by the plaintiff in error (defendant below) disclose such a defect therein as to leave the court of Iowa without any jurisdiction to condemn the claim of the defendant in error. The plaintiffs in error offered in evidence several sections of the Iowa law in support of their contention that the Iowa court had jurisdiction, and had the right to adjudicate the question conclusively as against the defendant in error. Among other portions of the Iowa law offered is section 2618 of the Code of Iowa of 1873, as follows: "Sec. 2618. In What Actions and When Made. Service may be made by publication when an affidavit is filed that personal service cannot be made upon the defendant within this state in either of the following cases." The fifth provision of the section is as to attachment and garnishment proceedings. Upon a careful investigation of the transcript of proceedings offered in evidence, it appears that no affidavit was in fact ever filed. The case in Iowa was first begun before a justice of the peace by one Willard against the defendant in error, in which the Rock Island Company was garnished. Judgment of condemnation was made without any affidavit for publication, and then the case was appealed by the plaintiff in error to the district court, and was pending in the district court at the time of the trial of this case in the court below. The district court obtained no jurisdiction by the appeal, the justice of the peace having none. The supreme court of Iowa, in the case of *Fuller v. Riggs*, 68 Iowa, 328, 23 N. W. 730, consider this matter, and hold that without the proper affidavit the court was without any jurisdiction, and any judgment against the defendant was void for want thereof. In this case there was an affidavit filed, but it did not conform to the requirements of section 2618 of the Code, to which the court makes special reference. The court held the same way in the case of *Taylor v. Ormsby*, 66 Iowa, 109, 23 N. W. 288. Our own supreme court passed upon this same question in the case of *Adams v. Baldwin*, 49 Kan. 781, 31 Pac. 681, and held that no judgment can be rendered without this affidavit being first made, in the absence of personal service, and that a publication notice without the affidavit

does not give the court jurisdiction. If we give the same effect to this proceeding that the supreme court of Iowa would give to it, we have conformed fully to the acts of congress and to the constitution of the United States. The evidence discloses an absence of jurisdiction of the Iowa court where the case was said to be pending, and consequently is no defense to the plaintiff in error against the claim of the defendant in error for his wages. The judgment is affirmed. All the judges concurring.

(5 Kan.App. 380)

NAILL v. LEBOLD.

(Court of Appeals of Kansas, Northern Department, C. D. March 22, 1897.)

DIRECTING VERDICT.

Lebold commenced her action in replevin against David W. Naill for possession of personal property. Defendant answered that he held the property by reason of an execution levied in an action against Conrad H. Lebold; that the property was the property of Conrad H. Lebold, and subject to levy. Evidence examined, and held, that there is no evidence in the case tending to show that the property was the property of Conrad H. Lebold, or that the property was subject to said execution, and that the evidence does not prove, or tend to prove, any fact or state of facts upon which the jury could have found for the defendant. Therefore the court properly instructed the jury to return a verdict for the plaintiff.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by Fannie H. Lebold against David W. Naill. Judgment for plaintiff. Defendant brings error. Affirmed.

J. H. Mahan, for plaintiff in error. O. F. Mead, for defendant in error.

McELROY, J. On the 20th day of November, 1891, Fannie H. Lebold commenced her action in replevin against David W. Naill, and alleges in her petition that she is the owner and entitled to the possession of the property therein described, consisting of 256 yards of carpet and one mirror, all of the value of \$220.75. The petition contains all the necessary allegations of a replevin petition. The defendant answered that he held the property by reason of an execution levied thereon in an action against Conrad H. Lebold, and that the property was the property of said Conrad H. Lebold, and subject to levy under execution. The plaintiff introduced her evidence, and rested. The defendant introduced his evidence, and rested. The court instructed the jury "to return a verdict for the plaintiff," to which the defendant excepted. The defendant filed a motion for a new trial, which was overruled and excepted to; and he brings the case here for review, and assigns as error the action of the court in directing the jury to return a verdict for the plaintiff, and in overruling his motion for a new trial.

We have examined the evidence in this case, and it fully sustains the allegations in plain-

tiff's petition. There is no evidence in this case tending to show that said property was the property of Conrad H. Lebold, or that the property was subject to said execution. The evidence does not prove, or tend to prove, any fact, or state of facts, upon which the jury could find for the defendant. The trial court committed no error in instructing the jury to return a verdict for the plaintiff. The judgment of the lower court is affirmed.

MAHAN, P. J., having been of counsel, not sitting. WELLS, J., concurs.

(5 Kan.App. 439)

HILTON v. BOARD OF COM'RS OF SALINE COUNTY.

(Court of Appeals of Kansas, Northern Department, C. D. May 13, 1897.)

CITY ASSESSOR—COMPENSATION OF ASSISTANTS.

A city assessor is not prima facie entitled to collect in his own name three dollars per day for all the assistants he may employ in making and returning the assessment of a city of the second class.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by C. T. Hilton against the board of county commissioners of Saline county. Judgment for defendant. Plaintiff brings error. Affirmed.

David Ritchie, for plaintiff in error. R. A. Lovitt, for defendant in error.

WELLS, J. The facts of this case, as the same appear from the record, are substantially as follows: In February, 1893, C. T. Hilton was appointed as city assessor for the city of Salina, Kan., and was engaged personally in the duties of said office 65 days. His daughter, Daisy M. Hilton, helped her father in making said assessment 70 days, and his wife, J. H. or H. J. Hilton, 38 days. He was paid \$300 for his services, and presented a bill for \$219, claimed as a balance due him, which claim was disallowed by the county commissioners of Saline county; whereupon suit was brought for said sum before a justice of the peace of said county, and from there was appealed to the district court. Upon the trial in the district court the plaintiff presented his evidence, and rested; whereupon the defendant demurred thereto, which demurrer was sustained by the court, a motion for a new trial duly made, overruled, and excepted to, and the matter brought to this court on petition in error for review.

There are two errors complained of: First, that the court erred in sustaining the demurrer to the evidence; second, that the court erred in overruling the plaintiff's motion for a new trial. These together constitute in fact but one ground of error, and the sole question is, did the plaintiff make a prima facie case establishing his right to recover? There are two questions discussed in the briefs

herein: First. Were D. M. Hilton and J. H. Hilton lawful deputies of C. T. Hilton, city assessor? Second. Can C. T. Hilton recover, under the evidence in this case, for services performed by D. M. Hilton and J. H. Hilton? Under our view of the proper answer to be given to the second question, we do not consider it necessary to discuss or decide the first. Paragraph 6920, Gen. St. 1889, says: "Township or city assessors shall receive \$3.00 per day for each day actually and necessarily employed in assessing the property of their township or city, and in making the return thereof, to be paid by the respective county. The account for such services shall be verified by the affidavit of the assessor; but the board of county commissioners may have the power to make the aggregate amount less than charged: provided, it shall appear to them that full time was not made by the assessor for which he has charged; and any such assessor shall have authority to appoint a deputy, whose compensation shall be the same as the principal." This does not provide that the assessor shall receive pay for the services of his deputy, but it says "whose [the deputy's] compensation shall be the same as the principal," clearly indicating that the deputy is the real party in interest in a proceeding to recover pay for services as such. Neither is it necessary to decide whether an assessor may not employ a clerk to do the clerical work of copying, and recover for the reasonable value of said services paid, or perhaps assumed to be paid, by him therefor, as there is no evidence in this case upon which to base any such claim. We only decide in this case that a city assessor is not *prima facie* entitled to collect in his own name three dollars per day for all the assistants he may employ in making and returning the assessment of the city. The judgment of the court below will be affirmed. All the judges concurring.

(5 Kan.App. 437)

**NATIONAL BANK OF LANCASTER v.
MACKEY et al.**

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

**ACTION ON NOTE—FRAUD—KNOWLEDGE OF
INDORSEE.**

1. In an action upon a negotiable promissory note in the hands of an indorsee, an answer that avers that the note was procured by false and fraudulent promises upon the part of the payees therein named, in that they falsely and fraudulently promised the makers, to induce them to buy a stallion and pay \$400 in cash and give their three several notes for \$1,200, payable in one, two, and three years, that they would at the end of the first year receive the stallion back, refund the \$400, return the notes, and pay to the makers \$100 in money for the keeping of the horse, when in truth they did not intend so to do, but made the promise solely for the purpose of obtaining the money and the notes, and that the plaintiff took the note with the knowledge of these facts, states a good defense to such action.

2. The record in this case examined, and found to contain sufficient evidence to sustain the verdict of the jury upon said defense.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action by the National Bank of Lancaster against W. H. Mackey, Jr., and Henry Staats. Judgment for defendants. Plaintiff brings error. Affirmed.

Stambaugh & Hurd, for plaintiff in error.
J. R. McClure, for defendants in error.

MAHAN, P. J. The plaintiff in error brought this action against the defendants in error to recover \$400 on a promissory note made on the 23d of February, 1891, and due three years after date, payable to the order of O. L. Thisler and James Spillman, and by them indorsed to the plaintiff bank. The defendants answered that the note was procured from them by Thisler and Spillman fraudulently, through false representations, in this: that for the purpose of inducing the defendants to purchase a stallion at a price of \$1,600, and pay thereof \$400 in cash, and give their three several promissory notes for the remaining \$1,200, the said Thisler and Spillman would at the end of one year take the horse back, and refund the money paid, and surrender the notes, allowing the defendants the use of the stallion for the year, and pay them an additional \$100; that said promise was false and fraudulent, in that it was made simply for the purpose of inducing the defendants to part with their \$400 and make the notes, without any intention on the part of Thisler and Spillman of keeping said promise. The answer further denied that the plaintiff was an indorsee for value without notice of this defense. The case was tried to a jury in the Geary county district court at the October, 1894, term of said court. At the conclusion of the defendants' evidence the plaintiff demurred thereto, which demurrer was by the court overruled. The plaintiff offered no evidence. The trial resulted in a verdict for the defendants. A motion for a new trial was overruled, and the case is here for review.

The assignments of error are that the court erred in overruling the demurrer of the plaintiff to the defendants' evidence; that the verdict and judgment are not sustained by the evidence, and are contrary to law; that the judgment and verdict should have been for the plaintiff instead of the defendants; that the court erred in denying a motion for a new trial; and that the court erred in entering judgment for the defendants upon the verdict. There are in fact but two questions presented: The first is, does the answer allege facts sufficient to constitute a defense to the note in the hands of an indorsee? And the second is, was there sufficient evidence to support the averment that the note was obtained through false and fraudulent representations, to such an extent as to throw the burden upon the plaintiff of proving that in fact it was an indorsee for value? The note became due and payable on the 23d of February, 1894, and it was stipulated on the trial that

the plaintiff took the note by indorsement on the 26th day of January, 1894, within 30 days prior to its maturity. It appears from the record that there had been litigation between the original parties (that is, the defendants in error and Thisler and Spillman) respecting the notes, or some of them, theretofore matured.

The principal contention of the plaintiff in error is that false and fraudulent representations in such a case can only be predicated upon past events or present conditions and existing circumstances, and that the allegations of the answer only disclosed a breach of a covenant or a contract, for which damages might be awarded, but did not amount to fraudulently obtaining the notes; that is, that such a fraud could not be predicated upon a promise to do something in the future. This contention cannot be sustained. A representation or declaration of a present intention to do something in the future,—as in this case, or of one party to marry another,—made with a fraudulent intent, for the purpose of inducing another to part with his property, is a sufficiently false and fraudulent representation to avoid a contract, or afford grounds for equitable relief.

The other contention is that the evidence offered in behalf of the defendants is not sufficient to sustain the allegation that the promise was made with a fraudulent intent, and without any intention of performance, upon the part of Thisler and Spillman, and for that reason the demurrer to the evidence should have been sustained, and the motion for a new trial allowed. This question of fact is one peculiarly within the province of the jury to decide. There is some evidence to sustain the findings of the jury, and all of the evidence offered is uncontradicted, and must be taken as absolutely true. The verdict is not unsupported by the evidence. There was sufficient to go to the jury upon the question, and it was their province to determine the fact. The trial court approved the verdict, and we find no reason why it should be disturbed. Judgment is affirmed. All the judges concurring.

(5 Kan. App. 881)

CASNER v. ABEL.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

NEW TRIAL — MISCONDUCT OF JURY — REVIEW ON APPEAL.

1. Upon a motion for a new trial on the ground that the jury was guilty of misconduct in arriving at a verdict, by adding the amounts named by each of the 12 jurors, and dividing the aggregate by 12, when tried by the court upon evidence offered by both parties, and a finding made thereon, such finding will not be disturbed by this court, where it is sustained by the evidence, and such determination will be treated like the determination of any other question of fact by the trial court.

2. Where the record brought to this court, upon which to review a case, contains only the pleadings, the judgment, and the motion for a new trial, the evidence heard upon said motion,

and the order of the court denying the same, it will be presumed that the trial court correctly denied a motion for a new trial upon grounds not supported by testimony contained in the record. (Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Eastland, Judge.

Action by George D. Abel against Fred. W. Casner. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred. W. Casner, for plaintiff in error. George D. Abel, for defendant in error.

MAHAN, P. J. This was an action commenced before a justice of the peace by the defendant in error against the plaintiff in error to recover \$81 for professional services. The defendant filed a bill of particulars by way of set-off, claiming the sum of \$100 for work and labor, and \$10 for money loaned. This bill of particulars was verified, but no itemized account was filed therewith. There was a trial to a jury upon appeal, and a judgment for the plaintiff in the sum of \$58.50. There was a motion for a new trial, which was overruled, and the case comes here upon the case-made. None of the evidence is preserved, except the evidence upon the motion for a new trial.

The first assignment of error is in denying the motion of the plaintiff in error for a new trial. The second assignment of error is in rendering a judgment upon the verdict of the jury, and in not setting it aside, which is, in substance, the same as the first assignment; and we are unable to determine whether the court committed any error therein, for the reason that the record contains none of the evidence or proceedings of the court,—in fact, nothing but the bills of particulars of the respective parties, and the motion for a new trial, and evidence thereon, and the judgment of the court. The third assignment is misconduct of the jury in arriving at the verdict returned, by addition and division. The court heard the evidence upon this ground for a new trial, and decided it against the plaintiff in error, and decided it correctly upon the evidence. The contention is without merit. The fourth assignment of error is that the court did not render judgment for the plaintiff in error for the amount of his claim. We are unable to determine the correctness of this, for the reason stated above. The fifth assignment is as to the amount of the recovery. The same remarks apply to this assignment. The sixth assignment is error of law occurring at the trial, excepted to by the plaintiff in error. As none of the proceedings or rulings of the court are preserved in the record, we have no means of determining whether the court committed error or not. We are unable, from the condition of the record, to discover that the court committed any error, or that the plaintiff in error was deprived of any right, in the course of the trial. The judgment will therefore necessarily be affirmed. All the judges concurring.

(5 Kan.App. 456)

MURRAY et al. v. FIRST NAT. BANK OF CONCORDIA et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

FRAUDULENT CONVEYANCES — CONSIDERATION — BONA FIDE PURCHASERS.

1. Where the court found that "during all the time that James and his mother had worked together, as well some time before the death of the husband and father as after, there had been an understanding between them that said James should receive compensation for what he had done and furnished towards supporting the family and carrying on the farm and property thereon, and this sum, as arranged between them, amounted at the date of the deed hereinafter mentioned, with interest, to something over \$5,000"; and "in September or October, 1893, the said defendant Jane A. Murray, desiring to go to Oklahoma and take government land there, and to enable and qualify herself so to do, and so that she should have no other land, and in consideration of all the services her son had done for her, and the amount she had acknowledged to owe him, made said conveyance"; and "the value of the land conveyed, above incumbrances, to be fairly worth \$3,500,"—this amounted, in substance, to a finding that said conveyance was not voluntary, and that it was for a good, valuable, and adequate consideration.

2. A party buying land for an adequate price, in consideration or a bona fide indebtedness due him from the grantor, takes the same free from any claim of lien for indebtedness not a legal lien on said land at the date of purchase.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by the First National Bank of Concordia and another against Jane A. Murray and another. From a judgment for plaintiffs, defendants bring error. Reversed.

Caldwell & Ellis, for plaintiffs in error. L. J. Craus, for defendants in error.

WELLS, J. This was an action brought in the district court of Cloud county on the 16th day of November, 1894, by the defendants in error against the plaintiffs in error, to set aside a certain deed for real estate in said county made by Jane A. Murray, a widow, to James M. Murray, her son; dated September 1, 1893, and recorded in the office of the register of deeds for said county on December 12, 1893, for the reason that the same was without consideration, and made to defraud creditors, particularly said plaintiffs, to whom she became indebted as follows: First. While she was the owner of said land, she borrowed of the Citizens' National Bank \$200, which became due March 1, 1894, and on February 27, 1894, she borrowed \$140 more, giving new note for \$341, due in six months, upon which judgment was rendered October 4, 1894, for \$336.35 debt and \$15 costs; total, \$351.35. Second. On April 30, 1894, she borrowed \$52 for four months, and on June 15, 1894, \$52 for four months, upon which judgment was rendered on — for \$105.54 debt and \$5.40 costs, and transcript taken to district court November 14, 1894, at a cost of \$1.50; total, \$112.44. Third. On December 23, 1893, she borrowed of the First National Bank \$53 on 60 days, and on February

1, 1894, \$44.50; on April 1, 1894, and on February 17, 1894, \$51.50. On May 1, 1894, judgment was rendered on said three notes for \$152.84 debt and costs, \$5.25 costs, and an abstract taken to the district court on July 7, 1894, at additional cost of \$1.50; total, \$159.59. The defendants answered, denying any fraud, and alleging the bona fides of the sale of said real estate. A jury was waived, and the matter tried to the court, who made special findings of fact and conclusions of law, and rendered judgment for the plaintiffs as to a part of their claims, to which the defendants excepted, and bring the case here for review.

The first contention of error is in admitting certain so-called expert testimony to prove the lack of age of certain writings previously produced in evidence by a witness of the party attacking their genuineness. We are inclined to think that this evidence was improperly admitted, but as the court found that the deed was not fraudulent, in the ninth finding of fact, and that the debt was bona fide, in the fifth finding and the first conclusion of law, the error was not material. *Manufacturing Co. v. Nicholson*, 36 Kan. 383, 13 Pac. 597.

The second assignment of error is in receiving and considering in evidence the alleged statements of the grantor of the deed tending to contradict the conveyance. The brief of the plaintiff in error does not give the full substance of the evidence admitted, nor the pages of the record, as required by rule 6 of this court (40 Pac. v.), but on pages 27, 28, 29, 181, 198, 202, 203, 256, and 257 we find some evidence of the kind complained of; but in neither case does the record show any objections made or exception saved, and of course we cannot consider the objection now.

The third error complained of is that the court erred in its findings, as contrary to the evidence and the law. We think that all the findings of fact are supported by evidence, and, if so, we cannot hold them erroneous for that reason.

The fourth allegation of error is that the court erred in finding the deed to James M. Murray was voluntary, and not founded on good and sufficient consideration. It seems to us that this is just what the court did not find, but that it did find the contrary. The court found: "During all the time that James and his mother had worked together, as well some time before the death of the husband and father as after, there had been an understanding between them that said James should receive compensation for what he had done and furnished towards supporting the family and carrying on the farm and property thereon; and this sum, as arranged between them, amounted at the date of the deed hereinafter mentioned, with interest, to something over \$5,000." "In September or October, 1893, the said defendant Jane A. Murray, desiring to go to Oklahoma and take government land there, and to enable and qualify herself so to do, and so that she should have no other land, and in consideration of all the services her son had done for

her, and the money he had paid for her, and the amount she has acknowledged to owe him, made said conveyance." It seems to us that this was a finding of a consideration as claimed by the defendant, and the fact that the court further found that a part of the reason for making the deed was to qualify herself to take a homestead in Oklahoma does not in any way discredit the bona fides of the transaction. She had a perfect right to pay her debts with the land she then owned, and go to the territory and endeavor to get another home. Counsel speaks of this as an attempted fraud upon the government, but from the findings of the court we fail to see that it was such. There was no inadequacy, either, as the court found the value of the land conveyed, above incumbrances, to be fairly worth \$3,500.

The substance of the other allegations of error is that the court erred in its conclusions of law, and this is the serious question in the case. The court made mention two or three times in its findings in relation to the homestead of the son. It seems to us that this, as well as the mother's attempt to get a homestead in Oklahoma, were clearly irrelevant, and should not have been allowed to incumber the record. Because the father had taken a tree claim, and through the failure of the timber, or for any other reason, feared a contest, and, when in danger of losing it, preferred to let his son have it to seeing it go to a stranger, is no evidence of indebtedness or other obligation, and the fact that the son allowed the family to make it their home for many years denotes only filial affection and brotherly love.

The writer of this opinion has concluded that, if it was his duty to determine what the law should be, he would decide that where members of the same family, living together and sustaining confidential relations to each other, have business relations unknown to the world, one should not be allowed to appropriate a large part of the property of the other to pay a debt known only to themselves, and thus defeat the collection of other debts contracted upon the belief that no such secret debt existed; but, as our duty is only to interpret and apply the law as enacted, and in doing so we are bound by the prior decisions of our courts with final appellate jurisdiction, and, as our supreme court has decided this question, we are unable to reverse it, even if we so desired. With our construction of the findings of fact in this case, as heretofore given, it is very like the case of *Tootle, Hosen & Co. v. Coldwell*, 30 Kan. 125, 1 Pac. 329, and has also a strong family resemblance to the case of *Kennedy v. Powell*, 84 Kan. 22, 7 Pac. 606, and in each of these cases the transfer to pay or secure the debt of the relative was sustained.

The reason of the delay in recording the deed was evident, as it was executed after the parties started for Oklahoma, and was recorded very soon after they returned; and that fact has no influence on the case, as, under our view of the law, the rights of the parties are just the same as they would have been had the deed

been executed on the day it was filed for record. The judgment below will be reversed, and judgment entered for the defendants. All the judges concurring.

(5 Kan. A. 447)

SNYDER v. MOON et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

APPEAL—SUFFICIENCY OF RECORD—CASE-MADE—BILLS AND NOTES—TRANSFER—PAYMENT.

1. Where the record shows the appearance of the parties, the waiver of a jury, and an agreement to try said case before the court, and then "whereupon the following proceedings were had," and this is followed by a recital of the agreements, stipulations, and evidence concluding with "whereupon both plaintiff and defendant rested their case," and there is nothing in the record to indicate or suggest that anything has been omitted, *held*, that said record shows that it contains all the evidence offered and heard upon the trial.

2. Where the case-made shows that it was served within the time allowed therefor by the court, an agreement that it should be signed and settled on the first day of the March, 1895, term of said court, or as soon thereafter as the court can hear the same, and that it was settled and signed on March 6, 1895, by agreement of the parties, and no attempt is made to impeach said record or certificate, said case-made upon its face will be sustained against a motion to dismiss the same.

3. Where a negotiable promissory note is transferred by delivery only, and without indorsement, to a third party, and is paid at maturity by the maker to the payee at the place of payment therein named, without notice of its transfer until after said payment is made, said payment is a complete defense to an action on said note by the holder against the maker thereof.

4. In such a case the burden is upon the plaintiff to show that the maker had notice of the transfer before he made the payment thereof.

(Syllabus by the Court.)

Error from district court, Jewell county; Cyrus Heren, Judge.

Action by J. H. Snyder against W. C. Moon and another. From a judgment for defendants, plaintiff brings error. Affirmed.

T. S. Kirkpatrick and Ira F. Hodson, for plaintiff in error. B. W. Turner, for defendants in error.

WELLS, J. This is an action brought in the district court of Jewell county by the plaintiff in error, the plaintiff below, to recover a judgment upon a certain promissory note, a copy of which is as follows: "\$410.00. Burr Oak, Sept. 23rd, 1889. One year after date, for value received, the undersigned severally and jointly promise to pay Hulbert Bros., or order, four hundred ten dollars, at the Bank of Burr Oak, with interest at the rate of 10 per cent. from date if not paid when due, all makers and indorsers waiving protest and notice of protest and nonpayment of this note. And we further agree that no extension of time of payment of this note, whether with or without our knowledge, by receipt of interest or otherwise, shall release us, or either of us, whether makers or in

dorsers, from the obligation of payment. This note is to become due upon the removal of its makers from the county in which he now resides. All signers of this note are principal. W. C. Moon. Mary Moon. No. 1,583. Due Sept. 23rd, 1891." Said plaintiff, in his petition, claiming: "That after the execution and delivery of said note, and before the maturity thereof, for a valuable consideration, the said Hulbert Bros. sold, assigned, and delivered said note to the plaintiff, who is now the legal owner and holder thereof; that there is now due and unpaid upon said note the sum of four hundred dollars, with interest thereon at the rate of ten per cent. per annum from September 23, 1890," and praying judgment therefor. In answer to said petition the defendant pleaded payment thereof to the payee therein named at the place of payment therein specified.

The first matter demanding our attention herein is the motion of the defendant in error to dismiss these proceedings for the following reasons: "(1) That said pretended case-made does not contain all of the evidence adduced in the trial of said case in the court below; (2) that said pretended case-made does not contain all of the material evidence adduced in the trial of the cause in the court below; (3) that it does not appear that said pretended case-made was settled and signed as is provided by law; (4) that it does not appear that at the time of the settling and signing of the aforesaid pretended case-made that defendant in error was represented in person or by counsel; (5) that it does not appear that said pretended case-made was settled and signed within the time provided by law, and allowed by the court; (6) that said pretended case-made is not in due form of law."

In answer to reasons 1 and 2, we think that the record does affirmatively show that all the evidence is embodied therein. On page 6 it shows the appearance of the parties, the waiver of a jury, and an agreement to try said case before the court, "whereupon the following proceedings were had." Then follows a copy of the agreements, stipulations, and evidence, followed on page 17 with the statement, "Whereupon both the plaintiff and defendant rested their case." We think this negatives any presumption that other evidence may have been either offered or received. On the other reasons assigned it is urged that, as it appears by an interlineation in the body of the acknowledgment of service of said case upon the attorneys for defendant in error that "amendments suggested as hereto attached," and no amendments are attached, and nothing to show that any were acted upon, said case-made is defective in this respect. We do not think this position is tenable. Said paper shows no appearance of anything having been detached therefrom, and is immediately followed by an agreement of the parties that the case should be settled and signed on the first day of March, 1893,

term of the district court of Jewell county, Kan., or as soon thereafter as the court can hear the same; and no showing is made except by the said interlineation in the record that any amendments were suggested, and the court certifying that none were in fact suggested, and, further, that said parties agreed that the case should be settled and signed at said time. The motion to dismiss must be overruled.

This brings us to the case upon its merits. The defendant in error has filed no brief upon the merits of the case. This may mean either one of two things: First, that he fully expected his motion to dismiss would be sustained; or, second, that he had nothing to say on the merits of the case. And at this point we deem it proper to say that in all instances where a case is reached for trial in its regular order, and is thereafter placed upon the trial docket for hearing, the respective parties must be prepared to present it upon its merits, notwithstanding motions or other matters not to the main issue may be presented at the same time. This is necessary for the dispatch of the business of the court, and, if the defendant in error desires to present a motion upon the jurisdiction of the court or other questions not upon the merits alone, he must do so before the case is regularly reached for hearing. There are three assignments of error in plaintiff's brief, but the three in fact complain of but one error, and that is the court rendered the wrong judgment on the evidence and agreed statement of facts. It is agreed in the agreed statement of facts as follows: "(1) That the note set up in plaintiff's petition and sued upon herein is a negotiable promissory note, payable to the order of Hulbert Bros.; that it was transferred to plaintiff, before maturity, by delivery merely, and not by indorsement. (2) That on or about the maturity of said note the defendant herein paid the same to Hulbert Bros., who stated to the defendant that the note now in suit was in the possession of the plaintiff; that Hulbert Bros. would have said note returned to them, and deliver the same to defendant." Under these facts, in the hands of the plaintiff the note was not negotiable paper, and the payment to the payee is a complete defense to said action, unless the maker had notice before payment that it had been transferred to another. *McCrum v. Corby*, 11 Kan. 463; *Hadlen v. Rodkey*, 17 Kan. 429; *Calvin v. Sterritt*, 41 Kan. 215, 21 Pac. 103.

This leaves only the question, did the defendant have notice of the transfer before he paid the same? There is no evidence or stipulation as to the relative time, as regards the payment of the note, when the defendant was first informed that the note was not in the possession of the payee, and to sustain the judgment of the court below we are authorized to presume that it was after the payment thereof; in fact, the defendant offered to prove this, and it was objected to by the

plaintiff, and objection sustained by the court. The judgment of the court below will be affirmed. All the judges concurring.

(5 Kan.App. 435)

BILLINGSLEY v. BOARD OF COM'RS OF MARSHALL COUNTY.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

WORK AND LABOR—EIGHT-HOUR LAW.

Where a person contracts to do a certain amount of work for a certain sum of money, he cannot recover a greater sum than that contracted for, under chapter 114, Laws 1891.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by S. C. Billingsley against the board of county commissioners of Marshall county, Kan. Judgment for defendant, and plaintiff brings error. Affirmed.

Mann & Redmond, for plaintiff in error. W. S. Glass, for defendant in error.

WELLS, J. The only question in this case is whether a person can contract with a county to do certain clearly specified and described work for a certain specified sum monthly, perform the services, and receive pay therefor under the contract, and then, after the expiration of the contract and all renewals thereof, upon a showing that in the performance of said contract more than eight hours of labor a day were required and by him performed, collect of said county pay for such excess over eight hours a day, under the provisions of chapter 114, Laws 1891. In the consideration of this question, let us assume, as claimed by plaintiff in error, that the object of this law is—First, to shorten the hours of labor for the employed; second, to give the unemployed a better chance to get work,—and then inquire how either of these objects is to be aided by allowing one man to contract to do a day and a half's work each day, and then collect for the excess. It seems to us that the allowance of the plaintiff's claim would directly tend to defeat both. It is a familiar rule that a thing may be within the letter of a statute, and yet not within the statute, because not within its spirit or intention. *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511. But in this case the claim of the plaintiff is not within the letter of the law. The law referred to makes it unlawful for any county or any contractor therewith to require or permit any person to work more than eight hours per day under any contract with it, except in cases of extraordinary emergency, as therein designated. In this case there was no claim of any such emergency as contemplated in the exception. We are therefore presented with this alternative: Either the plaintiff in error violated the letter and spirit of the law in question, and now insists on being paid for doing so, or

that chapter does not apply to cases of this kind. Each of these positions is equally fatal to the plaintiff's claim. It is an elementary principle of law that a person cannot base a cause of action upon his own wrong. In the case at bar, if the services performed came within the scope of said chapter 114, then it was unlawful for the plaintiff to work more than eight hours each day, and it was unlawful for the commissioners to allow him to do so; and he by his act violated the law, and subjected the commissioners, if not himself, to a criminal prosecution, and now asks to profit by it. The writer of this is of the opinion that the law in question only applies to people who work by the day, and not to those taking contracts of a certain amount of work for so much money. Chief Justice Horton, speaking for the supreme court in *State v. Martindale*, 47 Kan. 150, 27 Pac. 852, says: "The words 'laborers, workmen, mechanics, and other persons,' in section 1, c. 114, evidently do not embrace any officer or employe for whom an annual salary has been specifically named and appropriated by the legislature. Further, chapter 114 is a penal statute, and must therefore be strictly construed. It cannot be extended by construction." The decision of the court below will be affirmed. All the judges concurring.

(5 Kan.App. 388)

BANK OF GLASCO v. SPRINGFIELD FIRE & MARINE INS. CO.

(Court of Appeals of Kansas, Northern Department, C. D. March 22, 1897.)

INSURANCE—CHANGE OF TITLE—AGENCY.

1. Where the insured gave a quitclaim deed to the property, purporting to be an absolute conveyance, but intended to be only a mortgage to secure the payment of debts, and no instrument of defeasance was executed, acknowledged, and recorded as provided by paragraph 3885, Gen. St. 1889, such action does not forfeit an insurance policy thereon containing a clause: "If the property be sold or transferred, or any change takes place in the title or possession (except in case of succession by reason of death of the assured), whether by legal process or judicial decree or voluntary transfers or conveyances, then, and in every such case, the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate."

2. The fact that the agent of the insurance company was, at the time of his appointment and at the time of the transaction in controversy also the agent of, a small stockholder in, and one of the managing officers of, the assured, and his appointment was made with full knowledge of such relations, and no fraud, deception, or concealment was used, is not sufficient to relieve the insurance company from being bound by the acts and knowledge of such agent.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by the Bank of Glasco against the Springfield Fire & Marine Insurance Com-

pany. From a judgment for defendant, plaintiff brings error. Reversed.

Ellis & Burnham, for plaintiff in error.
Caldwell & Ellis, for defendant in error.

WELLS, J. For the decision of this case we deem it necessary to consider only the question as to whether, under the findings of fact made by the court, the plaintiff or the defendant should recover, and in determining this question two important issues of law are distinctly raised: First. Where the insured gave a quitclaim deed to the property, purporting to be an absolute conveyance, but intended to be only a mortgage to secure the payment of debts, and no instrument of defeasance was executed, acknowledged, and recorded as provided by paragraph 3885, Gen. St. 1889, does such action forfeit an insurance policy thereon containing a clause: "If the property be sold or transferred, or any change takes place in the title or possession (except in case of succession by reason of death of the assured), whether by legal process or judicial decree or voluntary transfers or conveyances, then, and in every such case the policy shall be void. When property has been sold and delivered or otherwise disposed of so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate." Second. Is the fact that the agent of the insurance company was at the time of his appointment and at the time of the transaction in controversy also the agent, a small stockholder, and one of the managing officers of the assured, and his appointment was made with full knowledge of such relations, and no fraud, deception, or concealment was used, sufficient to relieve the insurance company from being bound by the acts and knowledge of such agent?

It was contended in the court below, and that contention was sustained by the trial judge, that such conveyance was in law an absolute transfer of the title to the property under paragraph 3885, Gen. St. 1889. Said paragraph reads as follows: "When a deed of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such deed shall not be defeated or affected, as against any person other than the grantee or his heirs, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the register of deeds where the lands lie." The plaintiff in error (the plaintiff below) insisted upon the trial, and still insists, that the above paragraph has no application to cases of this character; that it was enacted solely for the purpose of protecting creditors and subsequent purchasers; and we are referred to several respectable authorities in support of the contention of each party. On behalf of defendant in error we are referred to *Toulinson v. Insur-*

ance Co., 47 Me. 232, *Hennessey v. Andrews*, 6 Cush. 170, and *Footte v. Insurance Co.*, 119 Mass. 259. In the first-mentioned case the court assigns as one of its reasons for the decision the following: "The plaintiff, by neglecting to record Averill's bond, put it out of the power of the defendants to perfect their lien by recording the same." It seems from an examination of this case that the insurance company had or claimed some lien upon the property by virtue of the terms of the policy, but just what influence this had upon the decision we are unable to determine. The case of *Hennessey v. Andrews*, 6 Cush. 170, was a complaint for flowing land by a mill dam, and the party against whom the suit was brought set up the unrecorded defeasance to avoid his liability. This case presents a state of facts quite different from the one at bar. The case of *Footte v. Insurance Co.*, 119 Mass. 259, is also somewhat different from the case at bar. In that case the grantee of a deed had previously had a mortgage, and the deed complained of for which the defeasance was given was turned over to him in satisfaction of his mortgage, and without the payment thereof, and afterwards he collected rents from the premises. The court, in rendering the decision, at the top of page 261 say, "The deed carried with it also a legal change of possession." We are not advised as to how far the common-law attributes of a mortgage have been changed in that state, but would infer, from the clause recited, that to some extent at least they still remain, but in Kansas the law is well settled that every deed of conveyance, whether made to the trustee or not, if made for the purpose of securing debt, and for that purpose only, is a mortgage. See *McDonald v. Kellog*, 30 Kan. 170, 2 Pac. 507, and other decisions to the same effect.

The simple question in this case is whether, as regards the insurance company, this mortgage shall be changed to an absolute conveyance by virtue of paragraph 3885, Gen. St. 1889, to enable them to found a forfeiture thereon. We admit that courts of last resort in our own country have differed upon this proposition, but it seems to us that in harmony with our law and the decisions of our court upon subjects allied to this, we must hold that paragraph 3885, Gen. St. 1889, does not control. In fact, under the literal reading of the paragraph in controversy, the contention of the insurance company cannot be sustained. The language of the paragraph is, "Such deed shall not be defeated or affected." This is quite a different thing from saying that it shall be conclusively presumed to be an absolute conveyance for the purpose of aiding in a forfeiture.

On the second question in controversy there is no dispute but what the general rule is that one cannot be an agent of another where he is the other party in interest, or agent for the other party; but that rule is for the protection of innocent parties, and may be waived.

ed by either party upon a full knowledge of all the facts. See *Mechem*, Ag. §§ 66-68. The supreme court of Georgia, in the case of *Fitzsimmons v. Express Co.*, 40 Ga. 336, 337, uses this language: "Two parties may always, by mutual consent, no matter how diverse their interests, make a third their agent. It is true, if A. have an agent, that agent cannot, without A.'s consent, act as the agent of B. in a matter in which A.'s interest conflict with B.'s; but B., who selects the agent knowing he is the agent of A., cannot object to take advantage of his own wrong in giving knowingly to the agent a trust conflicting with his duty to A. This is plain common-sense and every-day practice." We are referred by the defendant in error to the recent case of *Insurance Co. v. Winfield*, decided by the supreme court of Kansas, January 8, 1897, and appearing in 47 Pac. 511, but we fail to find anything in that decision antagonistic to the views herein expressed. In that case the agent gave no information touching the relation of himself and the bank to the insured property, as expressly stated in the first section of the syllabus, and Martin, C. J., used this language: "When an insurance company employs an agent to solicit business for it in a particular locality, it has a right to expect that he will act only in its interest in that business. He would not be authorized to write a policy upon his own property, for as to this he would not be the agent of the company; and it would not be bound thereby unless, being fully informed of the facts, the principal officers of the company should accept the risk." In the case at bar the insurance company knew substantially the interest of the plaintiff in the property in question, and of their agent's relation to the bank. The judgment of the court below will be reversed, and said court ordered to render judgment upon the findings of fact thereinbefore found in accordance with this decision. All the judges concurring.

OVERHOFF v. TRUSDELL.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

NOTE — BONA FIDE HOLDER — FAILURE OF CONSIDERATION.

1. Where the evidence fails to show that the owner and holder of a negotiable note, bought before maturity, and for a valuable consideration, had any knowledge of the failure of the consideration thereof, its collection cannot be defeated by showing that the consideration therefor subsequently failed.

2. The collection of a note given for the rental of lands during the pendency of proceedings to foreclose mortgages thereon cannot be defeated simply by showing that during the term of said lease the mortgages were foreclosed, and the title thereto conveyed to another party.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action by Warren N. Trusdell against D.

F. Overhoff. Judgment for plaintiff. Defendant brings error. Affirmed.

James V. Humphrey, for plaintiff in error.
J. R. McClure, for defendant in error.

WELLS, J. This was an action brought by Warren N. Trusdell, the defendant in error, in the district court of Geary county, against D. F. Overhoff, the plaintiff in error, upon a negotiable promissory note executed by said D. F. Overhoff to H. S. Tolen for \$300 and interest. This note was duly indorsed in blank by a commercial indorsement, and in the body thereof contained this statement, "For rent of farm." As a defense the defendant below answered, admitting the execution of the note, but averred that the same was given for the rent of a certain farm in Geary county for the year commencing March 1, 1893; that at the date thereof there were certain foreclosure proceedings pending in the district court of said county, unknown to him, and that under such proceedings said farm was sold by the sheriff of said county in June, 1893, and by him conveyed to the purchaser, and by said purchaser he was compelled to renounce his right thereto under said lease, and thereby the consideration for said note wholly failed; all of which was known to the plaintiff when the note was transferred to him. To this the plaintiff filed a general denial. The matter was tried to a jury, the parties agreeing that the burden of proof was upon the defendant. After both parties had offered their evidence, the plaintiff demurred to the evidence of the defendant, and this demurrer was sustained by the court, and the jury directed to return a verdict for the plaintiff for the sum prayed for, which was accordingly done. A motion for a new trial was duly made, and overruled, and the case brought here for review.

The only question in this case is, was there any evidence upon which the jury would have been justified in finding for the defendant? It was shown by the evidence that the plaintiff purchased the note before maturity, and for a full consideration, and there was no evidence that at that time he knew or had reason to believe it was without consideration. He did know of the pendency of the foreclosure proceedings, and had filed answer and cross petition therein, and he also knew from the note and the statement of the person that he bought it of that it was for the rent of the land in controversy, but whether for the current or preceding year or years he was not informed. In fact, when he bought the note the title had not failed, and it was merely a matter of conjecture whether it would ever fail or not. Again, there was no evidence that the defendant was ousted from his possession of said farm, or that he suffered any damage on account of the change of title. Henry Taylor testified that he had subrented one-half of the place from Overhoff, and that in June, 1893, an agent of Wilkinson, the purchaser at the sheriff's sale, came out there, and that he

(Taylor) entered into an agreement with him that he (Taylor) should hold under Wilkinson, but there was no evidence that he paid or agreed to pay anything therefor. It also appears from the evidence that Wilkinson sued Overhoff and Taylor for the rent of the farm, and was defeated. The judgment of the court below was correct, and will be affirmed. All the judges concurring.

(5 Kan. A. 408)

MARYSVILLE INV. CO. v. HOLLE et al.

(Court of Appeals of Kansas, Northern Department, C. D. March 22, 1897.)

PUBLIC LANDS—TOWN SITE—ACTUAL OCCUPANT—REPORT OF COMMISSIONER AND PROBATE JUDGE—DEED TO TOWN SITE COMPANY.

1. An actual occupant of a town site upon government lands entered by the probate judge under an act of congress approved May 23, 1844, for the relief of citizens of towns upon lands of the United States under certain circumstances, and an act to regulate the entries and disposal of town sites (Kan. Laws 1857-58, p. 399), is entitled to the possession of the portion thereof actually occupied by him, regardless of the report of the commissioners or the deed of the probate judge.

2. The report of the commissioners and the deed of the probate judge are conclusive and final, unless impeached for fraud or by some direct proceeding within a reasonable time, as to the disposition of unoccupied lots among the actual occupants of said town site, or for their general good.

3. A corporate company, such as the Palmetto Town Company was, may be, through its members, acting for such corporation only, and not in their individual right, the sole and exclusive occupants of said town site, and under such circumstances the probate judge should convey such town site to such company.

4. The principal question in this case being whether or not the deed from the probate judge conveyed any title to the grantees therein named, the understanding and circumstances under which said deed was made and accepted, and the actions of the grantees thereunder, were proper subjects of inquiry, and any competent evidence tending to establish the defendants' claim in relation thereto was proper.

5. If the grantees in said deed from the probate judge accepted the same as officers and members of the Palmetto Town Company only, and afterwards, for a great number of years, held out to the world and asserted that said company was the exclusive owner of said property, and caused the people on said town site to believe and act upon the belief that such was the fact, they are now estopped from claiming the title to themselves thereunder.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by the Marysville Investment Company against Wilhelm Holle and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. S. Glass, for plaintiff in error. E. Hutchinson, for defendants in error.

WELLS, J. This is an action brought originally in the district court of Marshall county, Kan., by the Marysville Investment Company, a corporation, against the defendants herein, for the recovery of the possession of certain

lots in the town of Palmetto, now incorporated into and being a part of the city of Marysville, Marshall county, Kan., and for the rents and profits thereof. The defendants filed a general denial, and upon the issues thus joined a trial was had to a jury at the February term of said court, 1894. The jury returned a verdict for the defendants, which was approved by the court, and judgment rendered for costs. Exceptions were duly saved, and the case brought to this court for review.

The plaintiff, to prove title in it, introduced: First. The patent from the United States to Joshua E. Clardy, as probate judge of Marshall county, Kan., in trust for the several use and benefit of the occupants of the town site of Palmetto, according to their respective interests under the act of congress of May 23, 1844. Second. A deed from Joshua E. Clardy, probate judge of Marshall county, Kansas territory, dated the 28th day of October, 1858, to certain parties therein designated as members of the Palmetto town company, the first clause of said deed being as follows: "This indenture, made the twenty-eighth day of October, in the year one thousand eight hundred and fifty-eight, between J. E. Clardy, judge of probate court in and for Marshall county, and territory of Kansas, acting in relation to the Palmetto Town Company, according to the statutes of Kansas as in such cases made and provided, and F. J. Marshall, A. Morrell, W. S. Bruster, O. D. Prentiss, J. R. Quarels, R. Y. Shibley, J. P. Miller, R. A. West, A. S. Vaught, J. R. S. Allston, J. H. Meyer, and J. S. Magill, members of the Palmetto Town Company, parties of the second part." Third. A series of deeds from the larger part of the grantees of the last above mentioned deed, their heirs, legal representatives, and assigns, to the plaintiff in error herein, quitclaiming unto said company the land described in plaintiff's petition; it being a part of the same land described in the patent of the probate judge and in the deed from the probate judge of the grantees therein; said deeds, in the aggregate, pretending to convey to said plaintiff in error the undivided forty-two sixtieths of the property as conveyed by the probate judge. The defendants substantially admit that their title is only a possessory one, founded, as regards part of the lots, on void tax deeds.

The principal question in this case is in relation to the deed from the probate judge to the parties therein described as grantees. The defendants claim, in substance, that the deed from the probate judge under an act of congress for the relief of citizens of towns upon the lands of the United States under certain circumstances, approved May 23, 1844, and an act to regulate the entries and disposal of town sites (Kan. Laws 1857-58, p. 399), should have been made to the Palmetto Town Company, that company being the party that was legally entitled to the same. It was further contended by said defendants that said deed from the probate judge was intended to con-

vey said property to the Palmetto Town Company, and that was supposed by the parties to be the legal effect thereof. A large amount of evidence was introduced tending to show that the deed in controversy was made, acknowledged, and delivered with that view; that the Palmetto Town Company assumed control of the property, subdivided it into lots, and made a large number of conveyances thereof; and that the individual members of said town company never asserted or claimed any interest in the property of said town until long after the town company, as a corporation, became extinct by lapse of time. The supreme court of Kansas, in *Investment Co. v. Munson*, 44 Kan. 491, 24 Pac. 977, had this same deed before it for consideration. In that case this plaintiff was claiming first, under said deed, a title to the lots in controversy in that action, in said town, through the town company; and the court held that the Palmetto Town Company was created by an act of the legislature approved February 14, 1857, which failed to provide the duration of its existence, and that it ceased to exist 10 years after its creation, and that it was therefore powerless to execute a conveyance of real estate at the date of the deed offered in evidence. After the deed from the town company had been offered, and excluded by the court below, the plaintiffs then offered a deed from F. J. Marshall, one of the grantees in said deed from the probate judge, purporting to convey his interest in the land that had been entered as the Palmetto town site, including all the lots remaining unsold, or which had been conveyed by the Palmetto Town Company. This deed was rejected by the court below, as were a number of other deeds of like character executed by the grantees mentioned in the deed from the probate judge, and who are therein described as members of the Palmetto Town Company. It was urged that the deeds were incompetent because the only title which the grantors had in the property was derived from the deed of the probate judge to F. J. Marshall et al., and that as the deed of the probate judge does not purport to convey title to the Palmetto Town Company, but by its terms undertakes to convey to F. J. Marshall et al. as individuals, such conveyance was not in accordance with the rules and regulations prescribed by the legislature of the territory of Kansas relating to the entry and disposal of town sites; and the court below held, as a matter of law, that the deed from the probate judge was ineffectual to convey any title to the grantees named therein as individuals, and, as they individually acquired no title by that deed, they could not, as individuals, convey any title to the Marysville Investment Company. This the supreme court held was error, saying: "The probate judge having made the deed to these individuals, it will be presumed, in the absence of evidence to the contrary, that the parties to whom the deed was made were occupants, and entitled to a conveyance, and

that the town company was not an occupant, nor entitled to a conveyance. * * * The rights of the parties and the effect of the conveyances cannot, however, be determined in this case. The testimony was cut short on the exclusion of the conveyances referred to, and, as the rights and relations of F. J. Marshall and other grantees in and to the town site in question were not fully disclosed, we will not at this time undertake to define their rights, or the effect of the conveyances which were made." In the case at bar the sole questions upon which evidence was introduced and contest made by the defendants was that the deed in controversy was made intending to convey the property therein described to the Palmetto Town Company; that the deed was delivered to the town company, and accepted by it; the expenses of platting and managing the property paid by the company; and the individual members thereof never claimed the property as their individual property, but claimed it as the property of the company, and were estopped now from asserting personal ownership therein. In *Town Co. v. Maris*, 11 Kan. 128, the United States statute in question was held to be intended for the benefit of those actually occupying the town site by settlement and improvement thereon, and to secure to them severally, at the minimum price, all lands actually occupied by them, and the benefit of the sale of such other lands within the limits of the town as were not actually occupied, and, while the state authorities have the right to provide the rules and regulations by which said trust is to be executed, yet they cannot change the trust by substituting other parties to receive its benefits than those indicated in the law of congress, and add, "The law was made for the benefit of the occupants of the town, and not for speculators." This decision was followed in the succeeding case of *Town Co. v. De Long*, 11 Kan. 152. In the case of *Sherry v. Sampson*, Id. 611, the court held, in a case in relation to this same town site, that the probate judge was the proper party to make such entry, and after entering said land he held it in trust for the benefit of those actually occupying the town site, and according to their respective interests, and it is his duty to make deeds therefor to the actual occupants, respectively; and, when he has made a deed for any portion thereof to any person, it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person. In the case of *Jackson v. Town Co.*, 23 Kan. 542, the question as to what should become of the unoccupied lots of a town site entered under said act was suggested, but not decided. In the case of *Rathbone v. Sterling*, 25 Kan. 444, the court held that the award of commissioners and deed of the probate judge were not conclusive as against an actual possessor and sole occupant of a lot in such town site; but the argument in the opinion would indicate, though not expressly so deciding, that the award of the

commissioners and the deed of the probate judge would be conclusive in relation to the distribution of the unoccupied lots among the occupants of said town, unless the same was impeached for fraud or by some direct proceeding within a reasonable time. In *Guffin v. Linney*, 26 Kan. 717, the court held that the title of the actual occupant is superior to the title under the deed from the probate judge.

These are all the decisions of our supreme court which we have been able to find bearing more or less directly on the issues of this case, and from them it seems to us we are justified in deducing the following general principles, viz.:

1. That an actual occupant of such a town site is entitled to the portion thereof actually occupied by him, regardless of the decision of the commissioners or the deed of the probate judge.

2. That the decision of the commissioners and the deed of the probate judge would be conclusive and binding, unless attacked for fraud or by some direct proceeding within a reasonable time, as to the distribution of the unoccupied lots among the actual occupants of said town site, or for their general good.

3. That a corporate company, such as the Palmetto Town Company, may be, through its members, acting for said corporation only, and not in their individual right, the sole and exclusive occupants of said town site, and under such circumstances the probate judge should convey said site to said company.

4. As the principal question in this case is whether or not the deed from the probate judge conveyed any title to the grantees therein named, the understanding and circumstances under which said deed was made and accepted, and the action of the grantees thereunder, were proper subjects of inquiry, and any competent evidence tending to establish the defendants' claim in relation thereto was proper.

5. If the grantees in said deed from the probate judge accepted the same as officers and members of the Palmetto Town Company only, and afterwards, for a great number of years, held out to the world and asserted that said company was the exclusive owner of said property, and caused the people on said town site to believe, and act upon the belief, that such was the fact, they are now estopped from claiming title to themselves thereunder.

The instructions of the court presented to the jury these issues plainly and fairly, and the jury found for the defendants. We think the instructions of the court were correct upon the main issue in the case, and that no reversible error appears therein. The judgment of the court below will be affirmed.

McELROY, J., concurs.

MAHAN, P. J. I cannot agree with my brethren in their judgment in this case. The plaintiff showed by proper conveyances a title founded upon a patent from the government of the United States to J. E. Clardy, probate judge of Marshall county, "in trust for the several use and benefit of the occupants of the town

site of Palmetto according to their respective interests," under the act of congress of May 23, 1844. Clardy, in the execution of this trust, by deed duly executed and delivered, conveyed the lands in controversy to F. J. Marshall, A. Morrell, W. S. Brewster, O. D. Prentiss, J. R. Quarles, R. Y. Shibley, J. P. Miller, R. A. West, A. S. Vaught, J. R. Sallston, J. H. Mayer, and J. S. Magill, members of the Palmetto Town Company. These grantees held the land as tenants in common. By separate conveyances from a number of these grantees and their heirs, the plaintiff acquired, and upon the trial proved a title by deeds to, $\frac{42}{100}$ of the lands sought to be recovered by them in the cause. It was conceded on the trial, and the court so charged the jury, that the defendants were occupants without title of any kind save mere possession. The defendants and those under whom they claimed possession had been occupants of one lot, numbered 7, about 10 years. The defendants in no manner connected themselves at any time with the patent title, nor do they pretend that they were occupants of the town site, so as to have any rights or equities that could have been violated by the deed of the probate judge to Marshall and others. The patent is dated April 17, 1862. The deed by Clardy to the grantees described as members of the Palmetto Town Company is dated January 3, 1859. This deed has been twice considered by the supreme court of this state. *Sherry v. Sampson*, 11 Kan. 611; *Investment Co. v. Munson*, 44 Kan. 491, 24 Pac. 977. To avoid the force of these conveyances, the defendants contended: First, that the Clardy deed was not intended to be what it is on its face, and as declared by the supreme court,—a deed to the individuals therein named and designated,—but was a deed intended to convey the land to the corporation called the Palmetto Town Company, and that the corporation was in fact the rightful owner of the land, and therefore the individuals named in the deed were not the owners, and that the deed is void therefor; second, that the grantees named in the deed, from 1859 to 1861,—that is, to the beginning of the war of the Rebellion,—treated it as a deed to the corporation, and not to them as individuals. At the last-named date all save two of them left the state of Kansas, going to different states and territories. They did not thereafter pay taxes on the land, or openly assert ownership therein. By reason of these facts the opinion generally prevailed in the community that there was no way to obtain title thereto save by tax deed or prescription. Therefore defendants claim that they, the said grantees, and plaintiff claiming under them, are in law estopped from asserting their title under said Clardy deed against the defendants, or against such persons as had, acting upon the public opinion they induced, attempted to acquire title to the land by tax deed or adverse possession. The defendants nowhere pretend that they were induced to act upon the belief that the corporation was the owner by reason of the conduct of the grantees in the Clardy

deed, or otherwise than by the gossip to that effect, and that the legal existence of the corporation had expired, so that it could not convey. Hence they concluded they must resort to obtaining tax deed, prescription title, or obey the Scriptural injunction, and cease to covet the land. It strikes me as a startling as well as a novel application of the doctrine of estoppel by conduct. Upon these facts the court instructed the jury as follows: "Fourth. If, for more than 25 years, the plaintiff's grantors represented the Palmetto Town Company as the owner of the property in controversy, or for that length of time permitted the Palmetto Town Company to appear as such, or as having complete authority over it, and afterwards made claim of ownership, and made deed attempting to convey their interest to the plaintiff, the plaintiff will now be estopped to deny such ownership or authority of the Palmetto Town Company against persons who, relying on such representations or silence, have purchased or acquired interests in the property." This instruction is not applicable to the facts as shown by the defendants themselves, and could only serve to mislead the jury. According to the evidence offered by defendants, the Palmetto Town Company was incorporated by the legislature of the territory of Kansas February 14, 1857. It ceased to have legal existence February 5, 1867. There was a futile effort to resuscitate the corporation in 1887. In 1859 Albert Morrell, as president of the company and as agent of the Clardy grantees, made two deeds of part of the lots of the town site. The records of the company from May, 1859, to July 2, 1861, offered in evidence by the defendants, disclose confusion in the minds of the grantees of Clardy as to where the legal title rested. This is as much as can be said of those proceedings of the members of the corporation. At the latter date the record closed, and began again January 24, 1867,—long after the defendants had acquired possession of the premises in controversy. During the interim from July, 1861, to January, 1867, the corporators were scattered. At the latter date 11 of the 13 were present in person or by attorney. The members of the company and their attorneys in fact had a number of meetings from January 24, 1867, to June 14, 1868, when they authorized a sale to the plaintiff of all their interest in the town site, and made provision for quitclaim deeds from the various members or their heirs. There was the same confusion apparent as to the rights of the corporation and the individual members that characterized their earlier meetings and proceedings. No other evidence is contained in the record of acts comprising an estoppel by conduct.

The court instructed the jury further as follows: "Fifth. If the plaintiff's grantors, for more than twenty-five years owners of the property in suit, neglected to pay taxes on the property, and made no claim to it, and suffered the corporation called the Palmetto Town Company to be held out to the world as the owner, and after said corporation had become

defunct, so that it could not make deeds for real estate, suffered the belief to prevail in the community that a tax title was the only obtainable title to the property, and without objection, and without making known their claim to the property, suffered the defendant and his predecessors in interest to take possession of the property under tax deeds, and make valuable and lasting improvements, greatly enhancing the value thereof, under the honest belief on the part of the defendant and his grantors that their tax titles were all the title that was obtainable, and in ignorance of any claim on the part of the grantors of the plaintiff, the plaintiff's grantors would now be estopped from asserting title to the property, and the plaintiff, their grantee, would be in no better position, but would also be estopped. If you find from the evidence that the plaintiff is so estopped, you will return a verdict for the defendants." The analysis of this is that a party who does not pay his taxes must be careful that the purchaser at the tax sale (an adversary proceeding) is correctly informed as to who is the true owner, because, if he should not look up the records, but rely upon public rumor, and the tax proceedings should prove a failure in conferring title, forfeiting your estate, that you will suffer a forfeiture by estoppel. I am compelled to hold that the case, on the facts, lacks the essential elements of estoppel, and that the law given by the court is not the law of estoppel by conduct.

As to the proposition that the defendants, in no manner connected with the plaintiff's claim of title, having no interest that could have been prejudiced by the deed when made, and not having acquired any such interest, can impeach the deed for fraud or mistake, I am utterly unable to agree thereto. The supreme court, in *Sherry v. Sampson*, 11 Kan. 611, says: "And a person who has no interest in the land will not be allowed to raise any question as to whether the probate judge has made the deed to the proper party or not." This is the universally recognized rule, as I read the cases and the text writers. It is the reasonable rule, the ethical rule, the logical rule. *Story, Eq. Jur. § 165; Smelting Co. v. Kemp*, 104 U. S. 647; *Houck v. Kelsey*, 17 Kan. 333; *Carithers v. Weaver*, 7 Kan. 110; *Green v. Barker (Neb.)* 66 N. W. 1032. The court instructed the jury on this branch as follows: "Sixth. The act of congress under which the probate judge of Marshall county entered the town site made the probate judge a trustee for the occupants of the town site, according to their respective interests. Under this law the occupants of the town site at the time it was entered were entitled to a deed or deeds from the probate judge for their respective interests. In making such deed the probate judge was to be governed by such rules and regulations as should be prescribed by the legislative authority of the state or territory in which said town site was situate, so far as such rules and regulations did not conflict with said act of congress. The territorial legislature of Kansas passed in 1858 an act which provided, in sub-

stance, that where the persons who selected or laid out a town site have been incorporated as a town company, with power to purchase and hold the land on which such town site is situated, it should be the duty of the probate judge to convey the land thus entered to such incorporated company. Under the provisions of these two acts, if it is shown by the evidence that the persons who selected and laid out this town site of Palmetto were incorporated as the Palmetto Town Company, with power to purchase and hold the land on which said town site was situated, and if the Palmetto Town Company, so incorporated, was the sole occupant of said town site, then it was the duty of said probate judge to deed said town site to said company, and any deed made by him to any other person or persons would be void, and would convey no title to the individuals named therein; and this would be true although some or all of the individuals named in said deed were actually occupying some part of said town site, if their occupancy was merely as members of the Palmetto Town Company, and for the purpose of enabling said company to make good its occupancy of said town site, and to acquire title thereto under the laws already referred to." The record discloses that the grantees named in the deed of the probate judge were the members—all the members—of the corporation called the Palmetto Town Company; that two of them had residences on the land, occupied by them and their families. They were the sole beneficiaries of any deed that could have been made by the probate judge lawfully. The corporation, with the deed to it, would have occupied the same relation of trustee to the actual occupants. Why was the deed void under these circumstances? As to whom was it void? The world at large,—every intruder, like the defendants, who sought to obtain an adverse title by tax deed and adverse possession? The deed, under the facts disclosed by the record, was not void. Had it been made in violation of any occupant's vested right at the time it was made, it could have been avoided to the extent of such interest or the title so conveyed held to be in trust for the benefit of such occupant to the extent of his interest, and no more. The instruction is erroneous, misleading, and prejudicial, and a verdict obtained upon such assertion of law ought not to stand. Our supreme court, in *Riggs v. Anderson*, 47 Kan. 66, 27 Pac. 112, reversed the judgment of the district court of Butler county for holding as the district court of Marshall county held in this case. It says: "In an action for the recovery of real estate, where the plaintiff claimed title under a certificate issued by a town-site company, duly assigned, showing that the holder was entitled to a good and sufficient warranty deed as soon as such company should receive the title to the town site, and such town-site company obtained the title through the probate judge, but never made a deed to the assignee of such

certificate, and the corporation expired by limitation, and the defendant claimed under tax deeds which were void, and the fact was that he had been in possession of the premises, and had made lasting and valuable improvements thereon, more than one year before suit was brought, held, that the plaintiff's title was paramount to that of the defendant, and that he was entitled to recover as the equitable owner of such real estate." In this case the equitable right and the legal title were in the plaintiff, to the extent of $\frac{42}{100}$ of the lands, and they should recover that amount; and there exists no reason for holding that its legal title should be impeached for fraud or mistake, nor did it do anything that in law or common honesty should estop it from asserting its right.

(5 Kan.App. 461)

REIGHART v. HARRIS.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

APPEAL — NECESSARY PARTY — DISCHARGE OF GARNISHEE.

1. A garnishee who has, by stipulation in the case, been released from the liability of having a judgment rendered against him, and converted by such stipulation into a mere stakeholder or custodian of funds, holding them subject to the order of the court, is not a necessary party to a petition in error to review an order discharging such funds so held by such garnishee from the lien of said garnishment.

2. This court has jurisdiction to review an order discharging funds garnished in a cause, upon a petition in error filed before final judgment in such cause, and while such cause is yet pending in the trial court for trial upon the merits, between the plaintiff and defendant, under paragraph 4641 of the General Statutes.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action by Maggie P. Reighart against Ella M. Harris. From an order discharging a certain fund garnished as exempted, plaintiff brings error. Motion to dismiss.

W. S. Roark, for plaintiff in error. Thos. Dever, for defendant in error.

MAHAN, P. J. This is a petition in error for the purpose of reviewing an order of the district court of Geary county discharging a certain fund garnished in the case, upon the ground that the fund was exempted by the statute.

The first reason assigned why the petition in error should be dismissed is that all of the necessary parties are not before the court. An examination of the record shows that the garnishee has no interest in this controversy. By reason of the situation of the case, no judgment was or is to be entered against the garnishee. By stipulation of the parties, the garnishee now holds the fund simply as the custodian of the court, subject to its order. If the order of the court discharging the garnishee is correct, the money is to be paid to the defendant in error. If the order is

reversed, and if it should finally be determined that the fund was not exempt from seizure upon garnishment proceedings, then the money is to be paid to the plaintiff in error. A reversal of the order in this case could not, in any sense, affect the rights of the bank, garnishee. The entire controversy is between the plaintiff in error and defendant in error; hence there is no merit in the first ground.

The second ground is the same.

The third ground assigned as a reason why the petition in error should be dismissed is that the record is insufficient. The case comes here upon a transcript of the record, including bill of exceptions, disclosing the proceedings of the court. It appears to be a complete transcript of the proceedings, and is sufficient. Hence there is no merit in the third ground.

The fourth ground is that an order discharging funds in the hands of a garnishee, entered in the district court prior to the determination of the merits of the action to which the garnishment is ancillary, is not such an order as can be reviewed upon appeal while such action is still pending, untried, in the district court. Paragraph 4641 of the General Statutes defines the jurisdiction of the supreme court and the jurisdiction of this court. Whatever orders the supreme court may review this court may review if the amount involved brings it within its jurisdiction. Section 4641 provides that the supreme court may reverse, vacate, or modify an order of the district court that discharges, vacates, or modifies a provisional remedy. An order discharging funds garnished in a case is an order modifying a provisional remedy, and is reviewable, under the provisions of the section cited. The motion is denied. All the judges concurring.

(6 Kan. A. 427)

CHICAGO, R. I. & P. RY. CO. v. STURM.

(Court of Appeals of Kansas, Northern Department, C. D. March 22, 1897.)

ACTIONS IN DIFFERENT STATES—EXEMPTIONS.

It is not a bar to an action for wages in a state where wages are exempt that judgment for such wages had been rendered against defendant, as garnishee of plaintiff, in a state where wages are not exempt.

Error from district court, Republic county; F. W. Sturges, Judge.

Action by E. H. Sturm against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

M. A. Low and W. F. Evans, for plaintiff in error. V. D. Bullen and Thos. Dever, for defendant in error.

WELLS, J. The facts of this case are substantially as follows: E. H. Sturm worked for the Chicago, Rock Island & Pacific Railway Company during the fall and winter of

1893, for which it was indebted to him. On December 13, 1893, E. H. Willard brought an action before a justice of the peace of Pottawattomie county, Iowa, against E. H. Sturm, and garnished said railway company. On the 18th day of January, 1894, Sturm brought an action before a justice of the peace of Republic county, Kan., for the recovery of said wages, and recovered judgment thereon February 5, 1894, for \$140 and costs. Said case was duly appealed to the district court of Republic county, Kan. On February 20, 1894, judgment was rendered by the justice in Iowa against said Sturm, as debtor, and said company, as garnishee, for \$76.16 debt and \$19 costs, and said case was duly appealed by said company to the district court of Pottawattomie county, Iowa. On October 10, 1894, said case came on for hearing in the district court of Republic county, Kan., and said company defendant filed a motion, supported by affidavit, asking a continuance of said cause on account of the pendency of said cause in Iowa, which motion was refused. Thereupon said defendant filed its answer, setting up said garnishment, judgment, and proceedings in Iowa, and asking to be discharged and go hence with its costs. Thereafter, on the 12th day of October, 1894, said plaintiff, Sturm, replied to said answer, setting up the exemption of said wages, and denying the jurisdiction of the Iowa court. Thereafter, on the issues thus joined, the cause was tried to the court on October 23, 1894, and the court, on the supposed authority of the case of Railway Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430, found for the plaintiff and rendered judgment against said defendant for \$110, to which the defendant excepted, and brings the case here for review.

The court below, in giving its decision, founded it exclusively on the Sharitt Case, and plainly intimated that, were it not for that decision, the judgment would be the other way. The syllabus of that case, which is the law decided, can be distinguished from this, as in that case it is assumed that the wages were exempt under the laws of both states, which would make a very important difference. In that case, also, no question of the violation of the United States statute was raised. But a careful examination of the opinion of the commissioner, the concurring opinion of Justice Valentine, and a very able and exhaustive review of the questions involved by Chief Justice Horton in his dissenting opinion, satisfies us that every phase of the questions necessary for a decision of this case was carefully considered by our supreme court, and by a majority of the court decided adversely to the claim of the plaintiff in error in this case; and, having been so decided, we are bound by the decision, until reversed by the court that rendered it, without regard to our own views on the weight of authority, or the strength of reasoning offered or used by the respective parties. We are referred to the case of Railway Co. v. Baker

(decided by this court Jan. 11, 1897; *Gilkeson, P. J.*, delivering the opinion) 47 Pac. 563, as holding contrary to these views; but, if such is the effect of that decision, this court would still be bound by the decision of the supreme court. With these views, it is unnecessary to consider the other questions discussed. The decision of the court below will be affirmed. All the judges concurring.

(5 Kan. App. 393)

MUSGRAVE v. GLEN ELDER FARMERS' ALLIANCE CO-OPERATIVE SHIPPING & PURCHASING ASS'N et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

CORPORATION—PROCEEDING AGAINST STOCKHOLDER—SET-OFF.

1. In a proceeding by a creditor of a corporation against a stockholder thereof, under a statute making the stockholder liable to the creditor for the amount of his stock, said stockholder can set off such claims as he has paid on execution.

2. As a matter of equity, the stockholder is entitled to a set-off for the amount voluntarily paid, in good faith, of the just debts of the corporation to a creditor.

3. Where the stockholder against whom proceedings are had to enforce the payment of his stock liability is himself a creditor of the insolvent corporation, he will be allowed, in equity, to plead the indebtedness of the corporation to himself, as a set-off against his liability to other creditors.

Mahan, P. J., dissenting.
(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by John E. Musgrave against the Glen Elder Farmers' Alliance Co-operative Shipping & Purchasing Association and J. K. P. Boyd. Judgment for defendants. Plaintiff brings error. Affirmed.

F. T. Burnham, D. M. Thorp, and V. H. Branch, for plaintiff in error. A. W. Hicks and F. J. Knight, for defendants in error.

McELROY, J. The plaintiff in error, as a creditor of the Glen Elder Farmers' Alliance Co-operative Shipping & Purchasing Association, sought to recover against the defendant Boyd, as a stockholder of the company, under the provisions of paragraph 1192, Gen. St. 1889, which reads: "Execution against Stockholders—Action—32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after reason-

able notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The case was tried upon an agreed statement of facts, which is as follows: "The defendant association was a corporation under the laws of Kansas, and became insolvent, whereupon the plaintiff brought suit and obtained judgment against said corporation for \$751.66, in the above court. Afterwards plaintiff duly moved the court for an execution against said J. K. P. Boyd, defendant in this proceeding, as a stockholder in defendant corporation. It is admitted that said Boyd is a stockholder in defendant corporation to the amount of \$410, the par value of his stock, which was all paid up. First. Before plaintiff moved for execution herein, S. W. Earl, a stockholder and a creditor of defendant corporation, obtained a judgment against the corporation, and an order for execution against said Boyd as a stockholder therein, in the sum of \$115, which defendant Boyd paid, and which he claims as a set-off in this proceeding. Second. Before plaintiff moved for execution herein, S. W. Watson, after defendant corporation became insolvent, obtained a judgment against the corporation, and duly obtained an order for execution, in the same court where said judgment was rendered, against defendant Boyd for \$45, which sum defendant Boyd paid in satisfaction of said order for execution, and defendant Boyd claims said sum as a set-off in this proceeding. Third. That after said corporation became insolvent, and before plaintiff moved for execution herein, said defendant Boyd paid to the Bank of Glen Elder \$112.78, upon an existing indebtedness of \$800 of defendant corporation to said bank, which sum he claims as a set-off herein. Fourth. That after defendant corporation became insolvent, and before plaintiff moved for execution herein, defendant Boyd paid to the Farmers' and Merchants' National Bank of Cawker City, Kansas, the sum of \$61 upon a valid claim which said bank then held against defendant corporation in the sum of \$800, which sum of \$61 so paid defendant Boyd claims as a set-off herein. Fifth. That, during the time said corporation was doing business as such, defendant Boyd, as the agent and at the request of defendant corporation, rendered services and expended time and expenses in and about soliciting stock subscriptions and obtaining loans for said corporation of the amount and value of \$33.40, no part of which has been paid, and which defendant Boyd claims as a set-off herein. Sixth. That, during the time said defendant corporation was doing business, defendant Boyd was a director of said association, and, as such, rendered services and expended money for said corporation in the sum of \$23.40, no part of which has been paid, and which sum defendant Boyd claims as a set-off herein. Seventh. That, dur-

ing the time said corporation was doing business, defendant Boyd was, by the directors and stockholders, appointed on the building committee in the erection of a warehouse for the business of said corporation; that, as such, he was acting for said corporation actually and necessarily for twenty-five days, and that his services were of the value of \$68.75, no part of which has been paid, and which he claims as a set-off herein. All the facts herein stated to have been done by the defendant Boyd were done before plaintiff moved for execution herein, and that all the allegations of the plaintiff's motion are true. Dated at Beloit, Kansas, this 24th day of January, A. D. 1895." Judgment was rendered for defendant Boyd, and against the plaintiff, Musgrave, for costs, to which ruling of the court the plaintiff excepted, filed his motion to vacate and set aside the judgment, which motion was by the court overruled, and he brings the case here for review.

The determination of this case involves the examination of three propositions: (1) Was Boyd entitled to plead as a set-off the amount paid to S. W. Earl and S. W. Watson? Each of these parties procured a judgment against the company, and had an execution issued, which was returned unsatisfied for want of property on which to levy the same; and each of these parties procured an order for execution against Boyd. Thereupon he paid the amount of their judgments, for which he asks credit on the amount of his liability for his stock. (2) The second question is upon the third and fourth paragraphs of the agreed statement of facts. The Bank of Glen Elder and the Farmers' & Merchants' National Bank of Cawker City, Kan., each were creditors of the company, and held a just and valid claim against such company, on which Boyd made payments, for which he asks credit on his liability for stock. (3) Boyd held a claim against the company as a creditor, and he asks that the amount that the company owed him be treated as a set-off against his liability on his stock. These three claims,—that is, the amount that Boyd paid upon execution awarded against him as a stockholder, the amount that he paid to the Bank of Glen Elder and the Farmers' & Merchants' National Bank of Cawker City, and the amount of indebtedness that the company owed him, exceed the amount of his liability under this statute on his stock as a stockholder in this company. The questions, then, for determination, are as to Boyd's right to these three claims as a set-off in this action brought by Musgrave.

Our supreme court has decided the first two propositions in favor of the contention of Boyd in the case of *Abbey v. Long*, 44 Kan. 691, 24 Pac. 1111. Strang, C., delivering the opinion of the court, says: "The statute creating a liability on the part of the stockholder guarantees to the creditor of a corporation a trust fund, in the hands of the stockholders, liable for the ultimate payment of the corporation debts. The law says you

may combine your capital, create a corporation, relieve yourselves of the common-law liability of co-partners, and obtain the many other advantages growing out of corporate existence; but as a protection to the public, in lieu of the partnership liability you escape, you shall be held not only liable to the corporation and creditors for the full amount of your stock subscribed, but, to guaranty further protection to creditors of the corporation, you shall, if the corporation itself becomes insolvent, be charged with a further liability to such creditors, equal to the amount of your stock in the corporation. This liability may be discharged by payment on execution issued pursuant to the statute, as in this case. The authorities also hold, as a matter of equity, that such liability may be discharged by a voluntary payment by the stockholder, in good faith, of the just debts of the corporation, equal to the amount of the stock held by him in the corporation. This method of discharge from liability had its origin in, and is based entirely upon, equity, it being held that, as no creditor has any exclusive right to the fund in the hands of any individual stockholder before execution issues, the voluntary and bona fide payment, in good faith, of a just debt of the corporation, equal to the amount of stock held by a stockholder, is, in equity, equivalent to the payment of so much on an execution issued under the statute. But, as this method of discharge depends upon equity for its existence, the voluntary payment, to operate as a discharge, must be a bona fide payment of a just debt, and made in good faith."

There remains, then, the right of Boyd to plead, as a set-off to this claim of Musgrave, the indebtedness of the company to himself. This question was considered in the case of *Mathez v. Neldig*, 72 N. Y. 100. Church, C. J., in delivering the opinion, says: "I agree with the counsel for the appellant that the statute liability constitutes a fund which belongs to the creditors to secure the payment of their debts, but it belongs to all the creditors, as well those who are stockholders as those who are not. The defendant, as a creditor, had an interest in the fund, as well as the plaintiff; and his debt was one which would be chargeable against the funds, because it was a debt against the company, for the payment of which stockholders were individually liable; and this would be so irrespective of the question whether the money advanced by the defendant was used to pay obligations for which he was individually liable or not. The rule commends itself to my judgment. Stockholders have the same right to deal with the corporation that other persons have, and, as creditors, they are entitled to the same measure of protection. It may be, as argued, that the rule might enable officers of corporations to make preferential payments to favored creditors, and thus work injustice to others; but, if any restrictions or limitations in this respect are necessary, the rem-

edy is with the legislature." In the case of *Boyd v. Hall*, 56 Ga. 563, in an action against a stockholder upon his statutory liability to the creditors as such stockholders, the court says: "A bona fide judgment debt of a stockholder against the company in which he holds stock may be set off by him in equity against a suit to make him individually liable in proportion to his stock." "We cannot see why Hand, as a stockholder, should not be allowed to set off his judgment against the company, if that judgment be fair and honest. Against his individual liability to another creditor of the company, if his debt be honest, the company is as much bound to pay him as to pay others; and individual members, including himself, are just as responsible to him as a creditor as to other creditors. The fact that he is a stockholder can make no difference. The company may owe a stockholder as well as a stranger, and individual stockholders be liable to him as to others." In an action where a stockholder pleaded as a set-off the indebtedness of the company to himself, the supreme court of Missouri, in the case of *Jerman's Adm'r v. Benton*, 79 Mo. 155, said: "And another question, not less important than the one disposed of, is whether the defendant is entitled to have credited on his stock liability any debts existing in his favor against the company. * * * The argument of those who deny the equity belonging to the relation of the stockholder as a creditor starts with the proposition that all capital and obligations or unpaid capital constitutes a trust fund for creditors, —a proposition which every one in this country will admit. It is next argued that, if a stockholder is permitted to bring forward his claims against the company as a set-off against his liability to creditors, he would in this manner obtain payment of his demand in preference to other creditors. Accordingly, he is entirely excluded by this course of reasoning as a creditor, and the trust fund in dispute is handed over entirely to the suing creditor, who thereby obtains full preference and satisfaction of his demand, thus obtaining the advantage which was denied to the other creditors, merely because he was a stockholder. It is difficult to perceive on what principle one creditor should be preferred to another. The injustice of the inequality is as apparent when it is suffered by one as by the other; a stockholder has the same right with a stranger to become a creditor of the company. * * * But, in respect to the assets in the shape of the obligation of the creditor in the capacity of a stockholder, there would seem not to be the same equality in respect to the summary remedy, for the reason that such creditor cannot move for an execution against himself; and, unless his interest is protected in some manner in the summary proceedings, his undoubted equity in the fund which ought to extinguish his obligation as a stockholder will be ignored and lost."

In an action to charge a stockholder in a corporation, on the ground that the capital stock has not been fully paid in, the defendant set up, as an equitable set-off, an alleged indebtedness of the corporation to himself. In the case of *Wheeler v. Miller*, 90 N. Y. 359, Finch, J., delivering the opinion, says: "And thus the defendant is left in a position exposed to a statutory liability for the debts of the company to the extent of \$5,000, being the par value of his stock. He meets the emergency by pleading an equitable offset to the plaintiff's claim, founded upon an alleged indebtedness of the company to him. He has a right to make such defense. * * * But that liability constitutes a fund which any creditor of the company may reach. If now the stockholder sued is himself such creditor, to an amount equaling his statutory liability, he has quite as good a right to the fund which is pursued as the pursuer. Indeed, he has the better right, because it is already in his possession, and it would be inequitable to take it from him for the benefit of another creditor, who had no superior equity; but the stockholder must be really a creditor of the company." 2 *Beach on Private Corporations* says (section 727, "Set-Off and Counterclaim"): "Whether a shareholder may set off, against his liability to corporate creditors, claims which he himself holds against the company, depends upon the nature of the liability sought to be enforced,—the distinction being between his liability at common law and under statutes which are merely declaratory of the common law, on the one hand, and, on the other hand, the additional personal liability over and above his subscription imposed upon the shareholder in certain kinds of companies by our modern statutory law. In the former case counterclaims and offsets are not available in actions brought by or in behalf of corporate creditors. In the latter case the availability of the plea depends upon the language and purpose of the statute creating the additional liability. If the language of the act be construed as indicating an intention on the part of the legislature to create a fund to which all shareholders are to contribute, and from which the creditors are to be paid ratably, the shareholder must contribute his proportion thereto, and then come in with other creditors in the distribution of the corporate assets. But if the statute imposes upon shareholders a personal liability to creditors immediate and several, so that any creditor may institute an independent action against any shareholder for the enforcement of corporate debts, then a defendant shareholder may set off debts due from the company to himself. But, of course, a claim on which the corporation is not legally liable is not available as a set-off, and stockholders are not creditors in respect of sums paid by them to the company on their subscriptions."

We are not here to consider the question of the validity of the indebtedness pleaded as a

set-off. In the stipulation hereinbefore set out, it will be observed that the indebtedness is admitted as to all the items pleaded as a set-off. Paragraph 1206, Gen. St. 1889, reads: "Liability. No stockholder shall be liable to pay the debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Under this statute, Boyd could only be made liable to pay to the creditors of the corporation an amount equal to the par value of his stock. Boyd was not indebted to the company on his stock. The court found that the set-offs as pleaded—that is, that the amount that Boyd had paid on the executions, the amount he paid to the banks, and the amount that the corporation owed him—more than equaled the par value of his stock. Therefore he was not liable in this action to Musgrave. The indebtedness of the company to Boyd was properly pleaded, and such indebtedness constituted an equitable offset against his liability on stock to the action of Musgrave. The liability of a stockholder is to the creditors of the company. There is nothing to prevent the stockholder from being a creditor of the company in which he holds stock. "No stockholder shall be liable to pay the debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him." The amount due Boyd was a debt of the company. The judgment of the lower court will be affirmed.

WELLS, J., concurs.

MAHAN, P. J. (dissenting). I regret that I am unable to agree with my brethren in their decision in this case. The point decided by them, as I understand it, is that in a case where a creditor seeks to enforce the constitutional and statutory liability of a stockholder, under the statutory provisions therefore, such stockholder may set off any claim that is due him from his associates in the corporation; and not only that such stockholder may have the right to set-off, but in this case it was given to a stockholder who was likewise a director of the corporation. The constitutional provision in relation to the matter is as follows: "Dues from corporations shall be secured by individual liability of the stockholders in an additional liability equal to the stock owned by each stockholder, and such other amounts as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corporations for charitable or religious purposes." It applies to all private corporations for profit, except railroad. The provisions of the statute for carrying these sections of the constitution into effect are sections 32 and 44, arts. 4, 5, c. 23, Gen. St. 1889. By section 32 it is provided that an execution shall be awarded against the stockholder, and in favor of a judgment creditor of the corporation, when an execution against the corporation it-

self shall have been returned unsatisfied. Section 44 provides for an action at law against the stockholders of corporations who were such at the time of the dissolution of the corporation, and for contribution among the stockholders themselves. This right, both by the constitution and statute, is given to creditors of the corporation against individual stockholders. A cause of action is given by statute against the individual stockholder to recover from him, by a creditor of the corporation, an amount equal to the stockholder's subscription, if so much is required to satisfy the creditor's claim. The two classes, creditors and stockholders, are enumerated by the statute.

Let us inquire, first, what is a set-off? It is a demand which the defendant has against the plaintiff, and which he desires to use for liquidating the whole or a part of the plaintiff's claim. In some instances the demand may be the property, in effect, of a co-defendant, but it must be against the plaintiff. A corporation is an association of men for the purpose of carrying on their business. Before any law authorizing the formation of these commercial co-partnerships, if two or more persons desired to associate themselves together for the purpose of carrying on any kind of business, they were denominated either partners, or they were engaged in a joint enterprise as a single maritime adventure. It is useless to say that it requires no statute to make one man liable to another upon his contracts for debts which he owes the other, and that he is liable to the full amount of his fortune if need be. But men desiring to seek fortunes without hazarding all their property—fortunes already accumulated—invented the scheme of incorporation whereby they were not curtailed in any of their advantages, but were relieved of part of their liabilities; that is, the law authorizing their incorporation conferred upon them certain special privileges and immunities not enjoyed by others engaged in business. For instance, continuity of existence, regardless of death or failure of one of its members, and change of ownership of interest, is permitted without the consent of the other members of the association. Their liabilities for their debts is limited, provided they conform to the law under which they incorporate. When men associate together as co-partners, each member of the firm is the agent of all of the other members, within the scope of the business of the firm. When men associate themselves in a corporation, they choose their agents from among their own members, to have charge of their business, and to bind them respecting the business of the corporation. A partner was bound by all debts contracted by his co-partner in the line of their business. But the corporation which is composed of the stockholders, members of the corporation, is liable for the amount provided by the constitution and statute of the state under which they are incorporated, to the amount thereby fixed, and no more. One is simply an association without limit as to the liability of

the association. The other is an association of men for a private gain, with a limited liability.

Now, as to compensation for this limited liability, the constitution of the state of Kansas and the statutes provided that each individual member of association called a "corporation" shall be liable to the individual creditors of the corporation to an amount equal to their subscription, and in addition to their subscription. The association, as an association, has nothing to do with it. It is entirely between individuals. It is an individual liability. But, says the majority of the court, a stockholder, a member of the association, may be a creditor of the association. True, he may; so may a member of a co-partnership be a creditor of the co-partnership. Yet I have never heard it asserted, in an action against an individual member of a co-partnership for the purpose of recovering upon an obligation of the co-partnership, that this individual member had a right to set off that which his associates owed to him against the debt of the creditor of the co-partnership, and this is just what is done in this case. It is the association or corporation that owes the stockholder, and not the creditor of the association. The purpose of the statute was to create a liability to which creditors might look for the liquidation of their demands. It is not the policy of the law to permit the members of the association, or the association itself, through its chosen agents or its board of directors, by contract with each other during the active existence of the corporation, to absorb or destroy these resources of the creditor. I am well aware that courts have said that a stockholder has a right to this set-off, and that the text writers referred to by the court so say. The same authorities say, however, that one stockholder cannot maintain this action against another stockholder for his debt against the corporation. It is said, again, that a stockholder cannot maintain the action under the statute and constitution until he shall have discharged his constitutional liability by the payment, either voluntary or by compulsion, to some creditor of the corporation. The decisions are very uniform to this effect. And it is said that in no event shall a director or officer of a corporation maintain the action against a fellow stockholder. Why not? If the creditor has a right to set it off against his liability, why not maintain the action against his co-associates? There can only be one answer to it, and that is that it is against the policy of the law to permit the members of the association, by treating with their agents, the board of directors, to absorb this fund provided specially for creditors, and not for members. The liability only accrues to the creditor. It only accrues after insolvency, and not before. And, if the members of the corporation itself may destroy it by their relation with it and each other, then they render the statute and constitution nugatory. Many of the courts, by a process of refinement upon the law of corporations, seem to have lost sight entirely of the substance,—that is, the men associated together which form the corporation,—

and treat entirely of some intangible, unreal figment of the imagination, and call it the corporation, apparently nothing but the name and shadow of the thing itself. I take it that the corporation is substantially tangible, is composed of men, and that the only intangible, unreal thing about it is the name, unless, perchance, it shall prove to be the constitutional liability of the stockholder to discharge the obligations of the corporation. The statutes, in providing for the creation of a corporation, say that a certain number of men may associate themselves together, and form a corporation, recognizing that it is the men that form the corporation. Without the men there could be no corporation. My view is that the law intended to give this remedy, this right, this cause of action, to creditors, properly speaking, of the corporation, against the individual stockholders; and that, if it had intended any modification by way of setting off any obligation of the corporation itself to any member, it would have so said. But it is the policy of the law to create a fund,—a right to which the creditors of the corporation may resort after insolvency, and that neither the corporation nor its members can destroy or abridge this constitutional and statutory right by contract with each other during the actual existence of the corporation.

(5 Kan.App. 442)

PATTERSON et al. v. TEMPLE et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

VOIDABLE SALE—NOTICE OF FRAUD.

P. & G., at the time they paid for the goods, were in possession of sufficient information to charge them as parties to the fraud of Garber. Where one is in possession of sufficient facts to put a reasonably prudent man upon inquiry, and such inquiry would lead to a knowledge of the fraud, such party is chargeable with the fraud.

(Syllabus by the Court.)

Error from district court, Jewell county: Cyrus Heren, Judge.

Action by Elias Temple and Charles Marshall, partners as Temple & Marshall, against Noah Patterson and Charles Garber, partners as Patterson & Garber. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. W. Turner, for plaintiffs in error. T. S. Kirkpatrick and Hamilton & Harmon, for defendants in error.

McELROY, J. This was an action in replevin, commenced in the court below by Temple & Marshall against Patterson & Garber. The record shows: That Patterson & Garber were engaged in the mercantile business at Esbon, and that Temple & Marshall were millers at Clifton, operating the Clifton Roller Mills. That Samuel Garber, a brother of Garber of the firm of Patterson & Garber, was a resident of Red Cloud, Neb., and that on August 17, 1894, Samuel Garber, for the purpose of defrauding Temple & Marshall, wrote and

mailed a letter on the printed letter heads of the Farmers' & Merchants' Banking Company of Red Cloud, as follows: "Silas Garber, Prest. Geo. O. Yeiser, V. Prest. W. S. Garber, Cashier. P. A. Beachy, Ass't Cash. Farmers' & Merchants' Banking Co. Capital Paid up, \$80,000. Stockholders' Liability, \$100,000. Clifton Roller Mills, Clifton, Kansas—Gentlemen: I will buy from you 2 cars of flour if can do so on the terms mentioned below. 1 car of 600 sks. High Patent, at \$1.70 f. o. b. Esbon, Kansas. 1 car of 800 sks. Second Grade, at \$1.50 f. o. b. Esbon, Kansas on thirty days time. I have a customer there that I have been supplying with flour from the Red Cloud mills, and on acct. of low water they have shut down and your mill be recommended to me as putting out good flour, and as I don't want to let them go to some other mill for there flour, and then probably loose there trade when we can run again, hence this order to you folks. They use on an average of 1 car a month. I have been selling to them on 30 & 60 days but will pay you for the 2 cars at the expiration of 30 days. Now if you can fill this order do so at once. Bill the same to S. Garber Esbon, Kansas and send the bill of lading and bill to me here in Red Cloud. Yours truly, S. Garber." In response to this letter, Temple & Marshall shipped the flour as directed, with the belief that they were furnishing the flour to the Garber-Bedford Milling Company. S. Garber was insolvent, had no connection with the milling company, and wrote the letter for the purpose of deceiving Temple & Marshall, and to defraud them to the extent of his pretended purchase. He did not intend to pay for the flour. Marshall, of the firm of Temple & Marshall, when the flour was shipped, went to Esbon and made inquiry of Patterson & Garber as to the commercial standing of the Garber-Bedford Milling Company. That afterwards S. Garber arrived at Esbon, about the 25th of August, and sold the flour to Patterson & Garber, collected the money for the same, and pocketed the proceeds. Temple & Marshall had no suspicion or intimation that they had been defrauded until about 30 days, when they drew for their money and the draft was dishonored. An investigation followed, and this action was instituted.

There is but one question presented: Shall the plaintiffs in error or the defendants in error suffer by reason of the fraud of S. Garber? In other words, did S. Garber pass a good and sufficient title to Patterson & Garber? The case was tried by the court without a jury, and the court made general findings in favor of the plaintiffs (defendants in error) and against the defendants (plaintiffs in error). After the evidence was introduced, arguments completed, and comments of the court upon the issues involved in the case had been made, defendants asked that conclusions of fact sufficient to show upon what theory the court decided the case be made. The court stated that it was too late to make such request, but, that the theory of the court

might be fully understood, he would cause such conclusions of fact and of law to be entered as would show the theory upon which the court decided. The court found that S. Garber wrote the letter for the purpose of deceiving, cheating, and defrauding Temple & Marshall; that S. Garber sold the flour to Patterson & Garber, at Esbon, Kan.; that Temple & Marshall contracted to sell the flour, as they believed, to the Garber-Bedford Milling Company, not to S. Garber, and that S. Garber was not the agent of, nor was he in any manner connected with, the Garber-Bedford Milling Company; that Patterson & Garber did not actively participate in any of the fraudulent transactions of S. Garber; and that they did not know of such fraudulent conduct upon the part of S. Garber at the time they purchased and paid for the flour. But the court finds that Patterson & Garber had sufficient suspicions and information at the time they received the flour, and at the time they paid and took a receipt therefor, to have ascertained the fraud, if diligent inquiry had been made by them. The court found, as a conclusion of law, that S. Garber never had title to the flour in question, and that he could not, therefore, convey title to Patterson & Garber. The claim made by plaintiffs in error is that a bona fide purchaser from a fraudulent vendee acquires a good title; and it is insisted that, though the sale might have been avoided as to S. Garber, yet, not having been avoided while the property was in S. Garber's possession, and Patterson & Garber having purchased in good faith, they acquired a good title. The error lies in this: That doctrine applies only to cases of voidable sales, and not to those absolutely void. In a voidable sale, the title passes subject to the right of the vendor to proceed to set the whole transaction aside on account of the fraud practiced upon him. In a void sale, no title passes. Where the title passes, the fraudulent vendee may in some cases transfer a good title to a bona fide purchaser from him, but where no title passes the pretended vendee can transfer no title to a third party under any circumstances. The testimony shows that Temple & Marshall did not part with the title to the flour, and therefore S. Garber had no title, and he could confer none.

There is another theory in the case, however, upon which the judgment of the trial court, if the sale of the flour to S. Garber was voidable only, should be sustained. Patterson & Garber at the time they paid for the flour were in possession of sufficient information to charge them as parties to the fraud of S. Garber. We understand the law to be that where parties are in possession of sufficient facts to put a reasonably prudent man upon inquiry, and such inquiry would lead to a knowledge of the fraud, the party is chargeable with such fraud. In McDonald v. Gaunt, 30 Kan. 696, 2 Pac. 871, the court said: "We may go further, and say that if the creditor, in a case of this kind, has no actual knowledge of the fraud, or notice of the fraudulent de-

sign of the debtor to transfer all his property with the direct intention to defraud his other creditors, yet, if the circumstances surrounding his purchase were such as would put a prudent man upon inquiry, which, if prosecuted diligently, would have disclosed the fraud, he cannot be deemed a bona fide purchaser in good faith. 'Knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry is, as a general proposition, equivalent to knowledge of the ultimate fact.' In *Phillips v. Reitz*, 16 Kan. 390, the court said: "As to the second objection, the court distinctly charges that a vendee must be a party to the fraud, to avoid the sale, and then, in another instruction, apparently in explanation of what was necessary to make him party to the fraud, charged that it was enough if he knew of the vendor's fraudulent intent, or of facts sufficient to put him upon inquiry. Is this error? We think not. Knowledge of facts sufficient to excite the suspicion of a prudent man and put him on inquiry is, as a general proposition, equivalent to knowledge of the ultimate fact. And if the vendee knew of the fraudulent intent of the vendor, and bought with that knowledge, he can scarcely claim to be a bona fide purchaser, if he was knowingly helping the vendor to accomplish the fraud and do the wrong." From what we have said, it follows that the court did not err in overruling the motion for a new trial. The judgment will be affirmed. All the judges concurring.

(5 Kan.App.440)

BRANCH v. AUGUSTA NAT. BANK OF AUGUSTA, ME., et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

BILLS AND NOTES—TRANSFER—ESTOPPEL.

1. Where a promissory note assigned in blank is deposited with a third party, to be by said third party sold for the benefit of the payee, and said third party delivers the same to a fourth as the basis of credit which is extended in excess of the amount due on said note, and said fourth party had no reason to doubt that said third party was the real owner thereof until after it had extended said credit, the payee cannot recover the proceeds of said note, as against the holder.

2. Certain alleged errors in the admission and rejection of testimony and in the construction and weight of the evidence examined, and held not to be reversible errors.

(Syllabus by the Court.)

Error from district court, Osborne county; Cyrus Heren, Judge.

Action by W. T. Branch, assignee of the Security Investment Company of Cawker City, against the Augusta National Bank of Augusta, Me., and others. From a judgment for the bank, plaintiff brings error. Affirmed.

D. M. Thorp, V. H. Branch, and J. W. Tucker, for plaintiff in error. Pulsifer & Alexander, for defendants in error.

WELLS, J. On March 12, 1888, Benjamin E. Clark and Lydia C. Clark, his wife, execut-

ed to the Security Investment Company, a corporation of Cawker City, Kan., their promissory note for \$1,100, with interest coupons attached, secured by a mortgage on real estate in Osborne county, Kan. On the 20th day of the same month the payee, by its secretary, assigned said note, coupons, and mortgage, in blank, and delivered them to the Union Investment Company, a corporation of Kansas City, Mo., for sale. Said Union Investment Company did not in fact sell said notes, but about August 5, 1890, transferred them to M. V. B. Chase, the director of the Augusta National Bank of Augusta, Me., as collateral security for the debts of the Union Investment Company to said Augusta National Bank, without the knowledge or consent of the Security Investment Company, and said Augusta National Bank had no knowledge that the Union Investment Company was not the owner thereof, and by reason of said pledge it assumed obligations which it was required to pay in excess of said security. On February 7, 1891, said Security Investment Company made an assignment of all its property to W. T. Branch, the plaintiff in error herein, who has been ever since said date the duly-qualified and acting assignee of said company. The only question in this case was whether the plaintiff in error, as assignee of the payee company, or the Augusta National Bank, is entitled to the proceeds of said note and coupons; the money having been paid in to court by the maker thereof. The court below found in favor of the Augusta National Bank, and the assignee brings the case here on proceedings in error.

The first assignment of error is that the court improperly admitted evidence on behalf of defendant in error over the exceptions of plaintiff in error. In making his brief upon this assignment, the plaintiff in error entirely ignores that part of rule 6 of this court, which reads as follows: "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." This rule is necessary for the expedition of the business of this court, and should be complied with; but in this case we have patiently searched each of the pages referred to for some reversible error, and have not succeeded in finding it. The only claimed error specifically pointed out and argued is in relation to a letter written by W. P. Rice, president of the Union Investment Company, to Hon. M. V. B. Chase, dated August 5, 1890. This letter, the record shows, on page 126, was identified, and the original letter attached to the deposition of John R. Gould, and copied on page 123. We see no error in this.

Under the second assignment of error, complaint is made of the striking out of certain testimony of V. H. Branch on page 59. There was no error in this, as the question called for a conclusion of law, and the answer was properly stricken out. The witness was not prevented from telling just what did occur in regard to the matter in controversy.

As to the other assignments of error, it is only necessary to say that a careful perusal of the evidence satisfied us that there was some evidence upon which the court was authorized to find as he did, and the judgment of the court below will be affirmed. All the judges concurring.

(5 Kan. App. 431)

PROVIDENT TRUST CO. et al. v. CORON et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

PLEADINGS—SEPARATE CAUSES—NUMBERING.

Where two or more causes of action are stated in the same petition, and not separately stated or numbered, it is error for the court to overrule a motion of the defendant to require the plaintiff to separately state and number the several causes of action stated in his petition.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by Phillas Coron and Delirna Coron against the Provident Trust Company and others. Judgment for plaintiffs, and defendants bring error. Reversed.

John D. Milliken, for plaintiffs in error. I. A. Rigby and Thos. Wrong, for defendants in error.

MCELROY, J. The plaintiffs in the court below allege in their amended petition, among other things: "That on the 22d day of May, 1890, plaintiffs executed and delivered their notes and real-estate mortgage to the Provident Trust Company, for a loan of \$2,200; that, instead of paying plaintiff the said \$2,200, the Provident Trust Company retained \$100 until the release of a prior mortgage should be obtained and filed in the office of the register of deeds; that plaintiffs obtained the release, and caused the same to be filed with the register of deeds, but that defendant Provident Trust Company failed, refused, and neglected to pay the plaintiffs, for which plaintiffs claim judgment for \$100; that they were in default in the payment of interest and taxes on the mortgaged premises, and about the 26th day of August, 1891, while one of the plaintiffs, Phillas Coron, was sick and delirious and of unsound mind, the Provident Trust Company, by its agent, came to plaintiffs, and induced, enticed, and influenced said plaintiffs to execute and deliver to the agent of the Provident Trust Company the warranty deed to the mortgaged premises, for the alleged consideration of \$3,000; that plaintiff never received any valuable consideration for such deed; that the premises at the time were of the value of \$5,000, and that the Provident Trust Company and their agent Salthouse, to further cheat, swindle, and defraud said plaintiffs, did, on the — day of August, 1892, pretend to bargain and sell the premises above described to one George Gill, and did execute and deliver to said Gill a deed conveying said premises absolute, for the nominal

consideration of \$3,100; that Gill took said conveyance with notice and knowledge of all the transactions between the plaintiffs and the Provident Trust Company; and plaintiffs ask judgment against the Provident Trust Company for the sum of \$3,000, for the difference between the value of said premises and the mortgage. Plaintiffs further allege that Delirna Coron, one of the plaintiffs, rented the mortgaged premises to the defendant C. Greenwood, to farm for the season of 1892, and to deliver possession thereof March 1, 1893; and that Greenwood agreed to pay, as rent therefor, one-third of the crops raised on the cultivated ground, one-third of the income derived from the pasture land, and one-half of the hay grown; and that there were crops raised on the premises; and that there is due for the rental value the sum of \$196; and that the Provident Trust Company, together with their agent, connived and schemed with Greenwood, and entered upon the mortgaged premises, and unlawfully converted to their own use all of the rent due to these plaintiffs, and refused to account to the plaintiffs therefor, to the damage of the plaintiffs in the sum of \$425, for which plaintiffs claim judgment." "And plaintiffs pray judgment as follows: Wherefore plaintiffs claim judgment against the defendants the Provident Trust Company and John T. Salthouse that the deed be annulled, canceled, and, if that cannot be had, then for a judgment against said defendants for the sum of three thousand dollars, and for the sum of one hundred dollars, being for the balance due said plaintiffs on said twenty-two hundred dollar mortgage, and against the defendants Provident Trust Company, John T. Salthouse, and C. Greenwood for the sum of \$425, and judgment that said Greenwood be adjudged the renter of said plaintiffs, and to account to said plaintiffs for amount due said plaintiffs, and that he, said defendant Greenwood, be adjudged to yield and deliver possession of said premises to said plaintiffs."

The first error assigned is that the court erred in overruling the motion of the defendants to require the plaintiffs to separately state and number their several causes of action. The amended petition on which the case was tried contained but one count. There is no pretense that the several causes of action stated in the petition were separately stated or numbered. Was there more than one cause of action stated in the petition? If there was, such cause of action should have been separately stated and numbered. Section 88 of the Code of Civil Procedure provides: "Where the petition contains more than one cause of action, each shall be separately stated and numbered." *Pierce v. Bicknell*, 11 Kan. 263: "Where two or more causes of action are stated in the same petition, and not separately stated or numbered, it is error for the court to overrule a motion of the defendant to require the plaintiff to separately state and number the several causes of action

stated in his petition." We think that more than one cause of action is set out in this petition. There are several causes of action set out in the petition which are subject to separate defenses. It is obvious that the several causes of action should be separately stated and numbered. For instance, a certain defense might be good as to one cause of action and not good as against another. In all such cases the defendant has the right to have the different causes of action separately stated and numbered. The defendant may demur to one answer, to another, and admit another. In other words, he may plead to each cause of action as the facts may justify. This he may not be able to do if the causes of action are not separately stated and numbered. It is unnecessary for us at this time to examine all the assignments of error. If these several causes of action had been separately set out and numbered, it would have simplified the issues in the case. There are other errors appearing in the record which would probably require the reversal of this judgment, but, if the petition is amended, and the causes of action separately stated and numbered, it is not likely that the same errors would occur at another trial of this case. The judgment of the court below is reversed, and cause remanded for further proceedings in accordance with this opinion. All the judges concurring.

STATE ex rel. ORR v. FAWCETT.

(Supreme Court of Washington. June 22, 1897.)

QUO WARRANTO—JURY TRIAL—ELECTION LAW—IMPLIED REPEAL—MARKING OF BALLOTS—IRREGULARITIES—SUFFICIENCY OF BALLOTS.

1. No right of trial by jury in a quo warranto proceeding is given by Declaration of Rights, art. 1, § 21, providing that the right of jury trial shall remain inviolate; Code 1881, § 248, in force at the adoption of the constitution, providing for a jury trial of issues of fact "in an action at law."

2. Laws 1895, p. 393 (Election Law), was merely amendatory of the statutes regulating elections which were incorporated in the general statutes, and did not supersede Gen. St. § 413, providing that no ballot fairly showing the voter's intention shall be lost for matter of form, merely by failure to re-enact such provision.

3. The provisions of Laws 1895, p. 393, as to the manner of marking ballots, and (section 11) that no ballot shall bear any impression, device, or thing designed to distinguish it from any other legal ballots, are not mandatory, and no ballot is vitiated by marks, other than those required by the statute, made by a voter in an honest effort to express his choice, or by a variance from the prescribed method of marking the ballot, where the intention is apparent; the statute not providing that a ballot shall be void for noncompliance with such provisions, section 10 providing that a ballot from which it is impossible to determine the elector's choice shall be void, but that, when any part of the intention can be gathered from the ballot, it shall be effective as to such part, and Gen. St. § 413, providing that no ballot shall be lost for want of form.

4. Under such statutes, a ballot on which the cross is placed at the left of the candidate's name, instead of at the right, is valid.

5. So, also, is one in which two crosses, instead of one, are placed opposite the name.

6. Also one in which a cross is placed opposite one name, and the name of the opposing candidate is erased.

7. Also one in which a cross is placed after the name of each of two opposing candidates, and one of such marks is erased or scratched over.

8. Ballots are not vitiated by writing the words "Yes," "No," "For," "Against," etc., opposite amendments to be voted for.

9. Ballots are vitiated by marks which were obviously not made with any intention on the part of the elector to express his choice; and hence ballots with the words "Rats," "Don't want any king," or the names of persons not candidates written on them, are void.

Appeal from superior court, Pierce county: W. H. Pritchard, Judge.

Information in the nature of quo warranto by Edward S. Orr against Angelo V. Fawcett to try title to the office of mayor of Tacoma. There was a judgment of ouster. A new trial was denied, and defendant appeals. Reversed.

John Paul Judson, Ben Sheeks, and Hugh Farley, for appellant. P. C. Sullivan, J. S. Whitehouse, and Murray & Christian, for respondent.

DUNBAR, J. This was an information filed against the appellant, Fawcett, by the relator, Orr, charging Fawcett with the usurpation of the office of mayor of Tacoma. Appellant and respondent were opposing candidates for mayor at a regular election. The votes had been counted, and a certificate of election had been given to Fawcett, who qualified and entered upon the duties of the office. It was alleged by the relator that, by reason of the misconduct of some of the election officers, certain of the ballots which had been cast should have been counted for him, and had not been so counted, and that certain other ballots had been wrongfully counted for Fawcett; and it was asserted that, upon a correction of these errors, it would appear that the relator, and not Fawcett, had been elected. The court below found in favor of the relator, and gave judgment against Fawcett ousting him from said office. From such judgment, after a motion for a new trial had been made and overruled, an appeal is brought to this court.

The respondent has moved to strike the brief and statement of facts, for the reason that the brief assigned no errors, and that the statement of facts was not properly certified. Without entering into an extended discussion of this motion, which was vigorously prosecuted, we think that the matters in contention are sufficiently stated in the brief, and that the statement of facts is not material to the controversy, as the findings of fact by the court and the conclusions of law are sufficiently full to give the court an understanding of the merits of the case. So that the real question is, are the conclusions of law sustained by the findings of fact?

The three questions which are raised by the brief for the determination of this court are: (1) In an information in the nature of quo war-

ranto, is the defendant as a right entitled to a jury trial? (2) In such a case to try the title to a public office, can any of the ballots be counted when it appears that those from certain precincts are missing? (3) Did the court err in determining that certain ballots were void, and from certain others the intention of the voters could not be ascertained?

The first contention has been decided by this court adversely to appellant's claim in the case of *State v. Doherty* (Wash.) 47 Pac. 958.

The authorities on the second proposition have been so meagerly collated and presented that we think the court is justified in not passing upon that question, especially inasmuch as the conclusion which we have reached on the third proposition decides this case adversely to the interest of the relator. The ballots as counted by the inspectors and judges were 5,364. 2,683 of these ballots were counted for Fawcett, and 2,681 for Orr, which resulted in the announcement of Fawcett's election by a majority of 2. The court counted 5,233 ballots,—2,624 for Orr, and 2,609 for Fawcett; resulting in the announcement of Orr's election by 15 majority. A great many findings of fact and conclusions of law are presented in the appellant's brief, which are not objected to in any way, and conclusions reached by the court are presented, which conclusions were accepted by appellant as correct; so it has been with some difficulty that the court has been able to discover the conclusions upon which this controversy is based.

Conclusion 6 is as follows: "The court concludes, as to ballots numbered 10, 22, 23, 46, 48, 65, 71, 72, 74, 80, 83, 98, 107, 110, 111, 119, 120, 121, 124, 127, 138, 142, 144, 145, 148, 151, 182, 186, 193, 198, 200, 227, 231, 234, and 243, that said ballots, and each of them, are marked at a place not authorized or permitted by law; that the voter in these cases has failed to express his intention; that said marks constitute distinguishing marks, whereby the ballots could be distinguished from other legal ballots; that the intention of the voter could not be ascertained from any of the said ballots; and that said ballots, and each of them, are illegal and void, and could not be counted for any person for the office of mayor." These ballots were in all respects perfect, excepting that the cross was placed to the left of the names voted for, instead of to the right. Fourteen of these votes were cast for Orr, and twenty-one for Fawcett. It follows that, if they were improperly rejected, Fawcett should have an additional credit of seven votes; and we think they were erroneously rejected, for reasons which we will refer to hereafter.

The eighth conclusion of law is as follows: "That the pencil marks other than the mark 'X' appear on the following numbered ballots, to wit, 5, 27, 45, 50, 53, 57, 86, 87, 94, 95, 103, 112, 113, 114, 116, 128, 130, 131, 150, 155, 159, 160, 179, 180, 194, 197, 199, 232, 236, and 239; are such marks and things as are inhibited by section 11 of chapter 156 of the

Laws of 1895; and are such marks as would distinguish such ballots, and each of them, from other legal ballots; and that said ballots, and each of them, are invalid and void, and cannot be counted for any person for the office of mayor." As a sample of these rejected ballots, the finding of the court in relation to ballot 103 was as follows: "Ballot 103 was cast in the Fourth precinct of the Third ward. It is marked with a character 'X' to the right of the names Fawcett, Ovington, Metcalf, Quevli, and Hannah, with a black pencil. Horizontal black pencil lines have been drawn through each of the names of Orr, Sternberg, Benham, Allen, and Bell. Upon that part of the ballot providing for voting for and against amendments to city charter, ten long heavy lines have been made with a pencil composed of blue coloring matter." And the finding in relation to ballot No. 232 was as follows: "Ballot No. 232 was cast in the First precinct of the Seventh ward. It is marked with an 'X' opposite each of the names of Fawcett, Ovington, Metcalf, Quevli, and Link, and a straight lead pencil mark was drawn through each of the words 'mayor,' 'Edward S. Orr,' 'Wm. A. Sternberg,' 'Edgar V. Benham,' and 'Hamilton Allen.'" The finding in relation to ballot 239 is substantially the same, and ballot 199 was like the others, excepting that it was marked with two characters, "X, X," at the right of each of the names of Fawcett, Sternberg, Metcalf, Quevli, and Hartman, and two characters, "X, X," to the right of each place provided for voting on each of the amendments to the city charter, amendment No. 1 to amendment No. 21, inclusive. These are substantially the objections to the ballots rejected by this conclusion. These ballots, if counted, would have given 17 votes to Fawcett, and 10 to Orr; and, as we think they should have been counted, Fawcett should be credited with 7 votes additional, so far as the eighth conclusion of law is concerned.

The ninth conclusion is as follows: "That ballots numbered, respectively, 24, 26, 38, 40, 58, 70, 73, 76, 79, 84, 109, 115, 118, 125, 129, 135, 154, 161, 169, 171, 178, 189, 201, 226, 228, 229, and 245, each bears upon its face written language which is not authorized or permitted by law; that each bears some impression, device, color, or thing designated to distinguish such ballot from other legal ballots; that each of said ballots bears some device, color, or thing whereby it might be designated and distinguished from other legal ballots; that each of said ballots bears written language which is inhibited by law; that each of said ballots is illegal and void and cannot be counted for any person for mayor." The finding of the court in relation to rejected ballot 189 was as follows: "That ballot No. 189 was cast in the 3rd precinct of the Fifth ward, and is marked to the right of the name of A. V. Fawcett with two crosses, being about 1½ inches apart, and also marked with an 'X' to the right of the words 'Ovington,' 'Metcalf,' 'Quevli,' and

'Hartman,' and also marked with an 'X' to the right of, 'For amendment No. 10'; that at the words 'Against amendment No. 19,' two horizontal pencil marks are made through the words 'Against amendment No. 19'; that, to the right of the words 'Against amendment No. 19' the word 'No' is written with a lead pencil, and to the right of that written, and in the same blank space with it, is also made a character 'X'; that upon said ballot, and to the right of and opposite the words 'For amendment No. 1,' appear the following words in lead pencil, 'Don't want any king.' Ballot 73 had the word "Rats" written on the amendments. Ballot 58 had the name of J. M. Houser marked upon the margin, and ballot 26 had the name of Jacob Wurth marked on the margin. These four ballots, we think, were properly excluded by the court, for the words written were not so written with any intention on the part of the elector to express his choice of a candidate. They were not honest mistakes, and showed a frivolous and wanton disposition on the part of the elector to disregard the election laws. The rest of the ballots, however, under this finding, we think, were erroneously rejected. The words or signs which the court objected to were generally the word "No" after amendments, or "For" after amendments, or "Against" or "Yes," and pencil lines which were evidently made with the intention of making plain the expression of the voter. One ballot had a cross to the right of the name "Fawcett," and a cross to the right of "Orr," and the cross to the right of Orr was pencilled over and obliterated. This was ballot 164, and the finding was that the cross was made to the right of each of the words "Fawcett," "Ovington," "Metcalf," "Quevli," and "Watson," and that an "X" was made to the right of the words "Edward S. Orr," and afterwards obliterated by having pencil marks run over and drawn through the same. The evident intention of the voter was to correct a mistake which he had made in putting the cross to the right of Orr, instead of Fawcett. We think the contention of the appellant should be sustained that 15 of these votes should have been counted for Fawcett, and 8 for Orr, and that Fawcett should therefore have an additional credit of 7 votes.

The tenth conclusion of law is as follows: "That ballots numbered, respectively, 3, 16, 20, 30, 31, 32, 41, 44, 61, 62, 96, 137, 164, and 224 each bears upon its face marks made with lead pencils which are not authorized or permitted by law, and that each of said ballots bears some impression, device, color, or thing designated to distinguish such ballots from other legal ballots, and that each of said ballots bears some device, color, or thing whereby it might be designated and distinguished from other legal ballots; that each of said ballots are illegal, and cannot be counted for any person for mayor." With the exception of ballot 61, we think the words

or interlineations which were made upon these ballots were all intended by the elector to make his meaning clear, and that they were not of that character of device or impression which is prohibited by the statute. Three of these ballots were for Orr, and ten for Fawcett, and Fawcett should be credited with seven additional votes.

It is conceded by the appellant that, under the eleventh conclusion of law, in which 10 ballots were rejected, 6 should have been counted for Orr, and 4 for Fawcett. This concession coming from the appellant, we will not enter into a discussion of those ballots, but from a cursory examination we are inclined to think the concession was correctly made. Orr would therefore be entitled to two votes additional.

The twelfth conclusion is to the effect that ballots numbered, respectively, 14, 82, 104, 166, and 187, bear upon their face scrawling lines and pencil marks not authorized or permitted by law, and that, therefore, they fall within the statute inhibiting impressions, devices, etc., and they are held to be illegal and void, and are excluded. The finding of the court is that ballot 14, which was voted for Orr, had a large cross over the amendments; ballot 82, for Orr, had pencil lines over all the amendments; 104, for Orr, pencil lines over all the amendments; 187 and 166, being voted for Fawcett, had pencil lines over all the amendments. It is conceded by the appellant that these votes should have been counted, three for Orr, and two for Fawcett. Orr should therefore have an additional credit of one vote under this finding.

It is not profitable to pursue further the description of these ballots. We have not gone into a minute description of each ballot in controversy, because it would render the opinion impracticably long, and would serve no good purpose. But sufficient has been said to indicate that, if the votes had been counted which should have been counted under our view of the law, Fawcett should have been declared elected by at least 12 majority. The controversy here is substantially a legal one. It is true that many of the cases cited by the respondent have squarely held that the provisions of the statute in relation to the location of the cross, and other provisions governing the manner of voting, were mandatory, and that, if the voter did not employ the means and methods pointed out by the statute, his ballot was void, and should not be counted. Thus, in *Curran v. Clayton* (Me.) 29 Atl. 930, it was held that these provisions of the statute were mandatory, and that the ballots were void. An examination of this case, however, shows that the statute of Maine which was in force at the time of the trial of that cause was altogether different from our statute, and provided in terms that any distinguishing mark upon a ballot should render it void. There is also an absence from that statute of the liberal provisions which occur in ours in re-

lation to counting the ballot if the voter's intention can be ascertained.

Perhaps it would be well, before proceeding further, to notice our statute. Sections 10 and 11, p. 393, Laws 1895, are as follows:

"Sec. 10. That section 391, volume 1, Hill's Annotated Codes and Statutes of Washington, is amended to read as follows: 'Sec. 391. In the canvass of the votes, any ballot or parts of a ballot from which it is impossible to determine the elector's choice, shall be void and shall not be counted; provided, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part.'

"Sec. 11. That section 401, volume 1, Hill's Annotated Codes and Statutes of Washington, is amended to read as follows: 'Sec. 401. Voting shall be by ballot. No ballot shall bear any impression, device, color or thing designated to distinguish such ballot from other legal ballots, or whereby the same may be known or designated. * * *'

Section 413 of the General Statutes provides, among other things, that "no ticket shall be lost for want of form, or mistake in initials of names, if the board of judges can determine to their satisfaction the person voted for and the office intended." It is stoutly contended by the respondent that this section of the law is not in force; that the law of 1895 was a complete law within itself, and that all other laws on the subject of elections were repealed by the passage of the law of 1895. But we think this is not the proper construction of the statute. The law of 1895 was largely amendatory of the laws incorporated in the General Statutes, and it in no way undertook to supersede any provisions of the old law, so that the section above referred to stands with full force and effect. It will therefore be seen that our statute is very different from, and has more carefully guarded the rights of electors by making provision for mistakes which are necessarily incident to this system, than the statutes of some of the other states. Whatever may be said of the Australian system, a glance at the ballot at a general election is sufficient to convince any one that it is not an easy thing for a person of common understanding to intelligently and without great chance of mistake express his wish. A person accustomed more to the plow or the plane than to the pen would almost certainly be confused when he was ushered into a dark booth with this ticket, with its multifarious provisions and its immense dimensions spread out before him. Indeed, it is probable that the most careful business man, who has been accustomed to perusing and executing documents of a business character, will have grave misgivings as to the correctness of his vote when he leaves the booth. And to hold that every misconception of the printed directions of the law would deprive an elector of his vote would certainly be a holding not within

the contemplation of the legislature which passed the statute we have just mentioned, for it has been careful to provide that, when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part. The whole is composed of parts, and, if it is the duty of the judges of the election to count a part when the intention in relation to such part can be ascertained, it follows that they must count the whole ballot when the intention in relation to all of the parts can be ascertained. This provision, coupled with the other just above mentioned, that no ballot should be lost for want of form, it seems to us, absolutely excludes the idea that any mark which may by mistake be placed upon a ballot shall be considered such a distinguishing mark as will void the ballot. If such marks were to be considered distinguishing marks, then it follows that every mistake that a voter makes in departing from the strict letter of the law would constitute a distinguishing mark, and would, in substance, nullify the provisions of the statute in relation to the counting of the votes when the intention of the voter could be ascertained, and the further provision that no ballot should be lost for want of form.

It is contended by respondent, and is no doubt true, that the distinguishing feature of the Australian ballot system is a careful provision for a secret ballot; and the necessity of this is so obvious to ordinary intelligence that it is needless to discuss it. It is also undisputed that the elective franchise, though a constitutional privilege and right, must be exercised under such reasonable legislative restrictions as will prevent intimidation, bribery, and fraud, and secure an honest, untrammelled, and genuine expression of public sentiment. It is also true, however, that, in the absence of constitutional inhibition, all statutes tending to limit the citizen in the exercise of the right of suffrage should be liberally construed in his favor. If his ballot is rejected, it must come within the letter of the prohibition; and, when the statute specifically declares under what conditions ballots shall be rejected, courts should not enlarge those conditions, or make other or different conditions from those expressed in the statute grounds for rejecting the ballots. It will be noted that our statute provides only one condition under which a ballot should be rejected, viz. a ballot from which it is impossible to determine the elector's choice; and, after all, this should and must be the intention of the legislature. The important thing is to determine the intention of the voter, and to give it effect. Now, so far as the ballots under consideration are concerned, in ballot 71, for instance, the material part of which we produce here below, the voter placed a cross, as will be seen, opposite, but to the left of, the name of Fawcett and every other candidate on the Citizens' ticket.

SECOND WARD.
Fourth Precinct.

REPUBLICAN TICKET	
CITIZENS' TICKET	
Vote for one.	MAYOR.
Republican	Edward S. Orr.
Citizens'	X A. V. Fawcett
Vote for one.	CITY TREASURER.
Republican	William A. Sternberg.
Citizens'	X William Orvington, Sr.
Vote for one.	CITY CONTROLLER.
Republican	Edgar V. Benham.
Citizens'	X Wm. M. Metouff.
Vote for one.	CITY PHYSICIAN.
Republican	Hamilton Allen.
Citizens'	X Chris. Quervil.
Vote for one.	COUNCILMAN.
Republican	John Holzgate.
Citizens'	X Charles P. Culver.

It would seem that it would not be hard to determine the intention of the voter so far as this ticket is concerned, and under the statute, if the intention could be determined, the ticket should be counted, for that is an express and mandatory provision of the statute. The voter evidently had in mind the placing of a cross opposite the name of the candidate for whom he desired to vote, and it did not occur to him to follow the direction in relation to the position of the cross to the left or to the right of the name. In fact, the marking of the name by a cross is the essential thing, after all. The statutes in some of the states provide that the cross shall be to the left of the name; in others they provide that it shall be in a square to the right of the name; in others, in a circle. But in all the preference is indicated by the cross. In the case at bar many of the tickets were marked with the "X" to the left not only of the candidates' names, but to the left of the amendments, for or against, the entire length of the ticket, leaving no doubt whatever of the intention of the voters.

Again, in relation to that class of tickets that were rejected because the names of candidates, either on the Citizens' or Republican ticket, were erased, where the cross was made opposite and to the right of the name of the candidate intended to be voted for, it was evidently the intention of the voter to make sure the expression of his will, that he did not intend to vote for the other candidates, that he erased their names. The legal effect of placing a cross opposite and to the right of the name of a candidate would be to erase the name of the opposing candidate; and the fact that the voter did erase their names with a pencil, whether blue or black, could certainly not in any way lessen the force given to the expression of his will indicated by placing a cross opposite the names of those for whom he did intend to vote.

Under the old system it was the custom to mark off with a pencil the name of a candidate on any ticket for whom the voter did not wish to vote. And so we think in relation to all these ballots in controversy that, notwithstanding these erasures and irregular markings, the intention of the voter could be certainly determined from the ballot, and, when that can be done, the requirements of the statute are met, and the vote should be counted. It is true, as is stated in some of the authorities cited by the respondent, that, if the voter is not compelled to follow absolutely the letter of the law in relation to these expressions, the courts will constantly be called upon to construe the intention of the voter; but this cannot be avoided. They are constantly called upon to construe the intention of parties in all sorts of transactions; and, while it may render a vote somewhat uncertain, yet it will not bring about as much hardship as it would to disfranchise a large number of citizens because of their inability to properly construe technical directions. The desire to have his vote counted will be a sufficient incentive to the ordinary voter to exercise his best judgment and caution in voting.

What we have said in relation to the discovery of the intention of the voter will cover the statute in relation to the other proposition, that no ballot shall bear any impression, device, color, or thing designated to distinguish such ballot from other legal ballots, or whereby the same may be known or designated; for if the impression or mark which is made upon the ballot is made as we have before said, not for the purpose of distinguishing the ballot, but through an honest mistake in attempting to vote, it does not fall within the inhibition of section 11, above mentioned. Now, the ballots which we have mentioned, where the word "Ivats" was written across the amendments, and where the names of Wurth and Houser appeared upon them, it seems to us, do not fall within the liberal rule which we have laid down. These words were not used, and could not be used, by the voter for the purpose of expressing his preference for a particular candidate; but they were distinguishing marks, which were placed upon the ballots for some other purpose. It is reasonable to suppose that the purpose was to distinguish the ballot, although it is not plain to us what the meaning of this provision of the statute is,—whether it has reference to the impressions and devices placed upon the ballot by the voter, or whether it has reference to impressions, devices, colors, or things originally upon the ballot, which would distinguish it. In most of the states the language of the statute is, "No elector shall place upon his ballot any impression, device," etc.; while that of ours, it will be noted, is, "No ballot shall bear any impression, device," etc. But, whatever the statute may mean construed in connection with section 10 and section 413 of the General Statutes, it evidently does not mean to render void ballots where marks have been made upon them through mis-

take, in the attempted exercise of the right of franchise.

In *Vallier v. Brakke*, 64 N. W. 180, a South Dakota case, it was held that where the law provided that the cross should be placed at the head of the party ticket, and within a circle, and where the law provided that the cross should be placed at the left of a candidate's name, a cross at the head of a party ticket or one near the circle was a nullity, and that a cross at the right of a candidate's name was not an informality in the form of marking, but was unauthorized and of no effect. This, we think, was rather a harsh ruling, even under the statute of South Dakota, which has not thrown around the voter the guards which our statute has for the purpose of protecting his vote. The court in that state, however, viewed these tickets in a different light from that in which we are inclined to view them, as will be seen by the following excerpt from the opinion: "The system devised," said the court, "is so simple that a man of sufficient intelligence to know what a circle is, how to make a cross, and left from right, can find no difficulty in making up the ticket he desires to vote. He can have no difficulty in expressing his intention in the manner the law has prescribed. It is not necessary, therefore, to impose upon judges of election or courts the duty of ascertaining the intention of the voter, except in the manner pointed out by the statute, namely, by the marks he has placed upon the ballot in the manner prescribed by law." This is a rigid and strict construction of the law, which we could not follow even if the statute under which the opinion was rendered was like ours. The case quoted by the respondent, viz. *McKittrick v. Pardee*, 65 N. W. 23, from the same state, follows *Vallier v. Brakke*, *supra*, excepting that this case is not in point, for the reason that it was there held that the will of the voter could not with any reasonable certainty be ascertained. In *re Vote Marks*, 21 Atl. 962, is a case where the supreme court of Rhode Island was called upon by the governor to construe the election laws. The opinion is rendered without any discussion, and evidently without any presentation by counsel. There it was held in so many words that no mark other than a cross can be used; that it must be placed on the margin to the right of the name of the candidate; and that the ballot law makes a cross effectual as a vote only when it is inscribed at the right of the name printed or written on the ballot, and opposite thereto. The opinion does not disclose the statute on the subject, and we have not been able to obtain it; but it must be concluded, we think, that the statute under which the opinion was rendered does not contain the provisions in relation to counting the votes that are contained in our statute. *Whittem v. Zahorik* (Iowa) 59 N. W. 57, in addition to the fact that the intention could not be discovered, would not be any authority under our statute, because the court deliberately made the announcement that the intention was immaterial as against the express provisions of

the statute. But even in that case, holding as strictly as it does, the court evidently would not have rejected some of the ballots rejected here on account of the devices tending to identification, for it says: "It is not practicable to adopt a rule in regard to identifying marks which would be applicable in all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others, where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted; but where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected."

In this connection we wish to mention another class of rejected tickets, viz. where the candidate's name had been marked with a cross opposite, and the opposing candidate's name was also marked with a cross, and the first cross had been erased or pencil marks had been drawn across it. It is too evident for discussion that the intention of the voter could be ascertained in such a case. He had evidently, by mistake, placed the cross opposite the name of the candidate for whom he did not intend to vote, the two being placed one above another on adjoining lines; and, when he discovered his mistake, he made the cross opposite the name of the candidate for whom he did intend to vote, and erased the other. While it is true that all these departures from the strict letter of the law constitute a ballot which is not quite so satisfactory or so clean as a ballot made by a person who is fortunate enough to make no mistakes whatever, yet that is not a sufficient ground to deprive a voter of his elective franchise. *Baxter v. Ellis* (N. C.) 16 S. E. 938, we were unable to find.¹ *State v. McElroy*, 44 La. Ann. 796, 11 South. 133, a Louisiana case, holds that the law in relation to all these provisions is mandatory; that they must be strictly followed under the statute of that state, or the ballots cannot be counted. They go so far as to hold that the provisions directing the officers who should prepare ballots and conduct the election are mandatory, and that, if they are not followed, the election is void. This case is squarely opposed to the doctrine laid down by this court in *Moyer v. Van De Vanter*, 12 Wash. 377, 41 Pac. 60; and here we might notice the contention of respondent that the distinction drawn between the acts of voters and acts of election officers in the latter case settles the proposition that the provisions of the law in relation to the acts of the voters are mandatory. We do not think that the court in that case undertook to pass upon that ques-

¹ 15 S. E. 938.

tion. Under the reasoning of that case, doubtless, if the voter had willfully disobeyed any material provision of the law, his vote would not have been counted; but we do not think it goes beyond that. The case of *Parvin v. Wimberg* (Ind. Sup.) 30 N. E. 790, we do not think throws any light on the subject involved. *Bechtel v. Albin* (Ind. Sup.) 33 N. E. 967, *Sego v. Stoddard* (Ind. Sup.) 36 N. E. 204, and *Zels v. Passwater* (Ind. Sup.) 41 N. E. 796, are all cases decided under statutes affirmatively making the ballots void where there was no provision for counting the ballots in case the intention could be discovered, and no provision in the statute that no ballot should be lost for want of form. And *Kearns v. Edwards* (N. J. Sup.) 28 Atl. 723, was decided under a statute which provides in terms that, "if any ballot voted at any election shall have thereon any device whereby it can be identified, such ballot shall be absolutely void; the intention of the voter cannot be considered, in determining the legality of any ballot, in canvassing the same." So that, under the provision of this statute, of course the decision could not have been otherwise than as rendered.

It may be conceded, however, that the general tone of the decisions quoted by the respondent and the expressions used by the courts sustain in the main the contention of strict construction; but there are many other cases holding that these provisions are directory, and that they cannot be construed to be mandatory except where the statute especially provides that the ballot shall be avoided, and holding that marks that are made, not with the evident intention of distinguishing the ballot, but through mistakes in undertaking to vote, are not such marks as under the statute, even where the statute provides that ballots shall be void if such distinguishing marks are made, would avoid the ballots. In *Houston v. Steele* (Ky.) 34 S. W. 6, under a statute similar to ours so far as the arrangement of the ballots is concerned, but without all the liberal provisions of our statute, it was held that, under the statute which provided that the cross should be made in the large square, the law was sufficiently complied with by placing the cross just outside the square containing the device; that the use of three cross marks in the large square containing the party device will not invalidate the ballot. In relation to this last ballot, the court, in the course of its opinion, says: "In this connection, we notice ballot R 13, marked in the large square of the Democratic device with three cross marks in pencil, thus: + + + The question as to these ballots is not whether the intent of the voter is sufficiently shown,—for that is beyond dispute,—but whether these marks are 'distinguishing' marks, signs, or devices, within the meaning of the statute. Fortunately, we are not without direct authority on this point. Under a similar statute, the court, in *Woodward v. Sarsons*, L. R. 10 C. P. 733 (cited in notes to *Rutledge v. Craw-*

ford, 91 Cal. 526, 27 Pac. 779, and 13 *Lawry*, Rep. Ann. 763), held that 'the use of two or three crosses, instead of one, or of a peculiar form of the cross mark,' will not invalidate the ballot, without evidence of intent to distinguish it." This case also cites approvingly the case of *State v. Russell*, 34 Neb. 116, 51 N. W. 465, where that court said: "It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letter, figure, or character, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class. The fact that a number of ballots are, without any evidence of fraudulent intention on the part of the voters, distinguishable from others cast at the same polling place,—as, for instance, marked with a pencil or with ink of a different color,—does not bring them within either the letter or spirit of the statute." Sustaining this view, we also cite: *Hanscom v. State* (Tex. Civ. App.) 31 S. W. 547; *Spurgin v. Thompson* (Neb.) 55 N. W. 297; *Jennings v. Brown* (Cal.) 46 Pac. 77; *Owens v. State*, 64 Tex. 500; *Davis v. State*, 75 Tex. 420, 12 S. W. 937; *Dennis v. Caughlin* (Nev.) 41 Pac. 768; *Tebbe v. Smith* (Cal.) 41 Pac. 454; *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325; *Paine, Elect.* § 498; *Young v. Simpson* (Colo. Sup.) 42 Pac. 666.

It follows from what we have said that sufficient votes were rejected which should have been counted to have given a majority of all the votes cast to the appellant, Fawcett. The judgment of the lower court will therefore be reversed, with instructions to declare the appellant, Angelo V. Fawcett, the duly-elected mayor of the city of Tacoma.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

TAGGART v. BOSCH.

(Supreme Court of California, June 29, 1897.)

In bank. On petition for rehearing. Denied.

For former report, see 48 Pac. 1092.

BEATTY, C. J. I dissent from the order denying a rehearing in this case, for two reasons:

1. The superior court did not err in sustaining the objection to the questions asked of plaintiff in cross-examination. At the time of the ruling the object of the cross-examination had not been explained, and it was by no means apparent that the answers would be material. Immediately after the ruling, counsel for defendant explained what he desired to prove, and thereupon proceeded, and was allowed, to elicit all the information he desired as to when plaintiff had seen Patten, and when he told him about the note. There

was therefore no error, and, even if there had been technical error, there was clearly no injury.

2. The decision rests upon the ground that injury is presumed when error is shown. The petition for rehearing makes the point that this is contrary to a recent amendment of section 475, Code Civ. Proc., and the question of the constitutionality and proper application of that amendment is thus presented for decision. I do not think the judgment of the superior court should be reversed without a determination of that question by the whole court.

(117 Cal. 377)

SPRECKELS v. HAWAIIAN COMMERCIAL & SUGAR CO. et al. (S. F. 607.)¹

(Supreme Court of California. June 24, 1897.)

INJUNCTION—RESTRAINING PENDING SUIT—CONSTITUTIONAL LAW.

1. Civ. Code, § 3423, subd. 1, which provides that an injunction cannot be granted "to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings," applies to a suit pending in a foreign jurisdiction.

2. The law, by such a construction, is not in violation of the constitutional provision that the superior courts shall have original jurisdiction in all cases in equity.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Claus Spreckels against the Hawaiian Commercial & Sugar Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Guy C. Earl and Bishop & Wheeler, for appellants. Delmas & Shortridge, for respondent.

TEMPLE, J. This is an appeal from an order refusing to dissolve a temporary injunction restraining the corporate defendant from further prosecuting an action already commenced by said defendant against the plaintiff in the courts of the Republic of Hawaii, and to prevent the other defendants, as directors of the corporate defendant, from furthering the prosecution of said action. Defendants moved to dissolve the injunction upon the complaint, without answer or counter affidavit. They contend (1) that the complaint does not state a cause of action; and (2) that the courts of this state cannot restrain residents within the state from prosecuting an action already pending before the injunction suit was commenced, except to prevent a multiplicity of suits, and the injunction is not sought for that purpose here. It is evident that the second point is included in the first. There is really no question as to the power of the court, although appellants' counsel seem to so regard it, and in doing so have, I think, greatly weakened their position. The courts of this state have the same power to restrain persons within the state from prosecuting actions in either do-

mestic or foreign jurisdictions which courts of equity have elsewhere. The Code, however, has regulated the exercise of the power, and prescribed the conditions which entitle litigants to the preventive writ. Section 3423 of the Civil Code, so far as material here, reads as follows: "An injunction cannot be granted (1) to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings; (2) to stay proceedings in a court of the United States; (3) to stay proceedings in another state upon a judgment of a court of that state." Respondent's counsel contend that the operation of the first subdivision of the section must be limited to the courts of this state. The section is found in part 1 of the fourth division of the Civil Code. That part treats of the general subject of relief. The first section found in this part reads as follows: "Sec. 3274. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code." The titles included in the part are (1) relief in general; (2) compensatory relief; (3) specific and preventive relief. A glance at the sections included in this part will show that it was intended as a comprehensive statement of the entire law upon the subject. The theory and plan of the Codes required that it should constitute a comprehensive statement of the general principles of the law. The first section of title 3, in which the section in question is found, reads, "Specific or preventive relief may be given in the cases specified in this title, and in no others." Of course, then, the rules laid down must have universal application, unless a contrary intent is indicated. They cover the whole subject, and they are not rules of procedure. They define and regulate rights. Taking the first subdivision of section 3423 by itself, it is impossible to discover in it any ambiguity or uncertainty. It declares a general rule, easily comprehensible, in appearance of universal application. And to give it universal operation creates no confusion, and does not run counter to any generally admitted rule of law. Some courts had held, without any statute, that the rule as to foreign suits should be as there declared. Other courts had held differently. The legislature adopted one of these two rules of decision.

The learned and ingenious counsel for respondent argue that the two subdivisions, following in the same section, indicate a limitation. They argue that there would be no use for the other subdivisions if the first has universal operation. I think counsel are in error, and that the three provisions together constitute a harmonious whole, and that the set of rules would be radically changed if any was lacking. The first declares a rule of universal

¹ Rehearing denied.

application. No one is entitled to enjoin another from prosecuting a judicial proceeding already pending when the injunction was begun, except for the purpose of preventing a multiplicity of suits. This does not declare in terms that the prosecution of a suit commenced after the injunction suit was commenced may not be enjoined for some other reason than that it is necessary to prevent a multiplicity of suits. It is possible, however, that, taking section 3366 and the third subdivision of section 3422 together, it might be argued that a judicial proceeding will never be restrained in this state except to prevent a multiplicity of suits. But, if there be such a question, it is not involved here. The second subdivision clearly provides that the proceeding in a federal court shall not be stayed, even though it may be necessary to do so to prevent a multiplicity of suits, and although the suit which it is sought to stay was commenced after the commencement of the action in which the injunction is sought. Though the first subdivision be given universal operation, it would not prevent the enjoining of either of the above classes of suits. The third subdivision prevents interference by injunction to stay proceedings in another state upon a judgment of a court in that state. There is nothing upon this subject in the first subdivision. The action is not then pending, and, if it were deemed to be pending, the first subdivision would permit a stay when necessary to prevent "a multiplicity of such proceedings," and when the proceeding was not "pending" when the action in which the stay is sought was commenced. The third subdivision prohibits this, and thus finds its special office and usefulness. In my opinion, these considerations show conclusively that these three subdivisions establish a set of rules upon this subject each consistent with the other, and in which neither provision could be dispensed with without making a material change in the law; or, if there be any doubt as to the utility of either subdivision, it is as to the first. In view of section 3366 and subdivision 3 of section 3422, can the parties be prevented by injunction from prosecuting any judicial proceeding except when such restraint is necessary to prevent a multiplicity of such proceedings? If not, of course this injunction could not be maintained.

Counsel for respondent, however, contend that, if this construction of the law be correct, it is unconstitutional, because it deprives the court of jurisdiction conferred upon it by the constitution. Upon this subject the constitution simply provides, "The superior courts shall have original jurisdiction in all cases in equity." Certainly it still has jurisdiction of all cases in equity notwithstanding these provisions of the Code. The trouble, then, is, not that the court has not jurisdiction,—for it has,—but that the plaintiff under the present law cannot make a case which entitles him to relief. The right does not exist under the law. Statutory changes are almost perpetual.

New rights are created, under which new equities arise. These make new cases in equity, of which the courts at once take cognizance. The jurisdiction of courts of equity is not thereby enlarged. Neither is it diminished when by statutory changes some rights cease to exist, and certain cases which courts of equity once entertained can no longer arise. The grant of power is not confined to cases in equity which could exist under the law as it stood when the constitution was adopted. It includes all cases in equity at all times. It was not intended as a limitation upon the power to legislate upon the rights of persons. These sections deal with the rights of persons, and do not regulate procedure. This is shown, not only by their nature, but by the fact that they are found in the Civil Code, and in the part which treats of the general subject of reliefs to which individuals are entitled. Counsel will not contend that there has been any change in the law since the facts constituting plaintiff's supposed cause of action transpired. I think it has always been in this state as declared by the Code. The cases cited from our Reports (*Anthony v. Dunlap*, 8 Cal. 27, and *Uhlfelder v. Levy*, 9 Cal. 608) declare a general principle, and there is nothing to indicate that it is limited to courts of this state. The order is reversed.

We concur: MCFARLAND, J.; HENSHAW, J.

(117 Cal. 382)

In re CENTRAL IRR. DIST. (Sac. 17.)¹

(Supreme Court of California. June 24, 1897.)

IRRIGATION DISTRICTS—CONFIRMATION PROCEEDINGS—LIMITATIONS—SECOND APPEAL—RES JUDICATA—CONSTITUTIONAL LAW—ORGANIZATION OF DISTRICTS—PETITION—NOTICE—SUFFICIENCY—QUALIFIED SIGNERS—BONDS—VALIDITY.

1. Act March 7, 1887, known as the "Wright Act" (St. 1887, p. 29), authorizes the organization of irrigation districts. St. 1889, p. 212, supplementing the Wright act, but not amending it, provides for "a special proceeding" to be instituted by the boards of directors of irrigation districts, whereby, on behalf of their districts, the directors can demand the determination of the question whether the proceedings relative to organization were legal. St. 1891, p. 143, amended Act March 7, 1887, § 3, by inserting a provision that "no action shall be commenced or maintained, or defense made affecting the validity of the organization," unless within two years after an order of the board of supervisors has been entered on its minutes, declaring the territory duly organized as an irrigation district. *Held*, that Act 1891 has no application to proceedings instituted by boards of directors under Act 1889.

2. On a second appeal in the same case the appellate court is bound by its prior decision only on the points distinctly made and determined.

3. Where the jurisdiction of an inferior court is dependent on a fact which that court is required to ascertain, such decision is not conclusive unless, either expressly, or by failure to provide for a review of it, the law effectually declares that by all other courts it is to be regarded as conclusive.

4. St. 1887, p. 29 (the irrigation or Wright act, so-called), is constitutional.

5. St. 1887, p. 29, § 2, provides that in the organization of an irrigation district a petition signed by freeholders shall first be presented to the board of supervisors at a regular meeting, and shall be published for at least two weeks before the meeting, "together with a notice stating the time of the meeting at which the same will be presented." *Held*, that petitioners must give the notice.

6. To meet such requirements, there were published a petition, with the names of the signers thereto, and immediately below this the notice, "The foregoing petition will be presented to the honorable board of supervisors * * * on Monday, October 10, 1887, at 10 o'clock a. m. of that day." The notice was unsigned. *Held*, that the notice was insufficient, since it did not show on its face that it was given by persons authorized to give it.

7. Such defect in the notice cannot be cured by proof of actual knowledge on the part of those to be affected thereby.

8. Owners of small residence lots in towns and cities are not such owners of land as are qualified signers of a petition for the organization of an irrigation district, within the meaning of section 2 of the Wright act (St. 1887, p. 29), requiring such petition to be signed by 50 owners of land desiring to improve the same by conducting water on it.

9. Where bonds of an irrigation district have been sold before institution of confirmation proceedings by its directors, and the judgment rendered therein, that the district was duly organized, is reversed on appeal, the questions touching the regularity of the sale will be left to be determined in an action by the bondholders against the district.

In bank. Appeal from superior court, Glenn county; Seth Millington, Judge.

Proceedings by the board of directors of the Central irrigation district to have the validity of its organization and bond issues determined. Certain property owners appeared and contested the issues. From a judgment in favor of the district, and from an order denying them a new trial, the disaffected property owners appeal. Reversed.

Geo. W. Maxwell, R. M. Soto, Garber, Boalt & Bishop, and Lee & Scott (R. A. Long, of counsel), for appellants. R. Percy Wright and Johnson & Johnson, for respondents.

HENSHAW, J. This proceeding was instituted by the board of directors of the Central irrigation district under the provisions of an act of the legislature commonly and for convenience designated the "Confirmation Act." St. 1889, p. 212. The petitioners, as the act provides they may do, set forth (1) the proceedings leading to and terminating in the organization of the irrigation district, and (2) the proceedings attending the issue and sale of bonds of the district, and asked that these proceedings be reviewed and declared valid and legal. Certain persons interested in the district and owning lands therein appeared, and by answer contested the validity of the proceedings for the organization of the district, as well as the proceedings for the issue and sale of bonds. The findings of the court were in favor of the regularity and legality of all these steps and processes, and the judgment of the court followed accordingly. From that judgment, and from the

order denying a new trial, disaffected property owners within the district prosecute these appeals.

One of the property owners, L. P. Drexler, appeared and interposed to the inquiry as to the legality of the organization of the district a separate defense, to the effect that all such inquiry was barred by the provisions of section 3 of the act of March 7, 1887 (St. 1887, p. 30), as amended by the act of March 20, 1891 (St. 1891, p. 143). If this defense of Drexler is well made, it not only relieves from the necessity of considering appellants' attack upon the validity of the organization of the district, but, indeed, forbids such consideration. A determination upon this defense then lies at the threshold of the inquiry.

The so-called "Irrigation Act" or "Wright Act" was approved March 7, 1887 (St. 1887, p. 29). In 1889 the legislature passed an act which, while entitled an act "supplemental" to the Wright act, in law forms no part of that statute. It was an act creating a special proceeding for the determination of the questions enumerated in the act itself. It was a special proceeding authorized to be instituted by but a single class of persons, viz. the boards of directors of irrigation districts, whereby these boards of directors, on behalf of their districts, could demand determination of the question whether the proceedings relative to the organization, as well as the proceedings relating to the proposed or actual issue and sale of bonds, were due and legal. Under section 5 of this confirmation act, that no question might arise as to its scope or as to the powers of the court in determining the questions which might arise, it is especially provided that the court shall have jurisdiction "to examine and determine the legality and validity of, and approve and confirm each and all of the proceedings for the organization of said district, under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof." The rules of pleading and practice not inconsistent with the provisions of the act are made applicable to proceedings under it, and appeals are authorized from the judgment, and from the order denying a new trial, saving that such appeals must be taken within 10 days from the entry of the order or judgment. This confirmation act neither in terms nor in effect amends any of the provisions of the Wright act. It is an independent statutory enactment, embraced in seven separate and distinct sections, together forming, as the act itself designates it, a special proceeding; having reference, it is true, to the Wright act, but no more amendatory thereof than would be the special proceedings of certiorari or mandamus. It has no bearing upon nor dealings with the matter of the organization of irrigation districts, but provides exceptional and peculiar machinery by which the aid of

the courts may be invoked to secure evidence, and to determine whether a particular district has been duly organized and its bonds regularly issued. *Tregea v. Irrigation Dist.*, 164 U. S. 179, 17 Sup. Ct. 52; *Crall v. Irrigation Dist.*, 87 Cal. 140, 26 Pac. 797; *Irrigation Dist. v. Brandon*, 103 Cal. 384, 37 Pac. 484. In 1891 the legislature passed an act which by its title and by its terms purported to, and in fact did, amend the Wright act of 1887. St. 1891, p. 143. In amending section 3 of the original act, there was inserted the following: "And no action shall be commenced or maintained, or defense made affecting the validity of the organization, unless the same shall have been commenced or made within two years after the making and entering of said order." "Said order" is the order of the board of supervisors entered upon its minutes, and declaring the territory duly organized as an irrigation district.

The Central Irrigation district was organized in December, 1887. This proceeding was instituted in 1893. Whatever effect the act of 1891 may have to cut off rights of action or defenses which before its enactment were available to objecting land holders within an irrigation district in any action prosecuted by them, or by way of defense to any action prosecuted against them, we are not here called upon to consider; for it is plain that this provision of the act of 1891 was not designed to curtail the rights of boards of directors to seek a determination of the legality of the organization of their districts under the confirmation act, nor to abridge the jurisdiction of the court to decide these questions, a jurisdiction expressly and solemnly conferred therein; and it would be the merest stultification to hold that, while the directors of an irrigation district might seek and obtain a judgment of a court declaring that their district was legally organized under a proceeding inviting all interested to appear and attack that organization, nevertheless no defense could be made by any one touching upon the legality of the acts and proceedings for organization. Such procedure would partake neither in form nor in essence of the nature of a judicial determination. It would be equivalent to a pretended judicial process commanding a man to come and be heard, and upon his appearance denying him a hearing. The confirmation act treats of a special proceeding; the act of 1891, of an action. The distinction between the two is well recognized. "The term 'special proceeding' is used in the codes of practice of many of the states in contradistinction to 'action.' It may be said generally that any proceeding in a court which was not under the common-law and equity practice, either an action at law or a suit in chancery, is a special proceeding." 1 Enc. Pl. & Prac. p. 112; Code Civ. Proc. §§ 22, 23. Without, therefore, stopping to consider just what meaning is to be attached to the amendatory provision of the statute of 1891, we hold that it has no application to proceedings instituted by boards of directors on behalf of

their districts for confirmation of their organization and of their bond issues under the act of 1889.

It is next insisted that inquiry upon all questions affecting the validity of the organization of the district is foreclosed by the decision of this court in *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 825. In that case the district brought mandamus against its secretary to compel him to sign and seal certain of its bonds. One of the property owners was allowed to intervene for the purpose of contesting the legality of the bond issue. Certain issues were joined touching the validity of the organization of the district. The mandate was awarded, and an appeal taken. In its opinion and decision this court disposed of the objections presented adversely to appellants' contention; and, so far as concerns the propositions in that case advanced, it was indisputably an adjudication that they presented no valid legal objection to the organization of the district. But it does not follow therefrom that inquiry as to other matters is foreclosed, and that the judgment in the *De Lappe* case is res judicata upon questions not presented or considered in that case. Indeed, it may well be doubted whether, in a different case, with different parties, as is the present, the decision in the *De Lappe* case would be binding at all, or would have any other force than such as would be derived from the cogency of the reasoning, and the weight to be given to an existing decision. But, however that may be, certain it is that it cannot be construed as a final and conclusive adjudication, or any adjudication at all, upon propositions not presented to and passed upon by the court; for even in the same case an appellate tribunal is bound by its prior decision only upon the points distinctly made and determined, and not at all upon points which might have been raised, but were not. *Balch v. Haas*, 20 C. C. A. 151, 73 Fed. 974; *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. 22; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464, 2 N. E. 194; *Haynes v. Town of Trenton*, 123 Mo. 326, 27 S. W. 622. In this instance there is presented not only another proceeding between different parties, but, in addition, the points to which our consideration is now directed are entirely different from those pressed to determination in the case of *De Lappe*.

The final objection to a review by this court of the proceedings attending the organization of the district is based upon the proposition that jurisdiction to determine these matters by legislative enactment has been vested in the board of supervisors, and that the decision of that tribunal is final and conclusive. This is an enunciation of the doctrine that, where jurisdiction of even an inferior court is dependent upon a fact which that court is required to ascertain and settle by its decision, such decision is held to be conclusive. *Farmers' & M. Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312. That doctrine, however, cannot here be invoked. The finality of the decision

of such an inferior tribunal rests upon the further proposition that, either expressly, or by failing to provide for a review of the decision of such inferior tribunal, the law effectually declares that by all other courts it is to be regarded as conclusive. Here, however, the legislature by the confirmation act has provided for a review under direct attack of these very steps and processes, and consequently for a review of the board's decision upon their regularity and validity. Any proceeding provided by the law for the purpose of avoiding or correcting a judgment is a direct attack, which will be successful on showing error. *Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, and 41 Pac. 335; *Van Fleet*, Coll. Attack, 5. The proceeding established by the confirmation act is expressly directed to be had to review the determination of the board of supervisors, and therefore all claim of finality for the decision of the board must fall to the ground. *The Madera Irr. Dist. Case*, 92 Cal. 296, 28 Pac. 272, 675, the *Fallbrook Irr. Dist. Case*, 106 Cal. 355, 365, 39 Pac. 793, 794,—indeed, all of the cases which have arisen,—recognize this to be the intent and scope of the confirmation act.

Under this disposition of respondent's preliminary objections, we are brought to the consideration of the points presented by appellants. Of these, the first attacks the irrigation act as violative both of the constitution of the state and of the United States. But the decisions of this court, together with the decision of the United States supreme court handed down since this appeal was taken, form conclusive adjudications upon these propositions against the contention of appellants. *Irrigation Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379; *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 825; *Cral v. Irrigation Dist.*, 87 Cal. 140, 26 Pac. 797; *Board v. Tregea*, 88 Cal. 334, 26 Pac. 237; *In re Madera Irr. Dist.*, 92 Cal. 323, 28 Pac. 272, 675; *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56.

The next contention of appellants is that the organization of the Central Irrigation district was illegal because no sufficient notice was given as required by the irrigation act of the time of the presentation to the board of supervisors of the petition for the formation of the district. The irrigation act provides (section 2) that a petition, signed by the required number of freeholders of the proposed district, shall first be presented to the board of supervisors, accompanied by a good and sufficient bond. "Such petition shall be presented at a regular meeting of the said board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented." The publication of this notice is an essential prerequisite to conferring upon the board of supervisors jurisdiction to proceed in the matter of the organization. It is by the terms of the act made man-

datory that such notice should be given. The notice, when given, is the process by which the property owners to be affected are notified, and given an opportunity to present their objections to the board of supervisors. *Irrigation Dist. v. Bradley*, 164 U. S. 112, 171, 17 Sup. Ct. 56. The act does not in express terms declare by whom the notice is to be given, but it may be derived therefrom, by intentment as clear and explicit as though express language had been used, that the petitioners themselves are the persons, and the only persons, empowered to perform, and charged with the performance of, this duty. The petitioners are to present their petition at a regular meeting of the board, and only upon such presentation, after notice, does the board acquire official knowledge of the proposition, with power to act upon it. But, before such petition is presented, it shall have been published for at least two weeks. Clearly, it is not for the board of supervisors to cause the publication. Its functions do not begin until after the publication has been completed. The petitioners, then, and no others, are to give the notice. "According to the theory of the common law, all power of judicature flowed from the crown, and courts had no power to compel a party to appear or to proceed to the determination of a cause until the king, by his original writ, had issued his command to the sheriff to summon the defendant before them. Here 'the state is the sovereign, by whose power alone the citizen can be compelled to appear in its courts to answer an action brought against him.' *Curtis v. McCullough*, 3 Nev. 210; *Curry v. Hinman*, 11 Ill. 420. Hence, since the notice is in the nature of process to bring a party before a tribunal exercising judicial powers, it must be given by some one authorized by the state to give it. Notice, in the sense of the statute, does not mean knowledge. Actual knowledge, or the want of it, cannot be shown. It means the statutory instrumentality of knowledge; the formal process emanating from the source, and served in the manner prescribed by the statute. The advertisement is the process, and the posting in the public places is the service. The notice, then, must be issued by persons authorized by law to issue it; and it seems clear that this fact must be shown on its face by proper authentication, as more formal process must show it. No person can be summoned before a legal tribunal but in pursuance of law, and by persons authorized by law to summon him." *Minard v. Douglas Co.*, 9 Or. 206; *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287.

It was shown that there were published for two weeks in the *Weekly Colusa Sun* the petition, with the names of the signers thereto, and immediately below this the following: "The foregoing petition will be presented to the honorable board of supervisors of Colusa county on Monday, October 10, 1887, at 10 o'clock a. m. of that day." The notice was unsigned. It did not bear upon its face any showing of authority. It did not appear from it that it was given by the peti-

tioners, who alone could issue the process. Indeed, from all that is shown, the so-called notice may have been but the declaration of the editor of the newspaper, and the publication of the so-called notice may have been but the statement in the paper of a bit of news. It is essential to the validity of notice that it shall bear upon its face evidence that it has been given by the person authorized so to do, and this evidence is shown by the signature of the officer or other person charged with the duty. Nor can the defect in the notice be cured by proof of actual knowledge upon the part of those to be affected thereby. The statutory warning must be given, and must conform to the statutory requirements. *Gunter v. Fayetteville*, 56 Ark. 202, 19 S. W. 577. It is well said in *Shumway v. Bennett*, 29 Mich. 451: "There can be no judicial action affecting rights which is not based upon some process or notice whereby the parties interested are subject to the jurisdiction, and entitled to be heard. There is no rule of law which requires persons to attend and watch the action of courts unless the legal course has been taken to warn them, and there is no principle of law which would tolerate action upon the fullest notice where the party notified is denied a hearing. Notice is only useful to enable him to obtain a hearing." In *Niles v. Ransford*, 1 Mich. 338, mortgaged premises were advertised by the mortgagee to be sold under a power of sale in the mortgage, and the mortgagee afterwards, and before the day of sale, assigned the mortgage to a third person, who continued the advertisement in the mortgagee's name, instead of advertising anew as assignee in his own name. The sale was held irregular and void, and not a bar to the mortgagor's equity of redemption. In discussing the essentials to a valid notice, the court say: "It is urged that the notice of sale is not required by the statute to be signed by any one, but no conception can be formed of a legal notice which does not disclose on its face that it emanates from some person or court claiming to have the power to act in the manner indicated by the notice. It is this that gives to it its force; that makes it a notice. The statute does not prescribe the form of the notice. It declares that a notice shall be given, in which certain matters shall be specified. It does not regulate its form in other respects." A similar case is that of *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333, and it is there said: "Again, the notice was not, upon its face, and did not purport to be, the act of Galusha, but of Hall, the mortgagee. It is an essential quality of a notice that it appear to be given by competent authority, and a notice which upon its face is declared to be the act of a designated person, and which as such would be void, cannot be made effectual by proof that it was really the act of another and undisclosed person. A notice by a mere stranger can ef-

fect nothing." To like effect is the case of *Roche v. Farnsworth*, 106 Mass. 509. In *McVichie v. Town of Knight*, 82 Wis. 137, 51 N. W. 1094, the statute required the calling of an election to vote upon the proposed issuance of municipal bonds. Notice of the election was to be given by the town clerk. The notice in fact was given, and was signed "Thomas Huddleston," without official designation, but in truth Thomas Huddleston was the town clerk. The court held the notice to be defective, saying that it was not signed by any person as town clerk, and therefore did not show that it was given by the town clerk, as the law required. In *Eaton v. Supervisors*, 42 Wis. 317, the statute required a notice of appeal to be in writing. An unsigned notice under this statute was held to be insufficient. In *Com. v. Barrett* (Ky.) 17 S. W. 336, a condition in the statute provided that the law should become effective upon its approval by a majority of the voters of the county at an election to be held on a designated date, after notice by the sheriff of the election, published in three consecutive issues of the legal newspaper. The act and the notice were published. The publication of the notice was not signed by the sheriff, and was held not to be a compliance with the act, as it was impossible for the voters to tell whether or not the notice was official; and the court said: "It was vital to the validity of the election. By necessary implication the notice should have been official. The act provided that the sheriff should give it. This meant that he should sign it." In *Re Road Notices*, 5 Har. 324, the petition was for a new public road; and, on proof of the form of notice, it appeared that the written notice of intention to prefer the petition had no signature to it. On this objection being made, the court said the notice must be given by some one, and a paper without a signature could not be said to be a notice by any one of his intention to present a petition, and they held a signature to the notice to be necessary. In *Veeder v. Town of Lima*, 19 Wis. 280, the supervisors of the town were authorized by law to subscribe for capital stock of a plank-road company; but the question was first to be submitted to the electors of the town, upon the written application of 10 or more electors, by the supervisors posting up, 10 days beforehand, in at least 5 public places of the town, notices of an election for that purpose. The court, in reviewing the action of the supervisors, said: "No affidavit or affidavits of the posting up of the notices were ever made, deposited, or recorded in the office of the town clerk. At most, but two notices were posted; and even those, according to the most sure and certain testimony of the witness Ballou, were not signed by the supervisors. These facts alone are sufficient to avoid the election." In *Short v. State*, 79 Ga. 550, 4 S. E. 852, the well-settled rule is enunciated that the act of every

public officer must bear upon its face evidence of its official character; and therefore, where a tax d. fa. was issued and signed "William R. Smith," and it appeared neither by the addition of the words "Tax Collector" to his signature, nor otherwise upon the face of the paper, that he was tax collector, it was held not to be a legal process. To the same effect are the cases of *Spear v. Ditty*, 9 Vt. 282; *Taylor v. Burnap*, 39 Mich. 739; *Smith v. Hard*, 59 Vt. 13, 8 Atl. 317. In *Minard v. Douglas Co.*, 9 Or. 206, there was under consideration the sufficiency of a notice of the application for laying out a highway, required by the statute to be given to interested parties. The proceedings contemplated by the Oregon statute were well-nigh identical with the proceedings contemplated by the Wright act. A petition was to be presented, signed by the requisite number of freeholders, praying for the laying out and opening of a road. At the time of the presentation of the petition the statute required that it should be accompanied by satisfactory proof that notice has been given by advertisement, etc. The notice, as given, contained all the requisites of notice, saving that, instead of being signed by the petitioners, it was signed, "A. H. Kennedy, Attorney for Applicants." The supreme court of Oregon ably and elaborately considers the question of notice, reviews the authorities, and reaches the conclusion—with which we are in full accord—that it was the duty of the petitioners, under the statute, to give the notice, and that this duty was as effectually imposed by intentment as though it had been enjoined upon them by express words; that the notice given was to be in writing; and that the writing necessarily implied a signing and authentication in such unmistakable manner as to carry on its face fair evidence of its character and authenticity. In answer to this overwhelming weight of authority, respondents claim that in *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 825, this identical notice was upheld, and in *Board v. Tregoe*, 88 Cal. 339, 26 Pac. 237, a notice substantially the same was likewise approved. It is a sufficient answer to this to say that in neither of those cases was the question of the sufficiency of the form of the notice presented to the court for consideration; and the court's silence, as has been before said, upon a matter to which its attention was not directed, cannot be construed as a determination of the question.

It is further urged against the validity of the organization of the district that the petition for organization was not signed by the requisite number of qualified freeholders. The petition was signed by 58 freeholders. It is insisted that, of the 58, 22 were not qualified, because at the time they signed each of them was the owner merely of a town lot or town lots, or small parcels of land scarcely larger than a lot, in either the town of Maxwell or the town of Williams, the lands

whereof had been subdivided into blocks and lots. It can serve no useful purpose to review at length the evidence as to the real property owned by these 22 signers. In each case, however, there were upon part of the lands of these petitioners dwelling houses and out houses, stores, blacksmith shop, livery stables, business houses, carpenter shops, etc. The lands of each of these signers were in fact town lots, and used for residence or business purposes. Upon some there were, as usual about country places, flowers, shrubs, and a few orchard trees. In *Board v. Tregoe*, 88 Cal. 339, 26 Pac. 237, objection was made to including within an irrigation district any lands within the limits of an incorporated city or town. The question which this court was called upon to determine was, whether it was beyond the power of the supervisors to include such lands under the provisions of the act authorizing them so to do in case the lands were susceptible of irrigation from a common source, etc., and would be benefited; and it was held that town lands susceptible of such irrigation were not necessarily without the purview of the law, but that the question whether, in any particular case, a town would or would not be benefited, must remain a question of fact, to be decided by the board of supervisors, to whose discretion it has been committed by the legislature; and as to owners of town property, whose lands may be covered with buildings, it is said that it seems reasonable to assume that they must participate indirectly, at least, in the accruing benefits. But this determination, as is pointed out in *Irrigation Dist. v. Abila*, 106 Cal. 355, 39 Pac. 794, is not to be taken as an adjudication that holders of small residence lots in towns and cities are such owners of land, within the meaning of the Wright act, as makes them qualified signers of the original petition for the organization of the district. This presents an entirely different question, and we unhesitatingly hold that they are not such qualified signers, within the spirit of that act. The Wright act contemplates the formation of irrigation districts to improve the condition of farming lands by bringing water upon them. As in reclamation districts the purpose is to improve the lands, by carrying off the surplus water, so here it is to better the farming property, by conveying the necessary supply of water to the soil. Where a statutory provision is open to construction, the test of the reasonableness of any given construction is what may be done with it. It is necessary, says Chief Justice Shaw, to put extreme cases to test the principle. Bearing in mind that the purpose for which irrigation districts are permitted to be organized is for the improvement of agricultural lands, if it be held that owners of lots within incorporated cities or towns are qualified signers to the petition for their formation, then the machinery for the organization of such a district might be set in motion by 50 owners of small town lots, either

in part or wholly covered by residence and business houses. These 50 would embrace within the boundaries of their proposed district vast tracts of farming land, the owners of which might be to the last degree unwilling that such a district should be formed. By including also within the boundaries of their contemplated district the little town in which their lands were situated, they might easily, and probably would, at the election, outvote the opposing owners of the agricultural lands who might chance to be electors; and thus it would result that by the petition of townspeople only indirectly interested in the district, and by the vote of other townspeople not property owners at all, and therefore at the most very remotely concerned in the matter, thousands of acres of farming land, despite the protests of the owners, would be subjected to the burden and expense attending the organization and conduct of such districts. For it is a matter of common knowledge, and part of the history of the records of this court, that in some of these districts liens to the extent of 40 and more dollars have been imposed upon every acre of land despite the protests of its owners. Such is not the meaning of the act, nor should an interpretation be given to it which would make such practices possible. Qualified signers to the petition must be the bona fide owners of agricultural land, desiring to improve the same by conducting water upon it. To the use of the word "desire" employed by the statute some force must be given. It is unreasonable to suppose that a man whose lot is covered by a drug store, another upon whose lot is a blacksmith shop and a corral, a third upon whose lot is a residence and the usual shrubs and bushes of a flower garden, "desire" to irrigate their lands, in the sense of the word as employed in the Wright act.

The next objection of appellants, that the election held for the organization of the district was void because the proclamation for the election was not published by direction of the board of supervisors, is not open to consideration. The court's finding was in favor of the district, and appellants' bill of exceptions contains no specification as to the insufficiency of the evidence upon this matter.

The principal objections of appellants yet remaining for consideration go to the question of the validity or invalidity of the bond issue, and herein it is insisted—First, that all the bonds of the district are void for the reason that notice of the bond election held on April 2, 1888, was not legally given or posted; second, that all the outstanding bonds of the district, except \$12,500 thereof, are void for the reason that pursuant to the resolution of June 3, 1890, they were issued in place of, and substituted or exchanged for, bonds originally issued under the resolution of June, 1888, and the board of directors had no authority to

make such reissue, because by the resolution of June 5, 1888, and the issue of the bonds thereunder, the board had exhausted its power to issue bonds; third, the bonds of the second form prescribed by the resolution of June 3, 1890, are all void because they are antedated, and do not bear date at the time of their issue. We think it neither necessary nor yet proper to pass upon these questions. It is not necessary, because from what has been said it must follow that the district was not legally organized. As a consequence, its right to sell any of the remaining bonds is at an end, and the judgment of the trial court should so decree. Therefore there can no longer be any interest, either to the district or to intending purchasers, in the determination, and it becomes, from this point of view, merely a moot question. It is not proper, because some of the bonds (it is insisted) had been sold, and had passed into the hands of bona fide purchasers, before the institution of this proceeding. These bondholders are not litigating in the matter. A determination without their presence and participation might be embarrassing to a just decision upon full presentation by all the parties in interest. The confirmation act contemplates a review by a court of the proceedings attending the issue of bonds, whether the bonds have actually been sold or not. After the issue, and before the sale, of any bonds, it may well be of advantage to the district and to intending purchasers that the judgment of a court should be invoked to pass upon the regularity of the action of the district officers, but after sale different questions present themselves. The bonds are negotiable. Public corporations are estopped from setting up many defenses of irregularity against the innocent holders of such negotiable securities. Whether or not the holder be an innocent purchaser, and a purchaser without notice, is itself a question which can only be determined in an action against the district to collect upon the bonds. From all these considerations, and others which will readily suggest themselves, it is proper, in cases where bonds of a district have been actually sold before institution of confirmation proceedings, to refuse consideration to questions of the regularity of such sales, leaving their determination to that forum before which action may be brought to enforce collection; for it is only in such an action, before such a court, that there will be found full and unquestioned jurisdiction of the subject-matter and of all the necessary parties, as well as power to determine all objections and defenses. For these reasons the judgment and order of the trial court are reversed.

We concur: MCFARLAND, J.; TEMPLE, J.; HARRISON, J.

GAROUTTE, J. I concur in the reversal of the judgment and order upon the ground that, in my opinion, owners of town lots are not qualified signers of the petition.

VAN FLEET, J. I concur in the judgment, and in the views expressed by Mr. Justice HENSHAW, except only upon the question as to the sufficiency of the notice given of the time of presentation to the board of supervisors of the petition for the formation of the district. Upon that question I express no opinion.

(24 Colo. 146)

BUSH et al. v. HADDEN et al.

(Supreme Court of Colorado. June 1, 1897.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

1. A written co-partnership agreement between B. and H. fixed the capital at \$10,000, of which \$5,000 was to be contributed in land owned by B.'s wife, and \$5,000 in cattle owned by H. The latter then contributed his share, and afterwards the wife deeded such land to the firm, which gave T. a trust deed on the land, securing the firm's note for \$5,000, to H., who made advances to the firm in that sum during the partnership existence. The partnership was dissolved in 1887, when B. quitclaimed his interest in the land to H., and H. gave B.'s wife a special warranty deed of the land, subject to the trust deed. In an action brought by her in 1894 to remove such lien, she claimed that she deeded the land solely to indemnify H. for the \$5,000 contributed by him to the firm's capital, that he had been indemnified, that by the settlement the land was to be reconveyed to her with the trust deed canceled, and that she did not know of the stipulation in the deed to her making it subject to such lien until just before the suit was brought. *Held*, that the improbability of the wife's claim, in connection with positive testimony against it, justified a finding against her.

2. The wife testified that she did not read the deed to her because she had confidence in H.'s honesty, and that for that reason she had no knowledge of the stipulation therein as to the property being subject to the trustee. After she received the deed, however, her husband paid interest on the trust-deed note, and H. testified that he several times notified her that such interest was due, and that he would foreclose unless paid, and that the wife referred him to her husband. Afterwards the wife and husband obtained a loan on the property. *Held*, that a finding that the wife knew of the loan when she received the deed, or soon after, was sustained.

Appeal from district court, Larimer county.

Action by Lizzie A. Bush against Thomas H. Hadden and another to remove the lien of a trust deed on land, in which defendant Henry Hadden filed a cross bill making James F. Bush, plaintiff's husband, a party, and asking foreclosure of the trust deed. From a decree in favor of said defendant, plaintiff and her husband appeal. *Affirmed*.

Edward D. Upham and Talbot & Denison, for appellants. Frank J. Annis, for appellee.

CAMPBELL, J. In July, 1886, James F. Bush, one of the appellants, entered into a co-partnership agreement with Henry Hadden, one of the appellees, for buying and selling horses and cattle and real estate in Larimer county, Colo. The capital was \$10,000, of which, according to the written agreement, \$5,000 was to be contributed in land on the Canadian river then owned by James F. Bush and his wife, and \$5,000 in cattle then owned

by Henry Hadden. Hadden at the execution of the contract contributed his share; and in October, 1886, there was deeded to the co-partnership firm of Hadden & Bush the lands which are the subject of controversy in this suit, title to which was in the name of Lizzie A. Bush, one of the appellants, and wife of James F. Bush, and said conveyance was made by her. The present action was begun by Mrs. Bush against Henry Hadden and Thomas H. Hadden as trustee, and its object was to release the lands in question from the burden of an equitable lien resting upon them, which was created as will be hereinafter stated. The complaint, after averring the agreement for this co-partnership, alleges that the plaintiff Mrs. Bush conveyed these lands to the firm to assist her husband in forming the same, and to indemnify Hadden for advances of property to be made to the co-partnership, and upon the understanding between the three that the lands were to be reconveyed to her free from all incumbrance after Hadden should be indemnified, and that without any other consideration she made such conveyance. It is then alleged that, for the purpose of securing and indemnifying Hadden for advances of property made by him to the partnership, Bush & Hadden, as partners, in October, 1886, executed their joint promissory note for \$5,000, payable to Hadden seven years after date, and to secure the same gave their trust deed, embracing this land, to Thomas H. Hadden, as trustee. Following this is an allegation that on the 1st of May, 1887, by mutual consent, the partnership was dissolved, and a full settlement between the partners had, in which Hadden was indemnified for all advances made by him to the firm; that the \$5,000 note was paid, canceled, and destroyed by Hadden, and that he then agreed to procure a release of the trust deed; and that it was agreed that Mrs. Bush's lands, and also other lands acquired by the co-partnership, should be conveyed to her by the partnership firm free from all incumbrance. It is further alleged that, pursuant to such agreement, Hadden, pretending to carry out its terms, after receiving a quitclaim deed therefor from James F. Bush, made his special warranty deed to Mrs. Bush for the lands theretofore conveyed by her, which deed he (Hadden) caused to be recorded and thereafter sent to her, and which, in due course of mail, she received; that the said deed, contrary to said agreement, contained a clause or stipulation making said lands subject to the lien of the indebtedness represented by the \$5,000 note and the trust deed above referred to, of which stipulation plaintiff claims she remained in ignorance until some time in 1894, shortly before this action was instituted. Hadden filed his answer admitting the co-partnership agreement as alleged, the execution of the trust deed, the dissolution of the co-partnership, and the execution of the special warranty deed to the plaintiff. The answer denies that the land was conveyed to the co-partnership as an indemnity for

any advances made or to be made by him to the firm, or for any purpose other than the single one of enabling James F. Bush to comply with his agreement of co-partnership, and alleges that it was so conveyed and received solely as his (Bush's) contribution of capital or assets. The answer then states that at the dissolution of the firm a settlement of all accounts was made, as though no partnership had existed, and that Bush then assumed as his own liability the payment of the whole of the \$5,000 note; that said note was not then paid, canceled, or destroyed, and that the further agreement was made (and carried out) that Bush should quitclaim his interest in the lands in controversy to Hadden, and that the latter should deed the same to Mrs. Bush, subject to said lien; and that plaintiff knowingly accepted said deed constituting, or, rather, continuing, the lien, and subsequently recognized and acquiesced in such agreement. A cross complaint is set up in the answer, in which Hadden asks to have James F. Bush made a party, and also asks that a misdescription of some of the property included in the trust deed be corrected, and that a decree be entered ordering the trustee to sell the lands to satisfy the indebtedness thereby secured. An order of court was entered, making James F. Bush a party, whereupon he appeared and filed his answer; and after the issues were made up there was a trial to the court without a jury, which made specific findings in favor of the defendant Hadden, and dismissed the plaintiff's complaint, and upon the cross complaint gave judgment upon the note against James F. Bush in favor of Henry Hadden, and ordered the defendant trustee, Thomas H. Hadden, to proceed to foreclose the trust deed to satisfy said note. From this decree both Mrs. Bush and her husband have appealed to this court.

If we look only to the complaint, it is not altogether certain for what particular advances by Hadden plaintiff claims she made this conveyance as an indemnity. It might be that it was for advances of money and property other than his original contribution of \$5,000 to the capital; but, if we look to the evidence of Mrs. Bush herself, we find she testifies that she conveyed the lands as an indemnity for Hadden's original contribution of capital. It is true that she also says that the land was put in to form her husband's share of the capital, but she immediately follows this with a statement that it was an indemnity to Hadden for the latter's equal share of the capital. She further testifies, as her understanding, that the trust deed was not given as security for money borrowed by the firm to run the business, but to secure Hadden against business losses, mismanagement, and misfortune that might happen. Of the voluminous evidence, some relates to co-partnership accounts and transactions both before and after the dissolution, some to dealings between Mrs. Bush and

her husband, some to dealings between Mrs. Bush and Hadden, and some to individual transactions between Hadden and Mr. Bush. As might be supposed, considerable confusion results from such a method of trying the case. In view, however, of the special findings made by the court, we are not seriously embarrassed by this state of affairs, and do not find it necessary, for the purpose of ascertaining where its weight lies, to review this evidence in detail; for, under the general rule of this court, so often announced, if there is legal evidence sufficient to justify the findings and decree it will not be reversed merely because this court, upon the facts, might have arrived at a different conclusion. Counsel for appellants recognize the force of this, and upon oral argument went so far as to say that, if the record afforded any evidence in support of the findings below, they should not be disturbed. The specific findings made by the trial court are, in substance, as follows: First. That Bush and Hadden formed this co-partnership with a capital of \$10,000, of which Hadden contributed \$5,000 in cattle, and Bush, by his wife's assistance, the lands in question, valued at \$5,000. Second. That, upon the day Mrs. Bush executed her conveyance to the two partners, they, in turn, conveyed the lands in controversy to Thomas H. Hadden, as trustee, to secure the payment of a note of \$5,000 signed by Bush & Hadden, and payable to Henry Hadden in seven years, and that the consideration for said note was property already advanced and money thereafter to be advanced by Henry Hadden for the use of said firm. Third. That upon the dissolution of the firm, in June, 1887, a full and complete settlement of said co-partnership business was had, in and by which settlement the said indebtedness represented by the \$5,000 note and secured by the trust deed was assumed by Bush, and it was further agreed that the land covered thereby should remain as security until said incumbrance was paid and satisfied; and it was agreed that Bush should, and he thereupon did, quitclaim his interest therein to Hadden, and the latter should, and thereupon did, convey to Mrs. Bush, subject to the lien mentioned, the property in controversy, and that other property of the co-partnership, both real and personal, which was acquired by the firm, was also conveyed to Mrs. Bush; that the deed reconveying to Mrs. Bush the lands by her conveyed to the firm was accepted and recorded by her subject to the lien. There was also a finding that Hadden paid taxes upon this land after the conveyance to Mrs. Bush was made, and redeemed the same from tax sales.

It is with respect to the findings that the plaintiff conveyed the lands to the firm as the contribution of James F. Bush to the capital of the co-partnership, and that plaintiff accepted and acquiesced in the special warranty deed continuing the lien in ques-

tion, and to the refusal of the court to find that her purpose in making the original conveyance was to furnish and give an indemnity to Hadden for his contribution of capital, that the appellants particularly complain. We have gone through this record with much care, and are satisfied that the findings are amply supported by it. Our examination of this evidence had led us to conclude that this controversy has arisen, not because of any overreaching or dishonesty upon the part of Henry Hadden, or because of any intentional wrongdoing upon the part of Mrs. Bush. She appears to be a woman of intelligence and culture, but not of much knowledge of business affairs. Obviously, though both she and her husband seem not now so to regard it, she intrusted much of her business affairs to her husband; and, if she has been wronged, it is due to him, and not to Henry Hadden. In support of her case, Mrs. Bush was unable to testify to any definite, material facts, or to any definite statements or conduct by Hadden, giving color to her charges. The most she was able to do was to give her conclusions or the understanding which she got from portions of conversations overheard by her between Bush and Hadden before the agreement of co-partnership was entered into; and it is apparent that the understanding to which she testifies, that this land was to be held as an indemnity for Hadden's advances, was derived, if not wholly, certainly in great part, from what her husband told her. It is true that her husband testifies that there was such an understanding, but both he and she admit that Hadden never asked or suggested such an arrangement; and Mr. Bush testifies that the conveyance was so made by his wife as a voluntary matter, upon his own suggestion. Upon the other hand, Hadden testifies that there never was such an understanding or agreement, and further testifies (as the court below found) that the conveyance of these lands was intended by Mrs. Bush, and so received by the co-partnership, as James F. Bush's contribution to the capital of the firm; the consideration being her desire to assist her husband, and certain benefits to herself which she anticipated from the joint business. If the lands were so transferred and contributed, they became a part of the firm assets, with which the firm could deal the same as with any other of its property. It also appears, and the court must have so found, that during the co-partnership Hadden made advances to the firm, in addition to his contribution of original capital, of money and property amounting to more than \$5,000, for which the trust deed operated as a security, which sum was due and owing to him by the firm at the time of its dissolution. Aside from this, if we consider the situation of the parties when this co-partnership agreement was signed, which was witnessed by the plaintiff herself, it is

highly improbable that the conveyance of the land was intended by any of them as an indemnity, and certainly it was not so regarded by Hadden. When the conveyance was made, he had already contributed \$5,000 in capital. If these lands were conveyed to the firm, and so received by Hadden, merely as an indemnity or extra guaranty, as Bush expresses it, for Hadden's share of the capital theretofore contributed, or even for advances which he might thereafter make, and Hadden should, as he actually did, advance property or money in addition to his original capital amounting to more than \$5,000, we would have this condition of affairs, viz.: A co-partnership between Bush and Hadden, in which Bush had an equal interest, the entire capital of which was contributed by Hadden. In other words, Bush would be an equal partner without contributing anything to the capital. The improbability that any such arrangement was made, taken in connection with the positive testimony against it which the record discloses, is an ample justification for the finding of the trial court that no such arrangement was in fact ever entered into. The court was justified from the evidence in finding that the lands were put in by Mrs. Bush as her husband's contribution to the capital of the firm as against Hadden's \$5,000 in cattle, and that thereafter, for the purpose of acquiring other property and paying the running expenses, Hadden advanced to the firm the \$5,000 represented by this note and secured by this trust deed, and that upon the dissolution of the firm the land was properly charged with the payment of this indebtedness, and that Mrs. Bush took the conveyance subject thereto. The appellants' contention (even if the point is important) that there is no evidence that Mrs. Bush knowingly accepted or received this special warranty deed is not tenable. It is true, she testifies that she did not know of the stipulation in question until a short time before she brought this suit, in the year 1894, but there are circumstances in the record that warranted the trial court in finding that she did. Soon after the deed was recorded it was sent to and received by her. She testifies that she did not read it, and, as an excuse for not doing so, says that she had confidence that Mr. Hadden would not do anything wrong; but if she had read it, as it was her duty to do, she would have become aware that her land was subject to the lien. After she received this deed, interest upon this note for some time thereafter was paid by Bush, and Hadden testifies that some time during the year 1892, and at different times therein, he had conversations with Mrs. Bush concerning this lien, in which he informed her that the interest was due and payable, and that he would have to proceed to a foreclosure unless payment was made, and she referred him to Mr. Bush (her hus-

band), who looked after such matters for her. Then, too, in May, 1889, Mrs. Bush and her husband borrowed money of the Lombard Investment Company, and gave their joint note therefor, and a trust deed upon this same property was executed as security. It is reasonable to suppose that this loan would not have been made had not the title of the property been examined and an abstract thereof furnished to the lender, and that at that time, at least, Mrs. Bush must have known that her land was not free from all incumbrance. From these and other circumstances that might be mentioned, it seems to us clear that Mrs. Bush must have known of this lien at or soon after the time she received the deed, and the court's finding to that effect is supported by the evidence.

As we have said, the contention is now made that Bush was not the agent of his wife; and, while we do not think it is material, yet, if so, it is apparent that, throughout these transactions, Bush was acting as his wife's representative, and that she must have known of it, and that Hadden was justified in acting as he did upon the supposition that Bush was her agent. That he knew of this clause in the deed is abundantly shown. It is also true that while upon the witness stand he testified in support of his wife's claim, yet much, if not all, of his testimony that is at all material is so inconsistent, and contradicted by his letters, by documentary evidence, and by other witnesses in the case, that his testimony is entitled to little, if any, credence. Without so deciding, we have thus far proceeded as though the class of evidence produced by the plaintiff was competent in this character of action. We do not find it necessary to a determination of this controversy to pass upon the point made by defendants, that parol testimony is improper under the issues as framed. This is a case where the plaintiff is contradicted upon every material matter by evidence, both written and oral, sufficient to uphold the findings of the trial court. If, for a valuable consideration, this conveyance was, as a matter of fact, made by Mrs. Bush as her husband's contribution towards the partnership funds,—which was the finding below,—the lands included in the conveyance were certainly subject to the disposition made of them by the co-partnership, and are subject to the lien created by this special warranty deed. The plaintiff, it is true, claims that the conveyance was made as an indemnity to Hadden for his contribution of capital, and that he has been indemnified. This is positively and specifically denied, and if the conveyance was not so made, or if Hadden was not so indemnified, both of which the court found against the plaintiff, her entire case falls. Considering the entire record, we conclude that the judgment must be affirmed, and it is so ordered. Affirmed.

PECK et al. v. FARNHAM.

(Supreme Court of Colorado. May 17, 1897.)

SECURITY FOR COSTS—PROSECUTION AS POOR PERSON—JURY—SPECIAL VENIRE—SERVICE BY CORONER—HARMLESS ERROR.

1. Under Mills' Ann. St. § 676 (Gen. St. 1883, § 309), providing that if any court shall, before or after the commencement of any suit, be satisfied that plaintiff is a poor person, he may be permitted to commence or prosecute his action as a poor person, the court may grant such permission during the progress of the trial.

2. Where plaintiff applied for permission to prosecute as a poor person, after the jury had been impaneled, notice of such application was unnecessary, under Code Civ. Proc. § 372, which provides that notice of a motion made during a trial shall not be required.

3. It was not error to deny a request that the special venire for jurors in an equitable proceeding be served by the coroner, instead of the sheriff, where the affidavit in support of such application was not made until after the venire had been served by the sheriff, and there was no showing that any of the jurors so summoned were objectionable, or that the right of peremptory challenge was exercised, as the findings of such jury are advisory only, and may be disregarded by the court.

4. Evidence, though conflicting, is sufficient to support the findings and decree where it meets the requirements of clearness, certainty, and convincing force.

5. Where plaintiff, on his examination in chief, and also on his cross-examination, had acknowledged that he signed certain certificates, admitted his connection with them, and explained the transactions to which they related, the erroneous exclusion of the certificates, when offered by defendants, was harmless, though such evidence was relevant under the issues.

Appeal from district court, Gunnison county.

Action by George W. Farnham against D. R. Peck and another. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Thomas C. Brown and J. R. Hinkle, for appellants. Alexander Gullett and S. D. Crump, for appellee.

CAMPBELL, J. The complaint filed by the appellee, George W. Farnham, alleges the formation by the plaintiff and the defendants of a co-partnership for the purpose of discovering and locating, working and holding, mining claims. It is also alleged that certain mining claims theretofore located, as well as those thereafter to be located by any of the parties to the agreement, were to be the joint property of the co-partners. The object of the action was to enforce the terms of the agreement with respect to the Iron Cap lode mining claim, which, the plaintiff alleges, was located by the defendants under the said agreement, and in which they refused to recognize plaintiff's claim of joint ownership. The answer denied substantially all of the allegations of the complaint. Upon the issues joined, the court submitted to a jury one interrogatory for their finding, which was as to whether or not such a partnership as was alleged in the complaint was in existence at the time of the location in question; and the answer thereto was in the affirmative. The record does not disclose that this answer was form-

ally approved; but it does appear therefrom that the court found the issues in favor of the plaintiff, and against the defendants, apparently basing the finding both upon the answer of the jury and its own deduction from the evidence, and entered a decree adjudging the plaintiff to be the owner of, and entitled to, the possession of one-third of said mining claim. From this decree the defendants have appealed to this court, and assigned numerous errors, which, in their briefs, they discuss under three heads, as follows: First. The court erred in excluding proper, competent, and relevant testimony offered by the defendants. Second. The court erred in denying the application of the defendants, asking that the special venire issued for jurors be served either by the coroner or some other proper person. Third. Although as a matter of secondary consideration, the court erred in allowing plaintiff to prosecute his suit as a poor person. These points are considered in their inverse order.

1. Appellants concede that the order permitting plaintiff to prosecute as a poor person is of itself not sufficient to reverse the judgment, because it is discretionary with the trial court whether or not security for costs shall, in the first instance, be exacted. *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78. They do claim, however, that the order was irregularly entered, as no notice of the application was given to them. The order was made after the jury was impaneled, and, under section 372 of the Civil Code of Procedure, notice of motions made during the progress of a trial is not required. But appellants say that the motion was not of a character that could properly be made during a trial. Section 676, *Mills' Ann. St.* (section 319, *Gen. St.* 1883), provides that if any court shall, before or after the commencement of any suit, be satisfied that plaintiff is a poor person, etc., he may be permitted to commence or prosecute his action as a poor person. By this section the court is not confined to any particular stage in the progress of the case after it is instituted, either before or after the trial is begun, in granting this permission; and certainly, in the absence of any showing of an abuse by the trial court of its discretion under this section, or of injury or prejudice to the defendant, neither of which is made to appear in this case, a court of review will not interfere.

2. This action is equitable in its character. Neither party was entitled, as a matter of right, to a jury trial. The court, *sua sponte*, might call and instruct a jury to aid it in passing upon a question of fact; but the finding of the jury would be advisory only, and might be altogether disregarded by the court. For this reason, in such a case, error may not be predicated upon incorrect instructions given to the jury, or upon its verdict. If this is true, then it would seem, upon principle, to follow that any irregularities or errors committed by the court in summoning or impaneling the jury may not be the subject of complaint by the defeated party. In a proper case, where, as a matter of right, the defendant is entitled to a jury, it might be

error for the court, where the showing was sufficient therefor, to deny the request of the defendant to have the coroner, instead of the sheriff, serve the special venire. But in this case the defendants had no such right that was infringed by the trial court. Courts are not organized merely for the purpose of announcing abstract principles, but it is only where some wrong has been committed prejudicial to the complaining party that they decide cases and apply remedies. An additional reason for holding this point without merit is that the affidavit in support of defendants' application to set aside the sheriff was not made until after the venire was served by him, and there is an entire absence of any showing that any of the jurors summoned by the sheriff upon the special venire were objectionable, or that the defendants exercised the right of peremptory challenge. As bearing upon these propositions are *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283; *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641; *Porter v. Grady*, 21 Colo. 74, 39 Pac. 1091; *Saint v. Guerrero*, 17 Colo. 448, 30 Pac. 335.

3. Though not embraced in either of the three propositions above set forth, there is a general assignment questioning the sufficiency of the evidence to support the findings and decree, and argument is made in its support. The evidence is not fully set out in the abstract, but an examination of the transcript satisfies us that, though conflicting, it meets the requirements of clearness, certainty, and convincing force, which the appellants claim is necessary to authorize a recovery in a case like this. Merely because evidence is conflicting does not of itself make it insufficient in these three particulars; otherwise, there never could be a recovery for the plaintiff where the defendant's testimony as to the material issues was opposed to that of the plaintiff. It was the province of the trial court to pass upon the credibility of the witnesses and the weight and sufficiency of the testimony, and if he saw fit to believe the witnesses for the plaintiff, as he had a right to do, the evidence in his behalf meets the requirements of this case, and there is no such infirmity attaching to it as would, under any of the recognized exceptions to the general rule, make it our duty to set aside the findings of fact made by the trial court.

Passing to the last and specific objection urged against the ruling of the court rejecting evidence offered by the defendants, we find that this offer consisted of three separate location certificates, of three several mining lodes, which were signed by the plaintiff, John Latimer, and George Porter. Their recitals show that these locations were made during the existence of the alleged co-partnership agreement between the plaintiff and the defendants. The avowed object of this evidence was to render improbable plaintiff's testimony that co-partnership relations existed between him and the defendants, by which all claims located by any of them were to become the joint property of all, by showing inconsistent conduct on

his part in making locations for himself and others during the existence of such co-partnership. It was also claimed to be material as tending to show a violation of the co-partnership agreement by the plaintiff, which would preclude him from insisting upon the enforcement of its terms as against his co-partners. The objection of the plaintiff was that the evidence was incompetent and irrelevant. It is immaterial upon what ground the court excluded the evidence if the ruling can be sustained upon legal grounds. We think this evidence was admissible and relevant under the issues, but the error in excluding it harmless. While the abstract is not satisfactory upon this point, the transcript, it seems to us, makes it clear that the plaintiff, upon his examination in chief, and also upon his cross-examination, when the substance of these certificates was stated to him, acknowledged that he signed them, admitted his connection with them, and gave such explanation of any apparently inconsistent conduct of his own in connection therewith, and any supposed violation of his duty to the defendants under the contract of co-partnership, as satisfied the jury and court of his good faith; and, as it seems to us, if the plaintiff was a credible witness, as the trial court found, his explanation (which it is not necessary here to give) was altogether satisfactory. Had these certificates, therefore, been admitted by the court, they would have been evidence of facts tending to weaken the plaintiff's case, which the plaintiff himself had already admitted to be true, and defendants' case would not have been strengthened by their introduction, while the only effect would be to incur the record with unnecessary matter. Perceiving no error in the record, the judgment is affirmed. Affirmed.

**INSURANCE CO. OF NORTH AMERICA
v. BONNER, Treasurer.**

(Supreme Court of Colorado. June 22, 1897.)

Tax—ENJOINING COLLECTION—SUFFICIENCY OF COMPLAINT.

1. Complaint will be sustained, if possible, where objection that it does not state facts sufficient to constitute cause of action is first raised on appeal.

2. That a tax is void is not, of itself, ground for enjoining its collection.

3. Where part of the taxes are void and part legal, one seeking to enjoin the void part must allege payment or tender of the legal taxes due, and must state facts showing what is legal and what void; and the mere statement that he has paid all legal claims for taxes is a mere legal conclusion.

4. Suit to enjoin collection of tax will not lie where the tax is not yet due, and there is no threat to collect it, or anticipation that there will be an attempt to collect it.

5. A complaint alleging that, if the treasurer is permitted to collect tax, "it will work a great and irreparable injury to the plaintiff," without stating facts showing the injury, or how or why it will result, merely states a conclusion of the pleader.

6. An action against a county treasurer cannot be treated as an application for certiorari to review the proceedings of the board of county

commissioners in levying a tax, though the prayer is for general relief, as well as for an injunction.

Appeal from court of appeals.

Action by the Insurance Company of North America against Olando Bonner, treasurer of Rio Grande county, Colo. Judgment for defendant on demurrer was affirmed in the court of appeals (42 Pac. 681), and plaintiff appeals. Dismissed.

Charles A. Merriman (Henry C. Charpiot and Wm. M. Maguire, of counsel), for appellant. Jesse Stephenson and C. M. Corlett, for appellee.

CAMPBELL, J. This action was begun in the district court of Rio Grande county by the Insurance Company of North America against Olando Bonner, county treasurer, to restrain the collection of a tax levied against it, upon the ground that the tax was void. The complaint was dismissed upon the defendant's demurrer, and it thereupon sued out a writ of error in the court of appeals, where the judgment below was affirmed. Plaintiff now prosecutes its appeal from the judgment of the court of appeals, and invokes the jurisdiction of this court, upon the ground that a determination of a constitutional question is necessary to a decision of the case.

Upon the plaintiff's own theory that the tax whose collection is sought to be enjoined is a franchise tax, and was illegally levied under a law impliedly repealed by a later law covering the same subject, and prescribing a lower rate than, and a basis of taxation different from, that contained in the prior law, it is doubtful if there is any constitutional question in the case, or any question other than one of statutory construction. Be that as it may, we are precluded from passing upon that point, for we are of the opinion that the complaint does not state a cause of action, or present a case that warrants the granting of equitable relief. This was the ground upon which the court of appeals predicated its judgment of affirmance, and, as our judgment is in accord with the conclusion of that court, it follows that the determination of a constitutional question is not necessary to a decision in the case as presented, and therefore jurisdiction to entertain this appeal is not vested in this court. The opinion of the court of appeals is reported in 7 Colo. App. 97, 42 Pac. 681, and so clearly shows the insufficiency of the complaint as to leave but little further to be said. The able presentation of the case here by counsel for appellant, and the fact that they raise questions of practice that are of importance, call for some further consideration by us. None of the counsel upon either side appearing in this court was in the case when it was heard in the district court. That the complaint is not satisfactory,—indeed, that it is seriously defective,—counsel

for appellant frankly admit; but that it is so defective as not to support a judgment, had one gone for the plaintiff, they are not willing to concede. They claim that the defendant interposed only a special demurrer below, upon which ground alone argument was had, and the decision based.

There may be some doubt as to the correctness of this claim, but, for the purpose of the argument, we assume it to be true. It appears, then, that the objection by the defendant that the pleading did not state facts sufficient to constitute a cause of action was not raised until the case reached the court of appeals. Although, under section 55 of the Code, as construed by this court and the court of appeals (*Wilcox v. Jamieson*, 20 Colo. 158, 36 Pac. 902; *Black v. Bent*, 20 Colo. 342, 38 Pac. 387; *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532; *McKee v. Howe*, 17 Colo. 338, 31 Pac. 115; *Toothaker v. City of Boulder*, 13 Colo. 219, 22 Pac. 468; *Marriott v. Clise*, 12 Colo. 561, 21 Pac. 909; *Hall v. Linn*, 8 Colo. 204, 5 Pac. 641; *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Creswell v. Woodside*, [Colo. App.] 46 Pac. 842), this objection may be raised at any time, yet, when raised for the first time in an appellate court, it is looked upon with disfavor. Applying this rule, counsel say it is our duty (which is true) to disregard all irregularities and informalities in the complaint, and, if possible, to sustain it. To the same effect is the case of *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118, and cases cited. The rule has thus been stated: "If the facts alleged, with all reasonable deductions that can be drawn therefrom, are sufficient to show a cause of action, the complaint will be upheld upon review." *Black v. Bent*, supra. This is the settled doctrine of this court, and we are disposed to frown upon the practice of reserving even such objections as are here raised, until the cause reaches an appellate court. But, giving to the rule its most liberal application, we are unable to spell a cause of action out of the complaint. It is more than merely inartificial; it is entirely wanting in some essential averments. In addition to what is said by the court of appeals, we may say that courts discourage the practice of granting injunctions to restrain the collection of the public revenue. That a tax is void is, of itself, not sufficient to justify the granting of a writ. The case must, in addition, be brought under the head of some of the well-recognized heads of equity jurisdiction. *Dows v. Chicago*, 11 Wall. 108; *High*, Inj. (3d Ed.) § 485 et seq.

Some of the particulars in which this complaint is bad are as follows: The plaintiff must allege payment,—at least, a tender,—of all legal taxes due. If part of the tax assessed against him is legal and part void, he must state the facts showing what is legal, and what void, and the mere allegation that he has paid all taxes legally assessed is not sufficient. *High Inj.* (3d Ed.) §§ 497, 498. The allegation here is that plaintiff "has paid and liqui-

dated any and all legal claims for taxes, or otherwise, made or held against it by the state of Colorado, as required by law." This is a mere legal conclusion. Besides this, according to the plaintiff's own theory of the case, it owed taxes to the county of Rio Grande, the towns of Monte Vista and Del Norte, where it had agents, and to the school districts in those municipalities. The tax due to each of these smaller subdivisions of the state is a separate and distinct tax from that due to the state itself, and there is no averment in the complaint of payment or tender of any such taxes. There is no allegation of a threat by the treasurer to enforce the payment of the tax, or even that plaintiff anticipated he would seek to collect it, either by distraint of its personal property, by suit, by sale under the statute, or otherwise; and it appears, also, that the taxes were not due until after the suit was brought. See *Id.* § 492. There is only a bare allegation that the tax is void, and no attempt to state the facts which, it is claimed, constitute the tax void, so that the court may draw its own legal conclusions from the facts as stated. This is clearly insufficient. *Id.* § 493. Ordinarily, the writ will not lie to restrain the collection of an illegal tax on personal property; and, while it is only by inference that we are advised of the ownership by the plaintiff of personal property, there is no allegation or even inference that the plaintiff is the owner of any real estate, the title of which might, by any possibility, be clouded. If this is a tax upon the corporate franchise, as the plaintiff maintains, the general rule is that the collection of a void tax on a franchise will not be enjoined. *Id.* § 520. The complaint alleges that, if the treasurer is permitted to collect this tax, "it will work a great and irreparable injury to the plaintiff"; but the facts are not stated showing to the court the nature of such injury, or how or why it will result, and such an allegation in a pleading is a mere conclusion of the pleader himself, which all the authorities hold to be not the allegation of a fact. *Id.* § 401, and cases cited. So it will be seen from the foregoing that by no rational rule of construction can this complaint be held good.

But, say counsel, as the prayer is for general relief as well as for an injunction, this action may be treated as an application for a writ of certiorari to review the proceedings of the board of county commissioners in levying the tax. This contention is wholly untenable, and it would seem not to be seriously urged. Certiorari does not lie to the collector of taxes, either to review his action, or any prior action upon which his own is based (*Cooley, Tax'n* [2d Ed.] 757); and it would be an anomalous practice to convert an action brought against a county treasurer to restrain the collection of a void tax into an action against the board of county commissioners to review its proceedings in levying.

the tax, even though, in a proper case, this remedy is appropriate.

Our conclusion being that the constitutional question, even if it is in the case, is not necessary to the decision of the controversy, but that the cause must be decided upon the insufficiency of the complaint, it follows that this court is without jurisdiction of this appeal, and it is accordingly dismissed. Appeal dismissed.

BOOTH v. DOMESTIC WATER CO.

(Court of Appeals of Colorado. June 14, 1897.)

APPEAL—BY PREVAILING PARTY.

A party cannot appeal from a judgment in his own favor because of the inadequacy of the relief thereby granted; his remedy being by writ of error.

Appeal from district court, Arapahoe county.

Action by Levi Booth against the Domestic Water Company. From a judgment in his own favor, plaintiff appeals. Dismissed, and docketed in error.

A. S. Blake, for appellant.

THOMSON, P. J. The appellant brought suit against the appellee to recover damages for the alleged wrongful diversion by the appellee of water belonging to the appellant. Equitable relief was also prayed. The case was tried by a jury, who returned a verdict in the plaintiff's favor for \$2,000. A motion by the defendant for a new trial was denied, and the court rendered judgment in favor of the plaintiff for the amount of the verdict and for his costs. Afterwards a motion by the plaintiff for injunctive relief was denied, and thereupon the plaintiff prayed an appeal to this court, which was allowed upon condition that he file within 90 days an appeal bond in the penal sum of \$300. In due time the bond was filed and approved, and the record lodged in this court. It is this record that we are now asked to review. The only judgment rendered in the case was in the plaintiff's favor. The right of appeal is statutory, and can be exercised only by the party against whom the judgment is rendered. An appeal bond is conditioned for the payment of the judgment, costs, interest, and damages in case of the affirmance of the judgment, and consequently there can be no appeal by the party recovering judgment. If the prevailing party has not obtained all the relief to which he considers himself entitled, he can have the judgment reviewed here only by writ of error. An attempted appeal where the statute authorizes none confers no jurisdiction upon this court, and any judgment it might undertake to render upon the merits of the controversy would be void. *Hall v. Mining Co.*, 6 Colo. 81; *Vallette v. Smelting Co.*, 11 Colo. 204, 17 Pac. 509; *Fischer v. Hanna*, 21 Colo. 9, 39 Pac. 420. It is provided by the Code that whenever the appellate court shall dismiss an appeal for lack of jurisdiction to entertain the same, if it appears that the

court would have jurisdiction if the action had come up on writ of error, the court shall order the clerk, without additional fees, to enter the action as pending on writ of error, and thereupon all the proceedings shall be such as if the action had been originally brought to the court on writ of error. *Sess. Laws 1893*, p. 80. The appeal will therefore be dismissed, and the clerk ordered to enter the cause as pending on writ of error. Dismissed, and docketed on error.

RICE et al. v. ROSS.

(Court of Appeals of Colorado. June 14, 1897.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE—OBJECTIONS WAIVED—RECORD—BRINGING UP EVIDENCE.

1. In an action tried without a jury, the judgment will not be disturbed on appeal where the evidence is conflicting.

2. A judgment will not be disturbed because of variance, though defendants objected to the evidence on that ground, where they did not allege surprise or ask a continuance, but proceeded with the trial, and introduced evidence to support their defense.

3. Where parties on appeal insist that the judgment is not supported by the evidence, the evidence must be presented in its entirety, and not in the form of a running statement of the substance thereof.

Appeal from Boulder county court.

Action by S. L. Ross against John Rice and Catharine Rice to enforce a lien on a mine for labor. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Chas. M. Campbell, for appellants. Richard H. Whiteley, for appellee.

BISSELL, J. The successful prosecution of this appeal must, in the end, depend on our view of the weight and strength of the testimony, and our conviction that the case so stands as to permit us to assert our opinion against the judgment of the trial court. The case was tried without a jury. The finding was for the plaintiff, and was rendered on conflicting testimony. There is evidence to support the decree, and, under the practice which prevails in this state, we may not, save under exceptional circumstances, assert our opinion against that expressed by the judge who heard the witnesses. The suit was brought by the plaintiff to enforce a mechanic's lien filed by him against the Colorado Mine, in Boulder county. The complaint alleged a hiring and an agreement to pay wages, set up the labor performed by the plaintiff and various assignors, from whom the plaintiff acquired title to their claims for work performed on the same property. It also contained a copy of the lien and whatever allegations were essential to maintain the suit. During the trial many witnesses were offered on both sides as to the terms of the agreement of hiring, and tending to show sundry and divers declarations on the part of the plaintiff and the defendants, which were more or less corroborated.

tive of their respective contentions. The contract was somewhat peculiar in its terms, but substantially it was that the parties should go to work on certain specified parts of the property, and do certain designated work. The defendants were to have the privilege of paying the parties, for their labor, \$3 per day, or were to give them a written lease on the property on the 1st of June following the employment for a term of six months. The performance of work, the refusal of the defendants to execute a lease at the time named, and the subsequent demand for the payment of the sum due under the wage part of the contract, were proven. The testimony was conflicting, and on it the court could have found either that there was no agreement to pay the stipulated sum of \$3 per day, and that the parties in reality were working under a parol license or lease, having the right to the ore which they might extract, or he, on the other hand, could conclude that the plaintiffs maintained their contention, and the defendant's promise was to pay them \$3 a day, unless he should elect to execute the lease on the 1st of June. It is conceded that no lease was executed, and it therefore follows, if the plaintiff's claim was accepted, that he was entitled to recover \$3 per day for the labor performed by himself and his assignors. The case need be no further stated. The real controversy is apparent from this short history of the transaction.

The errors complained of exhibit the force of the suggestion that the appeal turns on the weight and sufficiency of the proof. The appellants urge a variance between the complaint and the evidence, the plaintiff's failure to establish his right to a lien, because he proved no contract to labor either for himself or the others on whose behalf the suit was brought, and because by the evidence it was made clear that the parties were lessees, and therefore without a right to this particular remedy of lien. If the appellants' contention was accepted as true, and it was conceded the evidence supported it, the plaintiff had no cause of action on the lien which he filed, because there was a failure to establish a contract between him and the defendants. Manifestly, this question is very simply solved by the reply that the court found otherwise, and found that the parties were hired for a wage, definite in amount, and specific in the time during which it was to be earned, and only contingent on the exercise by the defendants of the power to make a lease under the right which had been reserved. The court found from the testimony that the lease was not made, and there was a contract to pay the wages which had become due because of this refusal. The error is consequently unavailable, unless we accept the appellants' contention that the evidence clearly demonstrates the contract was not one of hiring, but was one of lease. While we concede there is much conflict in

the testimony, and as it is exhibited in the bill of exceptions that the court could have found either way, we must, on this conflicting testimony, accept the decree of the court, as supported by sufficient proof to sustain the judgment.

The appellant likewise insists there was a variance between the complaint and the proof, because the complaint alleged a contract, and the evidence showed a contract which was not absolute, but contingent, and this variance should defeat the plaintiff's recovery. There are several answers to this contention. The variance worked no hardship to the appellants, for, although they objected to the testimony on this ground, they alleged no surprise, did not seek a continuance of the case for that reason, but proceeded with the trial of the cause, and introduced their evidence to support their theory of the contract. Variances are seldom fatal under our practice, and, while the rights of parties are abundantly protected by the rule which prevails, they must pursue it, in order to be entitled to any relief because of the disagreement between the pleadings and the proof. *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Railway Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76.

The position assumed that the plaintiff could not maintain the lien because he was a lessee may be accurate, but, like the other proposition, it is entirely dependent on the evidence. The court found there was no lease, but a contract of hiring. Having so found, it is needless for us to inquire whether, under any circumstances, either of contract or lease, a lessee has a right to this peculiar remedy. The record is presented to us in such shape that we should in no event feel at liberty to disagree with the trial court concerning the evidence, its force and effect. There is a bill of exceptions exhibited and substantially presented by the abstract. This bill of exceptions, however, does not contain the testimony as it was given by the witnesses. In fact, it is but a running statement of the substance of what the witnesses testified to, prepared by counsel, and evidently does not exhibit the evidence in its form and effect. Under these circumstances, we should hardly regard ourselves at liberty to assert a judgment concerning it. Wherever parties insist that the judgment is not supported by the evidence, it must be presented in its entirety, that we may see it in all of its aspects, be able to appreciate its force and significance, with all the limitations which surround the statements which are actually made by the witnesses. A bill of exceptions is always taken most strongly against the party excepting, and no intendment can be made in his favor. *Webber v. Emmerson*, 3 Colo. 218; *Dawson v. Williams*, 37 Neb. 1, 55 N. W. 284; *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305; *Railway Co. v. Wyrnant*, 134 Ind. 681, 34 N. E. 569. The evidence which a witness gives is frequently very much il-

illustrated by the questions which are put to him, and to which what he states may be replies. Where we are unable to see either questions or answers, or the testimony in its entirety, we may not, under any rule of practice with which we are familiar, undertake to disturb a judgment because it is unsupported by the testimony. A bill of this description is doubtless all that is sometimes necessary to raise questions of law, and, where it appears the testimony has been given tending to support certain facts, this alone is ample to enable the court to determine whether the case was correctly tried, whether the court observed the rules of evidence, and whether it kept within legal bounds in reaching its determination; but where, as in this case, we are called on to hold that a judgment is unsupported by the testimony, such a bill of exceptions will not subserve the purpose. So far as we are able to discover, there is evidence enough in the record to support the court's conclusions. The parties were entirely at variance in their statements. The judge who heard them, saw their manner, and had full knowledge of the entire case, is by far the most competent person to determine the controversy. There are no errors urged which, in our judgment, are sufficient to call on us to reverse the case, and it will accordingly be affirmed. Affirmed.

BOARD OF COM'RS OF ARAPAHOE COUNTY v. HALL.

(Court of Appeals of Colorado. June 14, 1897.)

COUNTY TREASURER—EMOLUMENTS—INTEREST ON
ILLEGAL DEPOSITS—AGREED STATE-
MENT—SCOPE.

1. The "fees, commissions, and emoluments" of a county treasurer's office, out of which alone his salary can be paid (Laws 1891, p. 307, §§ 10, 17), are not confined to the statutory charges for services, but embrace all legitimate income of the office.

2. Such emoluments do not include interest on money deposited by the treasurer without the consent of the county commissioners, as Act April 17, 1880, §§ 3, 4, forbids, under penalty, the deriving of benefit by any officer from the deposit of public funds in his charge.

3. Under an agreed statement that interest so received was deposited by the treasurer in the county fee fund, and that the contention of the commissioners is that it should be deposited in the general fund so as not to be available for salary, the question whether such interest, because of the invalidity of the contract therefor, belongs to the treasurer, and not to the county, will not be considered.

Appeal from district court, Arapahoe county.

Action by the board of county commissioners of the county of Arapahoe against Frank Hall. There was judgment for defendant on an agreed statement, and plaintiff appeals. Reverse.

Goudy & Twitchell, for appellant. Greeley W. Whitford and D. V. Burns, for appellee.

WILSON, J. It appears, from the agreed statement of facts upon which this cause was

submitted in the trial court, that defendant, Hall, is, and has been, since January 1, 1896, county treasurer of Arapahoe county; that the moneys belonging to the county, and which came into his hands as such treasurer during the year 1896, were by him deposited in various banks in the city of Denver, under contracts with them to pay interest thereon at a stipulated rate; that under such contracts he received during such year, as interest, the total sum of \$5,212.27; that he placed such interest to the credit of the county treasurer's fee fund on the books of his office as county treasurer, and has used the same in payment of his salary, and that of his deputies and assistants; that the board of county commissioners refused to approve such action, and demanded that such interest be placed to the credit of the county general fund, and be not used in the payment of such salaries, or any of them; that the fees, commissions, and emoluments of the office were not, for said year 1896, sufficient to pay the salary of the treasurer, and of his deputies and assistants actually necessary for the transaction of the business of the office, without the use of such interest money as a part of the fee fund, and that, even with such interest included, such fee fund was overdrawn to a small amount. The county instituted this suit for the recovery of such interest money so received and paid out in salaries, and upon trial judgment was in favor of the defendant. From this the county appeals. There is no charge whatever of misconduct or bad faith against the treasurer, nor is any question raised as to his right to make the contracts with the banks, nor as to any misappropriation of the money, if it could be properly credited to the fee fund. Neither is the ownership of the interest money in dispute, it being admitted by the defendant, and being at all times so treated by him, that it was the property of the county.

It is conceded that the sole question to be determined by this court is: "Are the moneys received by a county treasurer in this state, as interest upon county funds deposited by him under contracts made by him with the banks in which the same are deposited, applicable to the payment of his own salary and the salaries of his deputies and assistants?" Section 15 of article 14 of the constitution is as follows: "For the purpose of providing for, and regulating the compensation of county and precinct officers the general assembly shall by law classify the several counties of the state according to population, and shall grade and fix the compensation of the officers within the respective classes according to the population thereof. Such law shall establish scales of fees to be charged and collected by such of the county and precinct officers as may be designated therein for services to be performed by them respectively, and where salaries are provided, the same shall be payable only out of the fees actually collected in all cases where fees are prescribed. All fees, perquisites and emoluments above the amount of such salaries shall be paid into the county treasury." Under this

authority, at the legislative session of 1891, an act to provide for the payment of salaries to certain officers was passed and approved. Sess. Laws 1891, p. 307. Sections 10 and 17 of this act, so far as applicable to the matters in issue in this suit, read as follows: Section 10: "The county treasurers of the several counties in this state shall receive as their only compensation for their services an annual salary, to be paid quarterly out of the fees, commissions and emoluments of their respective offices, and not otherwise, to wit: In counties of the first class, the sum of five thousand dollars." Section 17: "Deputies and assistants may be employed by the sheriffs, county clerks, county treasurers, and county assessors under the direction of the board of county commissioners for said counties respectively, and shall be paid salaries out of the fees, commissions and emoluments of the office wherein employed, (except employés of county assessors, who shall be paid out of the county treasury,) to be fixed by the board, the selection of said deputies and employés to be made by the officer authorized to employ them." It is contended on behalf of the county that the fees, commissions, and emoluments of the treasurer referred to in the statute, and from which the salaries of himself, deputies, and assistants may be paid, are such as are fixed by the statutes regulating his fees; that such "fees, commissions, and emoluments," as the words are there used, include only such charges as he is allowed to make for services rendered; that the interest money in question was not received by him on account for services rendered, and therefore is neither a fee, commission, nor emolument. It is further urged that the contracts by which the interest money was received by defendant were within the express inhibition of the statute (Sess. Laws 1889, p. 208), and that, by the terms thereof, he could not derive any benefit or advantage therefrom, directly or indirectly; that such interest belonged absolutely to the county by virtue of such statute, and that it could not properly be credited to the fee fund, for the reason that thereby the treasurer would receive a direct benefit, being permitted to draw thereon for the payment of the salaries of himself and assistants; that it was not an "emolument," within the intent and meaning of the statute. It is claimed by defendant that the interest received was an emolument of the office, and that hence he had a clear right to apply it to the payment of the salaries of himself and of his employés.

In the interpretation of a statute, it is a fundamental rule and an indispensable requisite to first inquire what object was sought to be accomplished by it. The intent of the statute is the law, and general words may be restrained to it, and those of a narrower import may be expanded to embrace it to effectuate that intent. Suth. St. Const. § 218; End. Interp. St. § 73; *People v. May*, 9 Colo. 85, 10 Pac. 641; *Rogers v. People*, 9 Colo. 455, 12 Pac. 843; *Carlisle v. Car Co.*, 8 Colo. 327, 7 Pac. 164; *Omar v. Soper*, 11 Colo. 383, 18

Pac. 443; *Murray v. Hobson*, 10 Colo. 72, 13 Pac. 921. Prior to the passage of the salary act, above referred to, officers were permitted to appropriate and convert to their own use all fees, commissions, perquisites, and emoluments received by them while holding their respective offices. Under this system, the receipts of officers, in some instances, might amount to very large sums in the aggregate, and thereby enable them to receive, as compensation for their public services, amounts vastly in excess of the value of those services. Every fee, commission, perquisite, or emolument attached to a public office being essentially a tax, this condition of affairs would entail a needless and onerous burden upon the people. It was also a matter of public notoriety and common belief, founded on substantial reason, that the allowance of excessive compensation to public officials tended to produce political corruption, and encourage the perpetration of frauds at elections. The chief object of the salary act was to guard against and prevent these evils. To accomplish this purpose, the statute fixed a specific salary for each official, payable only out of the fees, commissions, and emoluments of his office. It treated all such fees, commissions, and emoluments of the office as the money of the county, requiring them to be paid to the county treasurer, and permitting them to be disbursed as other county revenues, subject only to a qualified right of property thereon of the officer paying them over, limited to the amount of his salary, together with that of his necessary assistants employed under the direction and with the consent of the county commissioners, and the incidental expenses of his office. It in effect compelled all persons elected or appointed to any of the offices specified to take it cum onere. Its evident intent was to make each office "pay its own way," by requiring the officer to look for his compensation and reimbursement for moneys expended in the conduct of his office to the fees, commissions, and emoluments thereof. If those were insufficient, he must bear the loss. The act did not offer a premium upon fraud, incompetency, or indolence by permitting the county commissioners to make up, from the public funds, any deficit in salaries occasioned by insufficient receipts of the office. In this view, we think it was clearly the intent of the legislature that all proper receipts of an office should be subject to the payment of its salaries and expenses. The words "fees" and "commissions" have each a definite and settled meaning, which is fixed by the legislature itself in the act concerning fees, adopted at the same session with the salary act. Sess. Laws 1891, p. 200. It is true, however, that sometimes an officer may be called upon to perform services in the line of his statutory duty which are not specified in the law regulating his fees, but he is not precluded from making a reasonable charge therefor by reason of this fact. *Roberts v. People*, 9 Colo.

458, 13 Pac. 630; *Garfield Co. v. Leonard*, 3 Colo. App. 376, 34 Pac. 583. The word "emoluments," as it appears in the statute in question, was clearly intended, in our opinion, to be taken in a general and comprehensive sense, so as to embrace all other proper receipts of the office not included within the terms "fees" or "commissions," as generally defined and understood. Every word in the law, whether constitutional or statutory, must, if possible, be given some meaning. *McLain v. People*, 9 Colo. 193, 11 Pac. 85; *Suth. St. Const.* § 239. The very frequency of the use of this word in the act under review absolutely precludes the idea of its having been intended to convey no meaning. To hold that "emoluments," as used and in the connection in which it appears in this statute, means any accretion, increment, gain, or profit to the office, is, we think, manifestly in accord with common sense and common usage, as well as with the established rules for the interpretation of the English language, and for the construction of statutes. We are equally clear, however, that in order to entitle an official to any benefit from an emolument to his office, which can be enforced under the law or by the courts, it must be legitimate and lawful. Even if it be not essential that it should be derived from the performance of a duty imposed or an act permitted by the statute, it must, at least, be free from the taint of violation of the law. It appears from the agreed statement of facts in this case that the interest money received by defendant accrued by virtue of contracts made by him as treasurer with certain banks in the city of Denver, upon deposits by him in said banks of "moneys belonging to said county, and which came into his hands, as treasurer of said county, during the year 1896." There is no contention that either the deposits or contracts were authorized by the county commissioners. The law nowhere makes it the duty of the county treasurer to loan out or deposit the county funds. On the contrary, it expressly prohibits the former, and also all contracts for the latter whereby any benefit or advantage, directly or indirectly, would accrue to the treasurer.

Sections 3 and 4 of an act in relation to public funds, approved April 17, 1889, and ever since in force, read as follows:

"Sec. 3. If any such officer, agent or servant shall make any contract or agreement with any person or persons, body or bodies corporate, or other association, by which such officer, agent or servant is to derive any benefit or advantage, directly or indirectly, from the deposit with such person or persons, body or bodies corporate, or other association, of any moneys or valuable securities held by such officers, agents or servants, by virtue of his office, agency or employment, such contract shall, as to such officer, agent or servant, be utterly null and void; but the person or persons, body or bodies corporate, or other association, shall be liable to the county, city,

town, township or school district where funds are deposited, in an action for the recovery of all such benefits or advantage as would, by the terms of such contracts or agreement, have accrued to such officer, agent or servant; and payment to the officer, agent or servant shall not protect the person or persons, body or bodies corporate, or other association, against an action of recovery brought by the county, city, town, township or school district whose funds are so deposited.

"Sec. 4. Any such officer, agent or servant who shall make any such contract or agreement as described in the last section of this act, or who shall receive any benefit or advantage, directly or indirectly, from the deposit of any money or valuable security held by him as such officer, agent, or servant, or over which he has control, care or supervision, by virtue of his office, agency or service, shall, upon conviction thereof, be punished by imprisonment in the penitentiary not less than one year, or by fine not less than five hundred (500) dollars." *Sess. Laws 1889*, p. 298.

Even if it should be admitted, and such appears to be unquestionably true, that it was the intention that the benefit derived from these contracts should inure solely to the county, and not to the defendant, yet the indisputable fact remains that if the interest received be credited to the fee fund, and disbursed in the payment of the salaries of himself and of his subordinates, he would receive a material, direct, and substantial benefit therefrom. But for this, neither he, his deputies, nor assistants would receive so much compensation for their services rendered. The last-cited act was in force at the time of the enactment of the statute in reference to fees and salaries at the legislative session of 1891; and it is to be conclusively presumed, in the absence of any modification, amendment, or repeal in terms or by implication, that the later act was framed in consonance with and with reference to the provisions of the former. It cannot be held that by the use of the word "emoluments," in the salary act, the legislature intended to permit the use of money so received for the purpose expressly prohibited by another act, and declared to be a penal offense. Such a conclusion would be subversive of good morals, and contrary to public policy. It is more in accord both with the reason and letter of the law to hold, as we do, that the lawmakers did not intend the word to include any gain, profit, or accretion from which the treasurer was expressly forbidden, by another statute, to derive any benefit or advantage. It follows, therefore, under the agreed facts in this case, that the interest received by defendant from the deposit of the county funds cannot be credited to his fee fund. If paid into the county treasury, it cannot be used in payment of the salary of the treasurer, nor that of any of his deputies or assistants. If these contracts for interest had been entered into by direction or under authority of the county commissioners, an entirely different question might be presented.

These views are decisive of the only question presented, or which we can consider on the record before us.

It is strenuously insisted by counsel for defendant that, if it be held that the interest earned upon deposit of county money cannot be treated as an emolument of his office, then it belongs absolutely to the defendant, and cannot be recovered in this or any other action. In support of this, they rely upon the authority of *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119, and *Gartley v. People* (decided by our supreme court at its present term) 49 Pac. 272. We are precluded, however, from considering the question of the ownership of the interest money, because it is conceded by the agreed statement of facts upon which this cause has been submitted that it is the property of the county. The defendant treated it as such, by paying it into the county treasury. The fact that he credited it on his books as county treasurer to the "fee fund" does not avoid this conclusion. This constituted a payment into the county treasury, for the accounting for which he would be held responsible, as fully and completely as if he had credited it to the "general fund." *Airy v. People*, 21 Colo. 145, 40 Pac. 362, is not similar in its facts, nor are its conclusions applicable. In that case the defendant, a county clerk, was prosecuted upon an information for failure to make the monthly reports to the county commissioners of the fees collected in his office, as required by law, and also for his failure to pay over such fees to the county treasurer. It appeared that the fees collected did not, at the time of the filing of the information, equal the sum allowed by the statute as his salary. The court held that the fees collected are the property of the officer until the amount thereof equals that of his salary; that it is only the excess or surplus of his fees above his salary which, by the constitution and the statute, belongs to the county, and which the legislature could compel an officer to pay over to the treasurer. The question did not arise, and was not considered, as to what the rights of property in the money would have been if he had paid his fees into the treasury, nor as to how he could have asserted his rights. It by no means follows from this opinion, or on principle, that, if he had paid the fees into the treasury, he would have had an absolute property right therein.

The sole question raised by the agreed statement of facts in this case is as to the proper application of the interest money received by the defendant. The whole gist and substance of the controversy is set forth in the fourth and fifth clauses of this statement, which read as follows: "Fourth. That the said Frank Hall, as county treasurer, has placed such interest so received on such bank deposits to the credit of the county treasurer's fee fund, in his office as county treasurer, and has used the same in payment of the salary of the treasurer and the deputies and assistants in his office as such treasurer. Fifth. The board of county commissioners has refused to approve such action

upon the part of said county treasurer, and has demanded that such interest so received be placed to the credit of the county general fund, and not used in payment of the salaries of the treasurer or of his deputies and assistants." It is apparent from this that the sole question submitted to the adjudication of the courts, the money having been paid into the treasury, is whether or not the money so paid in was applicable to the payment of the salaries of the treasurer and his assistants. Having answered this in the negative, we must decline to consider or express our opinion as to other questions suggested in the brief of counsel, but not raised by the record.

It is conceded by the county that no assistance was employed in the office of defendant except such as was necessary, and that its efficiency would have been crippled but for the application of this interest money to the satisfaction of its legitimate expenses. While this condition of affairs appeals strongly to the sympathy of the individual members of the court, yet it cannot justify a usurpation by the court of legislative functions. The sole duty of this court is to interpret the law as it is found upon the statute books, in accordance with the intent of its framers, if this can be ascertained by the well-settled rules of statutory construction. It has no power to strain or vary the meaning of the statute to relieve isolated cases of hardship. The court feels it proper to say, however, that none of the facts in this case show the slightest desire or attempt, on the part of the defendant, to evade or violate any law, or to reap any personal benefit or advantage from the execution of his trust, other than that expressly given him by the statute, as he construed it. He has attempted to make his office realize all the revenue possible, and to use it for the benefit of the public. His conduct has been free from any taint of fraud. For the reasons assigned, the judgment herein will be reversed. Reversed.

KENNEDY v. PEOPLE to Use of TOWN OF LA JUNTA.

(Court of Appeals of Colorado. June 14, 1897.)

TOWNS—PEDDLERS—POWER TO TAX—VALIDITY OF ORDINANCE—PEDDLER DEFINED.

1. Gen. St. § 3312, subd. 13, authorizing towns "to license, tax, regulate, suppress and prohibit" peddlers, empowers them to exact a license as peddlers from such persons only as can be termed such in the signification of the word as there used; and hence an ordinance which attempts to enlarge such signification is to that extent void.

2. Within the statute, a peddler is a trader who carries with him the goods which he sells.

3. Defendant was employed at a monthly salary to sell goods by samples and illustrated catalogue for his principal, a merchant of T. In the town of L., as such agent, defendant delivered a sofa, and received the money for it, the order for it having been previously taken by him. He took orders from the residents of L. for future delivery, and carried his samples with him in a wagon, both being the property of his

principal. The goods were shipped to L. by the principal, and defendant delivered them. *Held*, that defendant was not a peddler.

Appeal from Otero county court.

A. C. Kennedy was convicted of peddling within the town of La Junta without first having obtained a license, and appeals. Reversed.

W. B. Morgan, for appellant. Fred A. Sablin, for appellees.

WILSON, J. This appeal is from a judgment assessing a fine against Kennedy, appellant, for a violation of the ordinances of the town of La Junta, by carrying on the avocation of a hawker or peddler therein without first obtaining a license. Defendant admits that he had no license, but claims that his business was not that of a peddler, within the meaning of the law. The ordinances, so far as they relate to the questions at issue, are as follows:

"Sec. 9. Any person or persons who shall pursue the avocation of hawker or peddler within the town of La Junta without first obtaining a license therefor as hereinafter provided shall upon conviction be fined for each and every day he violates this ordinance in a sum not less than ten nor more than twenty-five dollars.

"Sec. 10. Any itinerant person who shall hawk, vend or peddle goods, wares or merchandise, household furniture, clocks, jewelry, gold, silver or plated ware, sewing machines, spectacles, drugs, nostrums, perfumes or any thing, either by delivering the goods at the time or by taking orders for the future delivery of the same, or any person who shall offer to vend, hawk or peddle any goods, wares or merchandise, or such other things as are above enumerated in any of the ways above stated, or any person who shall under color or pretense of bona fide merchants take up a temporary residence in the town of La Junta for the purpose of disposing of their goods, wares or merchandise of whatever kind whether at auction or at retail shall be deemed peddlers within the meaning of this ordinance and shall be required to procure a license to carry on said business and shall pay for said license at the rate of \$15.00 per day. All license granted under this section shall be for a specified number of days, and every applicant for such license shall state the kind and aggregate as to value as near as may be of the goods, merchandise or articles desired to be peddled; provided, however, that this ordinance shall not apply to colporteurs selling only Bibles or other religious works, and shall not include the class of men known as drummers, who solicit orders from men in business at their places of business, nor shall this ordinance apply to merchants permanently located in said town selling goods from their delivery wagons regularly sent out from their places of business to take and fill orders."

Municipal corporations are the creatures of statute, and can exercise only such powers as are expressly conferred upon them or exist

by necessary implication. *Bernheimer v. City of Leadville*, 14 Colo. 520, 24 Pac. 332; 1 Dill. Mun. Corp. § 89. Section 3312, Gen. St., specifies the powers granted to the board of trustees of towns, and the authority to license in this instance is found in the thirteenth subdivision thereof. It reads as follows: "To license, tax, regulate, suppress, and prohibit hucksters, peddlers, pawnbrokers, keepers of ordinaries, theatrical and other exhibitions, shows and amusements, and to revoke such license at pleasure." It will be seen that section 10 of the town ordinances attempts to define specifically what shall constitute a peddler. It is claimed by defendant that this definition enlarges and extends the meaning of the word beyond that in which it was used in the statute, and that in so far it is of no effect. It is well settled that the law by which a municipal body is created is to be strictly construed, and also the attempted exercise of authority under such law. If there is any reasonable doubt concerning the power, it is resolved by the court against the corporation. *Bernheimer v. City of Leadville*, supra. The legislature intended, by the subdivision of the section above quoted, to empower towns to exact a license as a peddler from such persons only as can be termed such in the signification of the word as there used. If the town council has attempted to enlarge the meaning of this word, as there used, and bring within the terms of the ordinance persons pursuing a business which could not properly be called that of a "peddler," as the word is used in the statute, such portion of such ordinance is void and of no effect. This principle is not only in accordance with sound reason, but is well settled by the adjudication of the highest courts. *Bernheimer v. City of Leadville*, supra; *City of Davenport v. Rice*, 75 Iowa. 74, 39 N. W. 191; *Emmons v. Lewistown*, 132 Ill. 380, 24 N. E. 58; *City of Chicago v. Hulbert*, 118 Ill. 636, 8 N. E. 812.

The remaining questions are: What is a peddler, within the meaning of the statute, and were the facts in this case sufficient to bring the defendant within the definition? It is a fundamental rule of construction that the legislature must have intended to use words in their known and commonly accepted signification. *Suth. St. Const.* 251. Webster defines "peddler" to be a traveling trader; one who carries about commodities on his back, or in a cart or wagon, and sells them. *Black, Bouvier, Anderson, the Century, and Worcester* all give substantially the same definition. The dominant and distinguishing idea in all seems to be that, to constitute a peddler, the trader must be one who carries with him the goods which he sells. This definition is also supported by the highest judicial authorities. *Emmons v. Lewistown*, supra; *City of Davenport v. Rice*, supra; *Com. v. Farnum*, 114 Mass. 270; *Village of Stamford v. Fisher*, 140 N. Y. 191, 35 N. E. 500; *Village of Cerro Gordo v. Rawlings*, 135 Ill. 36, 25 N. E. 1006; *Dellisle v. City of Danville*, 36 Ill. App. 660; *Com. v. Ober*, 12 Cush. 495;

Higgins v. Rinker, 47 Tex. 403; 2 Beach, Pub. Corp. § 1258. The term "hawker," as formerly defined, was an itinerant trader, who, like a peddler, carried his goods with him for sale, but also attracted attention, by public outcry or placard or exposure. Now, however, the terms "peddler" and "hawker" are considered equivalent and synonymous. Abb. Law Dict.

It remains to be considered whether the facts of this case were such as to bring the defendant within the meaning of the term "peddler" as above given. There was an agreed statement of facts at the trial, and from this we gather that defendant was the agent of a mercantile company doing a wholesale and retail business at the city of Trinidad, in this state; that his employment consisted in selling goods for the company by samples and illustrated catalogue, for which he received a stated monthly salary; that, as such agent, he solicited orders for the future delivery of merchandise in the town of La Junta, and about May 17, 1895, as such agent, delivered a lounge or sofa to a resident of said town, and received money therefor, the order for the same having been previously taken by him upon his showing to the purchaser an illustration of the article in a catalogue. It was also agreed that he had sold and delivered a carpet under similar circumstances. It further appears from the statement of facts that defendant took orders, as agent for said company, for future delivery from the residents of said town of La Junta, and carried his samples with him in a wagon, both samples and wagon being the property of his employers, and that the goods sold by him were shipped by his employers by railroad to the town, and there delivered by him to the person to whom he had previously sold. Upon this statement of facts, it is very clear that the defendant was not a "peddler," within the meaning of the statute, and was not liable to pay a license for the business which he carried on within the town. His avocation was, more properly, that of a commercial traveler or drummer. Certainly it was not that of a "peddler," as defined by all of the lexicographers, and as held by the great mass of authorities. The only case we can find, or to which we have been cited, conflicting in the slightest degree with this, is that of *Graffy v. City of Rushville*, 107 Ind. 502, 8 N. E. 609. The city ordinance considered in this case was made, in express terms, applicable only to nonresidents of the city, and was based upon a statute wherein the sole power granted to municipal corporations in reference to this subject was "to restrain hawking and peddling." It was held that one of the main objects which the legislature had in view by vesting such powers in cities was to permit them to protect their home merchants from competition. Under these circumstances, the court gave to the word "peddler," a more enlarged definition, thereby bringing within the provisions of the statute certain acts and an employment, which would not have constituted a peddler if the word were used in the ordinary sense in which it was usually employed. The

statute in Colorado is different from this, and there is nothing upon which an inference can be based that the legislature intended to attach to the word "peddler" any other than its usual and ordinary significance. The definition given in this opinion is that of all the recognized lexicographers, is supported by the law writers and by the decisions of the courts, without exception, unless the case from Indiana be one, and we must adhere to it. In this view of the case, the judgment was erroneous, and must be reversed. Reversed.

BOARD OF COM'RS OF OTERO COUNTY et al. v. HOFFMIRE.

(Court of Appeals of Colorado. June 14, 1897.)

JUSTICES OF THE PEACE—CHANGE OF VENUE—
JURISDICTION—APPEAL BOND.

1. Where, on application for change of venue, the justice did not transfer the case to the nearest justice, as provided by Gen. St. § 1903, the justice to whom the case was transferred acquired no jurisdiction.

2. Where a justice acquires no jurisdiction by change of venue, and defendant enters a special appearance and moves to dismiss the case therefor, and the motion is overruled and a judgment entered for plaintiff, and defendant appeals and makes no general appearance in the county court, defendant by appeal from the county court does not waive objections to the jurisdiction of the justice.

3. Where an appeal bond was signed by the board of county commissioners by "N., Chairman," it did not render N. liable thereon.

Appeal from Otero county court.

Action by E. J. Hoffmire against the board of county commissioners of Otero county, Colo., and others, to recover on an appeal bond. From the judgment of the court below, defendants appeal. Reversed.

Calvin E. Reed and Fred A. Sabin, for appellants. James Hoffmire (G. Q. Richmond, of counsel), for appellee.

BISSELL, J. This litigation was begun in an action brought by Mrs. Hoffmire, the appellee, against Otero county, before a justice of the peace, wherein she recovered a judgment from which an appeal was prosecuted to the county court, which was ultimately dismissed. In the prosecution of that appeal a bond was given, which is the subject-matter of the present suit. The bond was signed by the board of county commissioners of Otero county by John B. O'Neil, its chairman, and executed by Vroman and Washburn as sureties, who were, with O'Neil and the board, named as defendants in this suit. Suit was begun before a justice of the peace, J. W. Douthitt, whose office was in La Junta. After service of summons, and presumably on the appearance day, O'Neil, who was the chairman of the board of county commissioners, who were defendants in the suit, filed an affidavit under section 1903 of the General Statutes, alleging the prejudice of the justice, and demanding a change of venue. On the filing of the affidavit, Douthitt trans-

ferred the case to C. M. Robins, who lived in Rocky Ford, some 10 miles away. When the cause reached Robins, the defendants—appearing specially for the purpose, and making no general appearance in the suit—filed a motion to dismiss the case because Robins was without jurisdiction. With this motion they filed a showing that F. T. Moore was one of the regularly elected justices of the peace in precinct No. 6, with an office in La Junta, in close proximity to that occupied by Justice Douthitt. There was no showing per contra, save that Douthitt filed an affidavit stating that at the time he made the transfer Moore was sick and unable to hear causes. This latter fact probably is unimportant, but it was controverted by the affidavit of Moore, who made it evident that he was in his office for the transaction of business on the date of the transfer. The justice declined to dismiss the case, or retransfer it, or take any action about it, and rendered judgment for the plaintiff. Thereupon an appeal was taken to the county court, and the cause there filed and docketed, and on the incoming of the case in the county court the defendants, appearing specially for the purpose, filed a motion to dismiss it on the ground that Moore was without jurisdiction to try the cause, and that the county court must decide the question, and determine him to be without jurisdiction, and enter the proper order of dismissal and transfer to the proper court, if such order was permissible. The defendants made no appearance in the county court other than for the purposes of this motion. The county court denied it, took jurisdiction, heard and tried the case de novo, and entered final judgment against the defendants the board of county commissioners, Yroman, and Washburn, the sureties, and also against O'Neil. After the testimony was heard, and the court made its findings and ordered that judgment be entered in the judgment book, the defendants excepted to the findings and to the judgment as entered, prayed an appeal, and brought the case here.

The regularity and validity of the judgment are plainly dependent on a jurisdictional inquiry. We recognize the very great difficulty into which the appellee will be precipitated by the reversal of the judgment, but the matter has been so completely settled by adjudications of the supreme court that we are able to reach but one conclusion. The jurisdiction of a justice is purely statutory, and the proceedings must conform to the statute, and the plaintiff must see to it that he invokes the authority of the proper justice, and that his case is regularly conducted, in order to obtain a judgment which shall bind the parties and be unassailable if the case is appealed. This suit was originally begun before a justice in La Junta, and we shall assume, without inquiry, that the parties were regularly brought into court, as we are only concerned here with the regularity of the proceedings thereafter. On the return day the defendants filed a mo-

tion, under section 1963 of the statute, for change of venue. The papers were regular in form, and sufficient to compel the justice to transfer the case. This statute gives the right to any defendant, before the commencement of the trial, on filing an affidavit that he cannot have a fair and impartial trial before the justice, to have the case transferred; and it is made the duty of the officer to transmit all papers and documents belonging to the suit to the nearest justice, who is authorized to proceed as if the suit had been begun before him. This particular statutory provision has been in force ever since 1861, and in substantially its present form,—at least, in all particulars which affect this appeal. The justice made the order transferring the case to Robins, at Rocky Ford, instead of to Moore, who was a justice in La Junta, having an office within a short distance of the one occupied by Douthitt, before whom the case was brought. Whether the plaintiff made any objection or not, or suggested that the case should go to the nearest justice having jurisdiction, does not appear. Whether this be true, or the fact be otherwise, Robins acquired no jurisdiction by virtue of the transfer, and it was his duty when the case reached him to return the case to the justice from which it came. Whether Douthitt ever lost jurisdiction of the case, and whether he still has it, and the case may be continued before him, are matters about which we need not speculate, for we are powerless to make any order in the premises. As has been stated, the defendants did not submit to the jurisdiction of Robins, but immediately filed their motion to dismiss for this reason; and when they failed to appear further he took jurisdiction, and tried the case and entered judgment accordingly. Thereupon the defendants appealed the case to the county court, and promptly entered a special appearance, and moved to dismiss the case on the ground that the justice was without jurisdiction to hear and determine the cause. The motion was overruled, and the defendants took no further steps in the defense or trial of the case. There was no general appearance, either before Robins or the county court, which gave either court jurisdiction of the defendants so that they became bound by the judgment which was entered. The supreme court has decided that the defendant's rights are not at all affected by the appeal, but that, when a judgment is rendered by a justice without jurisdiction, an appeal may be taken by the defendant, and the question raised in the county court, so long as he makes no general appearance; and, if that court rules incorrectly respecting the matter of the jurisdiction of the justice, by taking an appeal from the judgment of the county court he can obtain a review, and the appellate court will pass on the question. All these questions which have been suggested have been finally and conclusively passed on. *Melvin v. Latshaw*, 2 Colo. 81; *Wagner v. Hallack*, 3

Colo. 176; *Downing v. Florer*, 4 Colo. 209; *Railroad Co. v. Roberts*, 6 Colo. 333; *Reynolds v. Larkins*, 10 Colo. 126, 14 Pac. 114. The same rule has been recognized in other jurisdictions, and it has been accordingly held, where the case was not properly transferred, and an appeal was taken from the judgment entered, that the appellate court would, upon a hearing, reverse the judgment, and send it to the court which had jurisdiction of the case at some point in its history. *Allen v. Belcher*, 3 Gilman, 594; *Baxter v. People*, 2 Gilman, 578.

Even though this jurisdictional question was out of the way, the judgment would necessarily be reversed, because it was entered against O'Neill, who was never a party to the instrument on which the action was brought. The bond was executed by the board of county commissioners through O'Neill, as its chairman, and the other two appellants, as sureties. There was nothing in the form of O'Neill's execution of the bond which made him liable thereon, and no judgment should have been rendered against him.

One or two other questions are argued, principal among which is the one respecting the sufficiency of the evidence to support the judgment. We are inclined to agree with the appellants that the proof did not warrant the recovery, but we prefer to base the reversal of the case on the other two propositions,—the lack of jurisdiction on the part of the justice, and the entry of judgment against one who was not a party to the instrument sued on. For these errors the judgment must be reversed. Reversed.

LUDINGTON et al. v. HEILMAN et al.

(Court of Appeals of Colorado. June 14, 1897.)

PLEADING—JOINDER OF CAUSES OF ACTION IN ONE COUNT—REMEDY—STATUTES—TITLE OF ACT.

1. Where two causes of action, which cannot be joined in one complaint, are united in one count, the remedy in the first instance is by motion to separate, and then by demurrer to the causes as separated, and not by demurrer to the single count.

2. The act entitled, "An act to provide for the formation of corporations," provides that, within 60 days after the 1st of January each year, the then directors of the corporation must file their reports in the proper offices, showing the amount of capital stock paid up, and the amount of the corporate debts, and that a failure to do so renders the directors who are guilty of the failure liable for the company's debts contracted within a time limited by the act. *Held*, that such provisions are germane to the subject of the act as expressed in the title.

Error to district court, Rio Grande county.

Action by Francis H. Ludington and William L. Chase, co-partners doing business under the name of the Kansas City Bag Manufacturing Company, against John B. Hellman and others. There was a judgment for defendants on failure of plaintiffs to plead further, after a

demurrer to the complaint was sustained, and plaintiffs bring error. Reversed.

Jesse Stephenson, for plaintiffs in error. Ira J. Bloomfield, for defendants in error.

BISSELL, J. The plaintiffs in error, who were doing business as co-partners under the name of the Kansas City Bag Manufacturing Company, in 1893 sold several lots of sacks and burlaps to the Monte Vista Farmers' Milling & Elevator Company. The total amount of sales was \$363.13. The goods were not paid for, and this action was brought to collect what was due. The defendants, of whom there were five, were directors of the Milling & Elevator Company in 1893 and 1894. The complaint contained all the averments necessary to a statement of the cause of action, as the plaintiffs conceived it, to make the defendants liable for the debt. It was charged that the defendants were directors in the month of January, 1893, and failed to file their report within 60 days of that date, and that the debt was contracted in the ensuing year. It also alleged a failure from that time forward to the commencement of the action to file the statutory report. The complaint also charged that these same defendants were directors of the Milling & Elevator Company in the year 1894, and failed to file their January report within 60 days from the 1st of January, 1894. There was no omission of any allegations material to the statement of the plaintiffs' cause of action as they brought it. The defendants demurred on two grounds: That several causes of action were improperly united in a single count; and that the facts stated were insufficient to constitute a cause of action. The demurrer was sustained, the plaintiffs stood on their complaint, and prosecute error to reverse the judgment.

Treating the subject inversely, the defendants insist the judgment may be supported because the plaintiffs attempted to join two causes of action in their complaint, which cannot properly be united under the Code provision regulating the joinder of actions, which is a defect that may be reached by the demurrer, and also because the act on which the suit is predicated is unconstitutional. Neither of these positions seems to us to be well taken or available. We are not inclined to consider or determine the sufficiency and accuracy of the argument on which the first proposition is supported, for we do not regard it as legitimately before us. The proposition insisted on is that since the Code only permits the joinder of causes of action of this class when they sound in damages only, and the action brought cannot technically and legitimately be held to be one sounding in damages only, therefore, if there be two causes of action, the one for the default in 1893, and the other for the default in 1894, they could not be rightfully joined in one suit. The trouble with the position is, the demurrer was for the improper union of the causes in a single count, and not for the im-

proper joinder of causes of action. As we understand it, the remedy of the defendants in the first instance was by motion to separate the two causes, and then by demurrer to the causes as separated; for it has been held that under our Code the objection that several causes are improperly joined in one count cannot be taken by demurrer, but must be taken by motion, otherwise it is waived. *Brewer v. McCain*, 21 Colo. 382, 41 Pac. 822. We should possibly be less conservative in the expression of our opinion but for the fact that this question was practically undetermined by the lower court, which held the suit unmaintainable because the statute under which it was brought was unconstitutional. Since this was really the question which the court decided, and whereon it entered judgment for the defendants, we are disinclined to express our views respecting the first proposition, though, in any event, what we might say would probably be obliter.

In respect to the unconstitutionality of the statute, we are inclined to be equally brief, and to limit the opinion to a bare statement of our views in the premises, because, if the parties are aggrieved by our conclusion, the question can be presented to the court which has the final arbitrament of such matters, and a conclusion and satisfactory settlement of the constitutionality of this particular statute be secured. We are further inclined to this procedure because the statute has been in force for upwards of 20 years, many suits have been brought on it, judgments rendered and affirmed on appeal, and thus far this particular question seems not to have been suggested by counsel or considered by the courts. It may be that this is a very unsubstantial argument on which to predicate our conclusions, but we are quite of the opinion this fact shows a pretty general consensus of professional conclusion on the subject. Besides, so far as we are able to see, that question has been practically settled by the supreme court in several cases. The particular constitutional provision which compels the legislature to express the subject-matter of an act in its title has been many times before that court, and it has always reached one conclusion, which may be very succinctly expressed. It is wholly unnecessary that the title should express all the matters which the act attempts to provide for, and, wherever any matter which is contained in the statute may be said to be fairly germane to the subject-matter referred to in the title, the act will be held constitutional. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *Clare v. People*, 9 Colo. 122, 10 Pac. 799; *In re Pratt*, 19 Colo. 138, 34 Pac. 680. It is a little difficult to conceive of anything more germane to the title of this act than the statutory regulation respecting the organization and conduct of corporations. The title of the act is, "An act to provide for the formation of corporations." It only embraces one subject, and the only inquiry is whether the particular provision under consideration is germane to that subject. The statute under

which the action is brought provides that, within 60 days after the 1st of January of each year, the then directors of the corporation must file their reports in the proper offices, showing the amount of capital stock paid up, and the amount of the corporate debts, thereby disclosing to the public who may deal with them the general financial condition of the corporation. A failure to comply with the statute renders the directors of the company who are guilty of the failure liable for the debts of the company contracted within a time limited by the act. We are quite unable to see why this matter is not a legitimate and necessary part of the act providing for the formation of corporations. The act provides the way in which corporations shall be organized; the persons by whom its affairs must be conducted, and their qualifications; prescribes their duties, and imposes penalties for a failure to perform these duties; and why this is not germane to the subject of the formation of corporations we are wholly unable to discover. A very fine distinction is attempted to be drawn between the formation and the regulation of corporations, but the organization of these bodies is subject to certain conditions, and their corporate existence is dependent on the performance of sundry and divers acts. All these matters are really part and parcel of the plan devised by the legislature for the formation of these bodies, are conditions of their existence, and conditions also on which they are permitted to continue their corporate existence, with the rights, powers, and exemptions which the statute confers. Our views in this particular receive substantial support from a very recent case in the circuit court of appeals (*Tabor v. Bank*, 10 C. C. A. 429, 62 Fed. 383). On the record as it stands, the district court erred in entering judgment for the defendants upon the demurrer, and it will be reversed and remanded. Reversed.

CITY OF DENVER v. BURNETT.

(Court of Appeals of Colorado. June 14, 1897.)

APPEAL—REVIEW—EVIDENCE IN RECORD.

In an action against a city for compensation for services as a policeman for a year, a judgment for plaintiff is without the support of sufficient evidence where the bill of exceptions, though purporting to contain all the evidence, preserved no evidence respecting the compensation to which such officers were entitled under the ordinances, nor anything showing that the prerequisites of an appointment had been complied with, and such action taken by the police board as might establish a contract between the city and the plaintiff, and where it appeared that plaintiff had not served as such officer, or offered to do so, since the day on which he qualified, and was shortly afterwards informed that he had not been appointed.

Appeal from district court, Arapahoe county.

Action by M. M. Burnett against the city of Denver. From a judgment in favor of plaintiff, defendant appeals. Reversed.

F. A. Williams and G. Q. Richmond, for appellant. C. L. Dickerson and Addison A. Hopkins, for appellee.

BISSELL, J. We entertain such grave doubts about the right of the plaintiff to recover that we do not hesitate to reverse the case chiefly because the record does not exhibit sufficient evidence to support it. Burnett brought suit against the city of Denver to recover pay as a policeman for the period between the 8th of May, 1894, and the 8th of May, 1895, in the sum of \$930, which he alleged was the compensation payable to a policeman at that time. The construction of the answer is such as to amount to an admission that the plaintiff would have been entitled to such wages had he been employed by the city and performed services during that period. The circumstances of the appointment are very peculiar. The plaintiff gave evidence tending to show that in the month of May, 1894, he made application to the fire and police board of the city of Denver for employment as a policeman, and that his application was pending before the board on the 7th of May. He offered evidence tending to show his engagement as an officer. To establish this part of his case, he testified that after his application had been presented he was informed by one of the members of the board that he had been appointed, and was instructed by that member to take the oath of office which is prescribed by the ordinance and statute, which he did, and to report for duty. Acting under this instruction, he took the oath before a judge of a court of record, and thereafter presented himself at the police office in the city hall, was given a key and a star, and detailed for a special duty that afternoon. Very shortly after he entered on his work, he was informed by some one, apparently in authority, that there was a mistake respecting his appointment; and he was called on to surrender his key and star, and thereafter performed no service as an officer. This evidence did not establish an employment or an appointment, and two members of the fire and police board as it was constituted in 1894 were produced as witnesses to give evidence concerning it. The city promptly objected to parol testimony respecting the matter; insisted that appointments were matters of record of the police board, and that the record was the sole and conclusive evidence of them. The plaintiff recognized the obligation to produce the ordinances relating to the payment of policemen to show the amount to which he would have been entitled had he worked, and which he was entitled to recover as damages for the alleged breach of contract, and the city agreed that the city ordinances as well as the record should be admitted in evidence. This is the only embarrassing feature of the case, because one of the principal points on which the case is to be reversed is the absence of any proof in the record which

might possibly show the compensation to be as he claimed it, the prerequisites of the appointment to have been complied with, and due action taken by the board which might possibly establish a contract between the city and the plaintiff. We are unable, however, to discover in the bill of exceptions any preservation of this testimony which the plaintiff was bound to offer, and did attempt to produce. If the bill of exceptions did not purport to contain all of the evidence, and did not so recite, we might indulge in the presumption that there was enough competent testimony to support the judgment, and therefore accept the finding as conclusive. The plaintiff accepted the bill of exceptions as prepared. It was signed by the judge, and contains nothing on this subject. Neither the ordinance nor any of the ordinances are produced, nor is the record, or any part of it, contained in the bill of exceptions, although there is a quasi recital by the clerk of what possibly were the contents of the record respecting the same. We cannot, however, find any copy of any resolution offered by any member of the board, or acted on by the board as a whole, any vote taken, nor anything else to indicate that the board, as such, took such action as would result in the appointment of Burnett to the position. When the book, which we may assume was probably the record of the acts of the fire and police board, was produced by the clerk, it appeared that the name "Burnett" was on the list of men who were acted on by the board on that date; but the initials were E. J., and not M. M., which latter were the initials of the plaintiff. It would appear from the testimony that there was some erasure on the book, and the initials originally there had been scratched out, and others inserted. We are left very much in the dark as to the circumstances under which this erasure was made. The court held that, since the record showed evidences of erasure, it could not be taken as conclusive; and he admitted the testimony of the two members respecting the circumstances under which it was done, which tended to prove that the board intended to appoint M. M. Burnett, and not E. J. We do not quite agree with the theory which the trial court adopted with reference to this record, as we are able to gather it from the bill of exceptions. It does not necessarily follow, because there was an erasure, that the record is not the only legitimate evidence of the appointment of a policeman. The record may not import the absolute verity which it would had it remained unaltered, and it may possibly have been the subject both of attack and of explanation, but we are quite unable to see how this fact renders the testimony of the two members of the board either satisfactory or conclusive respecting the board's action in making the appointment. One of the members testified that the man he voted on was M. M., but that when the record came to be made up, which seems to

have been on the same day, some other member remarked that it was a mistake, and the initials were changed and the name corrected. The board then, as an entirety, approved the proceedings, and accepted the record as amended; so that there is no evidence to show that the record as it stands does not exhibit the action which the board took with reference to the appointment of a Burnett on the police force. The members who testified, as well as the one who was absent, assented to the correctness of the record, concurred in the change, and the record stands as showing the appointment of E. J. Burnett, and not of the plaintiff, M. M. In the absence of any countervailing proof, this record would clearly demonstrate that the plaintiff had never been appointed, and, barring an appointment, his action must fall. The evidence which the members offered was not exact to show that in point of fact the vote was taken on M. M. Burnett, and not on E. J., and that this was the action of the board, which ought to control over the record. We do not intend to be understood as deciding that if the record, in its present shape, be absolutely contradicted by the members, and it is by their testimony established the vote was on M. M., but it was incorrectly entered on the book, this might not be sufficient to make out a case for the plaintiff. Our embarrassment in this particular comes from the fact that we are unadvised as to what the ordinance may be, or what the regulation is, which provides for the appointment of policemen, nor what action the fire and police board must take in order to make a valid appointment. Those matters are not before us. Doubtless there is an ordinance on the subject, and possibly the action of the board, in the absence of a record, would be enough for the purpose. Since we are quite of the conviction the record is in other respects defective, we are not at liberty to assume the regularity of the plaintiff's appointment, to the extent of making the city liable on the contract. If the plaintiff desired to make a case other than that which would be made by the production of the record itself, he was bound to show a vote or resolution of appointment. There was no proof of a vote, the adoption of a resolution, or any action by the board which would show a contract between the parties. The case is not supplemented by the proof which the plaintiff gave of the statement made to him by a member of the board that he had been appointed. A verbal notification by one member of the board, where the power of appointment rests in a board, cannot be enough to establish a contract whereon the plaintiff may recover.

The case is defective in other particulars. We are unable to see that there is any admission in the answer that the appointment, if made, would be for a year, whereby the plaintiff, if employed, would have a right of action on a contract, and a right of action, in case of a breach, for his wages for the

time. There is no proof of a resolution ordering an appointment for that time, nor anything in the proven statement of one of the members that the appointment was for a year. Manifestly, to entitle the plaintiff to recover a year's wages he must show a contract for that time, or the rendition of services. We are quite aware of the general rule which prevails in actions on contracts to employ for a definite period. The rule was definitely stated in *Reduction Co. v. Cook*, 7 Colo. 569, 4 Pac. 1111. Where a contract is once established, the party is entitled to recover damages, and the general measure is the agreed wages for the term. Proof of the contract, the agreed compensation, and the breach makes out a prima facie case; and it is incumbent on the defendant to mitigate those damages, if he may, by showing that the plaintiff has secured labor elsewhere, or might have done so by being reasonably diligent in that matter. While this obligation rests on the defendant, the city made no effort in that direction, perhaps relying solely on the lack of evidence of the appointment. It is so exceedingly probable that the plaintiff did not remain idle for an entire year, and was not entitled to recover a full year's wages by reason of the breach alleged, that these defects in the plaintiff's proof are given greater prominence than perhaps might ordinarily be the policy of an appellate court, and they are given all the weight to which they could be entitled.

We are not at all clear the plaintiff could recover without proof of a demand of performance. There is no evidence in the case showing a discharge by any one in authority, or having the right to relieve the plaintiff if he had been properly employed; nor do we discover any evidence that the plaintiff afterwards tendered his services to the proper authorities, and offered to perform the duties during the time which elapsed between the alleged discharge and the expiration of the year. The record contains no evidence to show that he offered his services, or attempted to carry out his contract, or at the end of the year made demand upon the proper authorities for his compensation. There was some evidence offered by the plaintiff that he sent a bill to the succeeding board, but what the bill was, what it covered, its form, or whether there was any demand other than a bill, or any offer of service by the plaintiff, is left undisclosed. These matters are suggested, rather than stated as a basis of the decision, because on the subsequent trial the difficulties which the court has found in ascertaining the rights of the parties from the evidence has led us to suggest what the plaintiff ought to do, so that, if he obtains judgment, there will be a basis on which it can be affirmed. This case does not come at all within the rule we have often declared, that we will not interfere with the judgment of a trial court because the evidence is insufficient to support the verdict or judgment.

That rule is always applied in cases where there is a conflict in the testimony, and where there is enough in the record to justify the court in finding for the plaintiff. Where there is sufficient proof made by the plaintiff to warrant his recovery, accepting it in its entirety, and whatever conclusions the trial court has a right to draw therefrom, we do not, except in rare cases, disturb the judgment. Wherever, however, on the whole case as made, the plaintiff is not entitled to recover, this general rule is no obstacle to a reversal. The plaintiff not having made out a case which entitled him to judgment, what was entered will be reversed, and the case sent back for a new trial. Reversed.

BOE v. LYNCH.

(Supreme Court of Montana. June 30, 1897.)

EVIDENCE—SUFFICIENCY.

Though juries are judges of the credibility of witnesses, yet where positive and direct testimony is undisputed and uncontradicted, and no improbability or inconsistency is apparent in it, or disclosed by other facts or circumstances, and the witness is not impeached or discredited, such testimony must be believed, and a verdict contrary to it should be set aside.

Appeal from district court, Flathead county; C. W. Pomeroy, Judge.

Action by Christ Boe against W. T. Lynch, Judgment for defendant. Plaintiff appeals. Reversed.

Action brought by the appellant (plaintiff) against the respondent for damages for the conversion of three head of beef steers November 27, 1893, alleged by appellant to belong to himself and one John Boe as partners doing business under the firm name of Boe Bros., and also damages for driving and molesting other stock belonging to said partnership, and claiming damages by reason of defendant's driving the stock off their usual range, and turning them out, so that they became lost, and eight head died, and appellant was put to great trouble and expense in hunting for the same. The respondent denied the partnership, and justified as a constable under an execution, in the case of *Heideman v. John Boe*, against the property of said John Boe, and stated in his return on execution that he sold the property of John Boe. Verdict for defendant. Motion for a new trial overruled. Plaintiff appealed.

W. N. Noffsinger, for appellant.

HUNT, J. (after stating the facts). For ground of reversal, the plaintiff and appellant relies upon the insufficiency of the evidence to justify the verdict. This raises the question of whether there was sufficient evidence to justify the finding that the property seized by the respondent as constable belonged to John Boe individually, or belonged to the partnership of Boe Bros. The plaintiff testified by deposition. In sub-

stance, his evidence was that he and his brother, John Boe, invested a sum of money in cattle several years ago in Flathead county, under an agreement that they were to share the profits and losses of the business equally, that John was to attend to the cattle, and that for his services for giving such attention he was to draw monthly wages. The firm brand was K B. John Boe corroborated Christ as to the partnership agreement, and testified that the cattle levied upon and sold were partnership property and bore the firm's brand; that upon August 2, 1894, he sold out to his brother, Christ, his interest in all the cattle formerly belonging to the firm. The written instrument of conveyance was put in evidence. On cross-examination he said that, although the property had been assessed to him at divers times, he had expressly told the assessor that it was firm property, and that his brother had actually paid part of the taxes, by remitting money. Another witness, who was apparently wholly disinterested, corroborated the evidence of both the Boe brothers as to the partnership relationship between them. All this evidence was uncontradicted. The defendant said that in November, 1893, he had an execution in his hands, issued by a justice of the peace in a case entitled *Heideman v. John Boe*; that John Boe paid the judgment after execution was issued and some cattle were seized, but would not pay the costs; and that, as constable, he thereupon released all but several head of cattle, which he sold for his costs (\$76) in serving the execution, which Boe had refused to pay when he paid the judgment. The justice testified that John Boe paid into his court the amount of the judgment against him in the case of *Heideman v. Boe*, and the costs then remaining unpaid, except the costs of the constable's levy of the execution, the correctness of which last item he disputed. This was all the evidence in the case bearing at all upon the material issue of partnership, and we fail to see any inconsistency or improbability in plaintiff's evidence which justified the jury in disregarding it as untrue. True, the jury are the exclusive judges of the credibility of a witness, but they have no right to arbitrarily disregard testimony, where such disregard is not based upon anything appearing on the trial, and because of some caprice which rests solely in their own minds. A jury is not bound to accept the testimony of a witness, where it contains improbabilities such as to afford a reasonable basis for believing it to be untrue, or where there are reasonable grounds for believing it to be false; but where positive and direct testimony is wholly undisputed and uncontradicted, and the witness delivering it is not impeached or otherwise discredited, and there is no improbability or inconsistency apparent in it, or any disclosed by any facts or circumstances throughout the case, they cannot arbitrarily refuse to believe such testimony, and find a verdict di-

rectly contrary to it, and which finds no support whatsoever in the evidence. In such a case they should believe, for the purpose of the suit, the testimony of the unimpeached, uncontradicted witness, and it is the duty of a court to set aside a verdict founded upon a disbelief of such clear and uncontradicted evidence. *Lomer v. Meeker*, 25 N. Y. 361. Juries, like judges, must exercise their judgment. Great latitude is allowed them. But the exercise of the judgment must be upon what is in evidence before them, and upon the credibility of the persons who furnish that evidence. *Elwood v. Telegraph Co.*, 45 N. Y. 549; *Engmann v. Estate of Immel* 59 Wis. 249, 18 N. W. 182. As appropriate to this subject, we quote a part of a comment of Judge Bailey, of the Illinois appellate court, in *Edler v. Uchtmann*, 10 Ill. App. 493, who said: "Juries must be governed by the evidence as it is given, bringing to its consideration, and to the determining of the facts which it tends to prove, a candid and dispassionate judgment; and they are not at liberty to reject the testimony of any witness from mere caprice, or because they may prefer the result which in that way becomes open to them." The record in this case shows no conflict in the testimony; nor do we find anything from which the jury were authorized to disbelieve the undisputed testimony offered in plaintiff's behalf. For this reason the judgment is reversed, and the cause is remanded for a new trial. Reversed and remanded.

PEMBERTON, C. J., and BUCK, J., concur.

HELENA CONSOL. WATER CO. v.

STEELE, Mayor, et al.

(Supreme Court of Montana. June 7, 1897.)

CONSTITUTIONAL LAW—LEGISLATIVE CONTROL OF MUNICIPALITIES—WATERWORKS.

1. Pol. Code, § 4800, subd. 64, providing that no municipality having a water supply furnished by private persons shall erect any water plant to be operated by itself, but, if it desires to acquire such a plant, shall purchase or condemn that owned by such private persons, is in conflict with Const. art. 12, § 4, prohibiting the legislative assembly from levying taxes for municipal purposes.

2. As applied to municipalities having contracts with private persons for water supply at the enactment of the statute, it also violates Const. art. 15, § 13, forbidding the legislative assembly to impose on the people of any municipality a new liability in respect to past transactions or considerations.

Appeal from district court, Louis and Clarke county; Henry N. Blake, Judge.

Suit by injunction by the Helena Consolidated Water Company against William D. Steele, mayor, and others, clerk and council, of the city of Helena. From a restraining order, defendants appeal. Reversed.

This is a suit by injunction. It appears from the record that on the 29th day of July, 1895, an election was held in the city of Helena by

which the legal voters of said city decided that the city might extend the limit of its indebtedness for the purpose of securing a water supply under the authority of section 6, art. 13, of the constitution of the state, and the laws passed in pursuance of such constitutional provision. At a meeting of the city council of said city, after it had been determined by said election that the city might extend its indebtedness for the purpose aforesaid, the city council, by resolution, directed the city clerk to advertise for bids for a supply of water to be furnished to, owned and controlled by, said city in accordance with plans and specifications which had theretofore been adopted by said city council. Thereafter the plaintiff water company commenced this suit to restrain the city from receiving bids for said purpose; the plaintiff contending in its complaint that it had established and was maintaining a water system in said city, and that by means of its said system the city had been for a long time furnished, and was then being furnished, with an ample supply of pure and wholesome water, and that under the provisions of subdivision 64 of section 4800 of the Political Code of the state the city was compelled by ordinance to purchase the water system of plaintiff, and had no authority to advertise for bids or to enter into any contract with any other person or persons, corporation or corporations, for a system of water supply for the inhabitants of said city. The defendants answered, and, among other things, deny that the city is prohibited from purchasing or supplying itself with another water system for the use of the city and its inhabitants by the provisions of the law above referred to or by any other law. On a hearing the court issued its order restraining the defendants from advertising for bids for a water plant to be owned and operated by the city of Helena, in accordance with the prayer in the complaint. From this order the appeal is prosecuted.

M. Bullard, H. G. & S. H. McIntire, and Too'e & Wallace, for appellants. B. P. Carpenter and Clayberg, Corbett & Gunn, for respondent.

PEMBERTON, C. J. (after stating the facts). There are a number of errors assigned in this record. The action of the court in striking out parts of appellants' answer is complained of. It is contended that the law referred to in the statement was not enacted in accordance with the requirements of the constitution. But we agree with counsel for respondent that the only question presented for our determination is as to the constitutionality of the last two provisos of subdivision 64 of section 4800 of the Political Code. We shall not, therefore, discuss any minor matters involved, but proceed to an investigation of the real issue presented. The two provisos involved constitute part of the law in relation to the legislative powers of incorporated cities and towns in this state. They read as follows:

"Provided, that whenever a franchise has been granted to, or a contract made with, any

person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof and in good faith, have established and maintained a system of water supply, the city or town granting such franchise, or entering into such contract, before taking any action for the procurement of a water supply to be owned or controlled by such city or town, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant upon such terms as the parties may agree; in case they cannot agree then the said city or town may proceed to acquire the same under the laws relating to the taking of private property for public use."

"Provided, that no city or town having a water supply furnished by private parties, under a contract or franchise entered into, or granted by the city or town, shall proceed to the erection or construction of a water plant to be operated by it, but in case the city or town shall desire to own and operate its water supply it shall acquire the plant already in operation therein as herein provided."

Has the legislature, by this enactment, undertaken to impose upon the city of Helena and its inhabitants an obligation unauthorized by the constitution, without the consent and against the will of the city council and the legally constituted authorities of the city? By the first of these two provisos it became the duty of the city, before taking action to procure a water supply to be owned or controlled by the city, to pass an ordinance notifying the plaintiff, the owner of the water supply system then in operation, that it desired to purchase the plant and franchise of the plaintiff upon such terms as might be agreed upon, and in case of disagreement the city would proceed to acquire the plant of plaintiff by condemnation proceedings. The second proviso makes it absolutely incumbent upon the city, and all cities similarly situated, to purchase whatever water plant or system is in operation and owned by any person or corporation under contract entered into with or franchise granted by the city or town, at the time such city or town decides to procure, own, or control a water system of its own. If any city or town desires to own its own water plant or system, this law requires it to purchase whatever water plant or system is owned or controlled by any person or corporation under any contract or franchise entered into with or granted by said city or town. The law compels the city or town to purchase, in one of the ways specified, whatever plant or system is so owned or controlled in said city or town by any person or corporation under any contract entered into with or franchise granted by said city or town. The city or town has no discretion in the matter. The requirements of the statute are compulsory. To purchase

such plant or system necessarily requires the city or town to incur an indebtedness. When an indebtedness is incurred by a city or town, it necessarily requires the assessment of taxes upon the property of the inhabitants, and the collection thereof, to meet and discharge such indebtedness. Is such indebtedness or obligation such a one as the state has the right to impose upon a city or town, or compel a city or town to assume without its consent? A city or town is bound to do and perform, and may be compelled to perform, certain public duties. But there are certain local and private obligations and offices which a city or town may or may not perform, and which they cannot be compelled by the state to perform. Discussing and distinguishing the questions here involved, Judge Cooley, in *People v. Common Council of Detroit*, 28 Mich. 228, says: "In *People v. Hurlbut*, 24 Mich. 44, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that, when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the state government, or assist when called upon to suppress insurrection, or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. The same doctrine was declared in *People v. Mahaney*, 13 Mich. 481, and in *Bay City v. State Treasurer*, 23 Mich. 508. It was also recognized in the statement that in the levy of taxes for purposes of general concern the municipal bodies cannot demand a right to be consulted, and their consent is immaterial. And we concur fully in the views which have been expressed by other courts in the cases to which our attention was called on the argument that, as regards duties which the people in the several localities owe to the commonwealth at large, they cannot be allowed a discretionary authority to perform them or not, as they may choose. Such an authority would be wholly inconsistent with anything like regular or uniform government in the state. But we also endeavored to show in *People v. Hurlbut* that, though municipal authorities are made use of in state government, and as such are under complete state control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. * * * We also referred in

People v. Hurlbut to several decisions in the federal supreme court and elsewhere, to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private in contradistinction to those in which the state is concerned, and which are called public, thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations. This distinction is very carefully drawn in *Bailey v. New York*, 3 Hill, 531, which concerned the New York waterworks, and also in *Small v. Inhabitants of Danville*, 51 Me. 359, *Philadelphia v. Fox*, 64 Pa. St. 180, and *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375. It is well stated by Lewis, C. J., in *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 183, in speaking of a municipal corporation as the owner of gas works. "The supply of gas-light," he says, "is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by these means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city; as much so as the houses and lands belonging to it." Upon the same question Chief Justice Breese, in *People v. Mayor, etc., of Chicago*, 51 Ill. 17, —a case involving the question as to whether the city of Chicago could be compelled without its consent to assume a local indebtedness,—said: "If the principle be admitted that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed; in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature. Can it be that the general assembly of the state, just and honest as its members may be, is the depository of the rights of property of the citizens? Would there be any sufficient security for property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation. We fail to perceive any real difference, in principle, in forcing this burden upon the city, and imposing a like burden, by the direct action of the

legislature, upon individual property owners within it, for in both cases the debt at maturity must be paid by such holders, while the accruing interest is a constant drain upon their resources. No case amid the multitude which have been cited by the relators goes to the extent of this, and, with our understanding of the constitution, no warrant is found there for such legislation. Rather than attempt to compel submission to such a law, surely, the alternative should be presented to the city, to be deprived of its corporate franchises, for cases, if such legislation is sanctioned, may arise where a city would prefer such deprivation in preference to incurring a debt which might prove greatly detrimental to their prosperity, or wholly ruinous." Judge Breese was discussing the power of the legislature to impose these local burdens or debts upon cities or towns under the constitution of Illinois, and concludes that the legislature has no such power. Section 5, art. 9, of the Illinois constitution, under which the decision referred to was rendered, gave the power to cities and towns to assess and collect taxes for corporate purposes. The provision of our constitution upon the subject is as follows: "The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes." Const. art. 12, § 4. It will be seen that our constitutional provision is much stronger, and goes much further in favor of the powers of cities and towns to assess and collect municipal taxes, than does the Illinois constitution. Our constitution says the legislature shall not levy taxes upon the inhabitants or property in any city or town for municipal purposes. It cannot be disputed that the indebtedness sought to be imposed upon the cities and towns by the legislation under discussion, without their consent, is for local municipal purposes. Nor can it be disputed that to compel the city of Helena, and other cities and towns, to assume such indebtedness against its will by this legislation, also compels the assessment and collection of taxes by the city against its will for the purpose of paying this compulsory indebtedness. Speaking of such legislation, Judge Cooley, in *People v. Common Council of Detroit*, supra, says: "The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the state at large, or any portion thereof outside the city limits, are not concerned, the state can no more, by process of taxation, take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to state use. To this extent the

corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the state. Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify, on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish, a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reason for opposing and contesting it would be the same in each case." Upon this subject Chief Justice Breese, in *People v. Mayor, etc., of Chicago*, supra, says: "So sensibly impressed were the framers of our constitution of the liability of legislative bodies to incur debts, sometimes for objects not entirely praiseworthy or useful, and the hazards, losses, and disturbances to which they lead, that they interposed the power of the people at the very threshold to prevent this danger, to tie up the hands of the legislature on this subject, to divest it of a power which dear-bought experience has satisfied the people should not be left unrestrained. The burden imposed by this law upon a fractional part of this state is tenfold heavier than the legislature can impose upon the people of the whole state, without their previous consent, manifested by a vote at a general election. In view of this wise and salutary provision of the constitution, can it be seriously contended that the legislature can exercise the assumed power to force one and all the municipalities of the state to incur debts amounting to millions of dollars by one dash of the legislative pen, for corporate purposes, when, to meet the most urgent demands of the public, and provide for the general welfare, they cannot create a debt against the state exceeding the sum of \$50,000? The proposition is so inconsistent with the spirit and plain intention of this provision that it can receive no favor in this court. How can we hold, in view of the protection this clause was designed to give the people of the whole state, that the people of a particular municipality can be subjected to a corporate debt without the consent either of the people to be taxed or of their corporate authorities? The protection of the whole implies, necessarily, the protection of all its organized parts, and the whole cannot be secure while all or any of its parts are exposed to danger. What is the real value of this provision of the constitution, if the legislature inhibited from incur-

ring a debt beyond \$50,000 on behalf of the state may force a debt tenfold or one hundred fold greater (for there is no limit to the power) upon all the cities of the state? We can perceive none. Where these municipalities become so indebted by compulsion of the legislature, the whole state in its real and substantive, if not in its corporate, body, will in truth and in fact be the debtor, for the same power of coercion can be applied to counties and towns, and, as the state is made up of cities, counties, and towns, the whole state may thus become involved. This provision, then, would be no restriction upon the power to create a debt beyond a certain amount, and would fall of its purpose of protecting the state and its citizens from oppressive burdens. Those citizens who are to be affected by the debt should certainly have some voice in its creation, on the same principle that the people of the whole state are to express their consent, by a vote, to the creation of a debt affecting them and their material interests."

These two decisions from which we have quoted so largely, delivered by two of the ablest jurists that this country has produced, are leading cases upon the questions involved in this appeal. These two distinguished judges declare that the cases have been exhaustively argued by the best lawyers of the respective states. These cases are, in our judgment, absolutely conclusive of the one question presented by this appeal, namely, the constitutionality of the compulsory statute under which this action is prosecuted. See, also, *People v. Batchellor*, 53 N. Y. 128; 1 Dill. Mun. Corp. (4th Ed.) § 72 et seq.

It is contended by appellants that the law in question is void, because in violation of section 13, art. 15, of the constitution, in that "it imposes on the people of the city a new liability in respect to transactions or considerations already passed." At the time of the enactment of this law the city was under no obligation to buy the plaintiff's water plant. The fact that the plaintiff had established, was the owner of, and was controlling and operating, its plant under the contract with, or franchises granted by, the city, at the time of the enactment of the law, constituted no valid consideration for this compulsory indebtedness. If this constituted a consideration, it was passed. Under the contract or franchise upon which the plaintiff bases its right of action the city reserved the right to enter into contracts with and purchase water from any other person or corporation for city purposes. The city, so far as shown, has never at any time assumed any sort of obligation to purchase plaintiff's plant. It is contended that the moral obligation of the city to assume this compulsory indebtedness is sufficient to support the law and relieve it of its unconstitutionality, if it be in conflict with the constitution. But we are unable to see what moral obligation the city is under, or has ever assumed, that would bring the law under the rule contended for by counsel

for respondent. The city never agreed to continue for all time to buy water of the plaintiff. It expressly reserved the right to do otherwise. Plaintiff's plant may not be capable of furnishing an ample supply of wholesome water for the inhabitants of the city, either now or as the city may expand and increase in population in the future. The plant and system may be practically worthless. It may be so involved in debt and incumbered that the plaintiff could convey no title for any sum proportionate to its real value. To purchase the plant might so increase the indebtedness of the city as to exceed the constitutional limit, or, at any rate, so as to become ruinous to the inhabitants of the city. The city may be able to procure a water system and supply for half what plaintiff's plant would cost. Is there any such moral obligation on the part of the city disclosed in this case as would justify this court in compelling it to assume the indebtedness necessary for it to assume in order to purchase plaintiff's plant, and tax the people for the money to meet such indebtedness, in total disregard of all these possible and probable events? Shall it be said, in obedience to this law, that the city authorities, the legal representatives of the inhabitants of the city, have no discretion in the premises, but must obey, notwithstanding disaster and oppressive taxation and ruin may come upon the people as a consequence? We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above, as well as the spirit of our governmental system, which recognizes "that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government." The law is not supported by any moral obligation, but is rather a violation of law, equity, the constitution, as well as the principle of moral obligation invoked by the respondent. It violates the general rule of the law that the consent of parties to a contract is essential to its validity, whether the parties be natural or artificial persons. We are at a loss to find any theory of law, equity, or justice upon which we can conscientiously sustain the constitutionality of the statute in question. The judgment and order appealed from are reversed, and the cause remanded, with directions to dissolve the injunction and dismiss plaintiff's complaint.

HUNT and BUCK, JJ., concur.

PARROTT v. MORASE et al.

(Supreme Court of Montana. June 14, 1897.)

APPEAL FROM JUSTICE—COSTS.

On an appeal to the district court judgment against defendant was reduced more than \$10. The plaintiff did not move that the costs be divided, but filed a memorandum, including all the costs incurred in the appeal. *Held* not error to sustain defendant's motion to retax costs, and to charge plaintiff with a docket fee of \$25,—in

view of Comp. St. 1887, § 502, providing that, when judgment of a court below shall be affirmed in part, the court shall divide the costs according to the justice of the case; and section 825, providing that, if a party on appeal fails to reduce the judgment \$10 or more, he shall not recover the costs of the appeal; and section 509, authorizing a docket fee of \$25 to be charged against a party including an item to which he is not entitled in a memorandum of costs required to be filed by section 507.

Appeal from district court, Fergus county; Dudley Du Bose, Judge.

Action by G. A. Parrott against Margaret Morase and another. From an order retaxing costs and the taxation of a docket fee, plaintiff appeals. Affirmed.

This suit was originally commenced in the court of a justice of the peace in Fergus county. In that court plaintiff recovered judgment for \$52. The defendants appealed to the district court for said county. On the trial *de novo* in the district court the defendants reduced the judgment to \$35. Thereupon plaintiff filed his memorandum of costs and disbursements, in which he included and claimed all the costs incurred in both the justice and district courts, which costs were included in the judgment, amounting in all to \$57. Whereupon the defendants filed their motion to retax the costs, on the ground that plaintiff had improperly included in his memorandum of costs the costs incurred by reason of the appeal to the district court, for the reason that the defendants had reduced the amount of plaintiff's judgment more than \$10 on the appeal. The court sustained the motion of defendants to retax costs, and taxed a docket fee of \$25 against plaintiff. From this action of the court the plaintiff appeals.

Wm. M. Blackford, for appellant. Van Table & Cheadle, for respondents.

PER CURIAM. It is conceded that the Compiled Statutes of 1887 are controlling on this appeal. Sections 502, 509, and 825, Code Civ. Proc., of these statutes, are as follows:

"Sec. 502. In all cases of appeal from the judgment of probate court or justice of the peace, when the judgment of such probate court or justice of the peace shall be wholly affirmed or reversed, the party succeeding shall recover from the opposite party his costs, not only in the district court, but before the probate court or justice of the peace, and shall have his execution therefor. When the judgment of the court below shall be affirmed in part, then the court shall divide the costs between the parties according to the justice of the case."

"Sec. 509. If any party shall include in such memorandum any item to which he is not entitled, or if any clerk, sheriff, referee or other officer shall include such item in the taxed costs, and a motion to retax the same shall be made by the party against whom the same is taxed, and if such motion to retax shall prevail, there shall be taxed, as a part of the cost of such motion, a docket fee of twenty-five dollars, and judgment therefor, with the other costs allowed

by law, shall be entered against the party, sheriff, referee, clerk or other officer who so unlawfully taxed the same, and the same may be offset against any costs or judgment in favor of the party or officer so improperly taxing such costs, and against the party making such motion; or if no judgment exists, the court may direct that the party making such motion have execution therefor."

"Sec. 825. If the party appealing fail to reduce or enlarge the judgment appealed from ten dollars or more, or reverse the same in the district court, he shall not recover any of the costs of the appeal."

Section 507 of the same Code requires the party in whose favor the judgment is rendered to file with the clerk, within two days after verdict, a memorandum of costs and disbursements verified by oath.

The appellant relies chiefly upon *Hibbard v. Tomlinson*, 2 Mont. 220, for a reversal of the action of the lower court. In that case the court simply held, under what is now section 825, quoted above, that the taxing of costs was a discretionary matter with the court. The other sections quoted in the statement above do not appear to have been referred to in *Hibbard v. Tomlinson*. Section 502, *supra*, provides that, when the judgment of the court below shall be affirmed in part, the court shall divide the costs between the parties according to the justice of the case. Under this section, it became the duty of plaintiff to apply to the court for an order dividing the costs between the parties, instead of including all the costs incurred in both courts in his memorandum of costs and disbursements, and having them entered as part of the judgment. By so doing, he included in his memorandum costs to which he was not entitled. This action compelled defendants to take the necessary steps to retax the costs, and, the court having properly retaxed the costs, the plaintiff became amenable to the provisions of section 509, *supra*. The court, having held that plaintiff had included, in his memorandum and judgment, costs he was not entitled to, acted properly in taxing a docket fee of \$25 against him. The judgment and order appealed from are affirmed.

COPE v. MINNESOTA TYPE-FOUNDRY CO. et al.

(Supreme Court of Montana. June 30, 1897.)

CHattel Mortgages—Affidavit of Good Faith
—By Whom Made—Corporations—Trustees
—Action by Mortgagee—Pleading.

1. The requirement that the affidavit of good faith to be attached to a chattel mortgage not accompanied by delivery of the goods shall show the absence of parties making the same by agent (Comp. St. § 1538), is not complied with by a statement in the mortgage that a party making affidavit by agent is a foreign corporation, since the mortgage cannot be looked to in aid of the affidavit; nor does the statement exclude the idea that the corporation has a local domicile for business purposes.

2. A chattel mortgage made by "R., F., and E., composing" a certain firm, is the mortgage of

such persons individually, and hence an affidavit of the good faith thereof, made in the name of the firm, "per" such persons, is insufficient.

3. The affidavit of good faith required to be made by the parties to a chattel mortgage (Comp. St. § 1538) may be made by one named therein as a party, though he is trustee for another, without the beneficiary joining therein, where the mortgage does not disclose the trusteeship.

4. A complaint in claim and delivery by a chattel mortgagee against a prior mortgagee, whose mortgage is invalid as to third persons, is insufficient, where it shows that plaintiff's debt has matured, whereon his mortgage expired, under Comp. St. § 1542, unless renewed as therein provided, and avers only the conclusion that the mortgage was extended.

5. A complaint in claim and delivery by a chattel mortgagee against a prior mortgagee, whose mortgage is invalid against third persons, is insufficient, where it does not state that plaintiff's mortgage was filed as required by Comp. St. § 1541.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action by George F. Cope, cashier, against the Minnesota Type-Foundry Company, J. Henry Jurgens, and Lucian Eaves. A demurrer to the amended answer of defendants Jurgens and the foundry company was sustained. Judgment for plaintiff on the pleadings was entered, and said defendants appeal. Reversed.

On March 30, 1895, a chattel mortgage upon certain personal property in the city of Helena was signed to secure the payment of certain promissory notes of even date therewith. The instrument recited that it was between "James B. Ross, Albert Frank, and Lucian Eaves, composing the firm of the Ross, Frank & Eaves Pub. Co., of the city of Helena, county of Lewis & Clarke, state of Montana, parties of the first part, and the Minnesota Type-Foundry Co., a corporation of the city of St. Paul, state of Minnesota, party of the second part." The affidavit attached to it was as follows:

"State of Montana, County of Lewis & Clarke—ss.: The Ross, Frank & Eaves Pub. Co., per Lucian Eaves, Jas. B. Ross, and Albert Frank, and the Minnesota Type-Foundry Co., per F. W. Smith, agent, the parties to the foregoing chattel mortgage, being severally duly sworn, each for himself says that the said chattel mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the said mortgagor. [Signed] The Ross, Frank & Eaves Pub. Co., by Lucian Eaves, Jas. B. Ross, Albert Frank.

"Subscribed and sworn to before me this the 14th day of March, A. D. 1895. Charles R. Craig, Notary Public. [Seal.]"

This mortgage was duly filed in the office of the county clerk and recorder of Lewis and Clarke county on March 14, 1895. Subsequently, on June 25, 1895, there was appended to it, as recorded, to further meet the requirements of the statute, an affidavit made by the secretary and manager of the Minnesota Type-Foundry Company to the effect that the mortgage had been made in good faith, etc. On June 22, 1895, another chattel mortgage was executed upon the same property embraced in

the first, to secure the payment of a promissory note payable 10 days after June 22, 1895. It recited that the indenture was between "Lucian Eaves, party of the first part, and George F. Cope, cashier, party of the second part."

The affidavit to this mortgage was as follows:

"State of Montana, County of Lewis & Clarke—ss.: Lucian Eaves and George F. Cope, cashier, the parties to the foregoing chattel mortgage, being severally duly sworn, each for himself says that the said chattel mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of said mortgagor. [Signed] Lucian Eaves. George F. Cope, Cashier.

"Subscribed and sworn to before me this 22d day of June, A. D. 1895. Frank D. Miracle, Notary Public."

The record fails to disclose that this second chattel mortgage was ever filed in the office of the county clerk and recorder. On November 13, 1895, the notes secured by the first chattel mortgage having fallen due and being unpaid, the Minnesota Type-Foundry Company caused J. Henry Jurgens, as sheriff of Lewis and Clarke county, to take possession of the mortgaged property for the purpose of selling the same in pursuance of the statute authorizing such a mode of foreclosure. On the 19th day of November, 1895, George F. Cope instituted an action against the Minnesota Type-Foundry Company, J. Henry Jurgens, and Lucian Eaves. The complaint, for a first cause of action (in claim and delivery) alleged that J. Henry Jurgens was the duly elected, qualified, and acting sheriff for Lewis and Clarke county; that plaintiff was, and ever since had been, the cashier of the First National Bank of Helena, Mont., a corporation. It set forth the terms of the mortgage executed on June 22, 1895. It averred that on the 13th day of November, 1895, the note payable to said Cope, plaintiff, had become due, and that the plaintiff had acquired a right to take and sell the chattels mortgaged in the manner prescribed by law, and that on the date last aforesaid the defendant Jurgens, at the instance of the defendant Minnesota Type-Foundry Company, a corporation organized under the laws of the state of Minnesota, without the consent of plaintiff, and wrongfully, had seized upon the foregoing chattels, and took the same into his possession, and ever since had retained the possession thereof. It alleged that plaintiff, deeming the possession of said property essential to the security of the payment of his said note, had demanded from the defendant Jurgens the possession of said property on November 14, 1895, but that said Jurgens had refused to deliver up possession thereof, and continued to wrongfully withhold said property. It failed to aver that plaintiff's mortgage had ever been filed for record. For a second cause of action in his complaint, plaintiff set forth the terms of the mortgage, the default, etc., to show that he was entitled to have his mortgage foreclosed as a first lien on the property in controversy.

Among the averments was the following:

"(3) That on the 26th day of June the said mortgage was extended to the 22d day of June, 1896." Again the complaint failed to state that the mortgage had ever been filed for record. The defendant Eaves defaulted. On the 15th day of January, 1896, the Minnesota Type-Foundry Company and J. Henry Jurgens filed an amended answer to the complaint. This answer denied any wrongful seizure of the chattels in controversy by Jurgens, and denied any wrongful withholding of said property by said Jurgens. It further set forth the fact and terms of the mortgage executed on the 13th day of March, 1895, and the nonpayment of the notes secured thereby. This mortgage was attached to the answer as a part thereof, and had indorsed thereon that it had been filed for record. The answer averred that F. W. Smith, the person mentioned in the aforesaid affidavit to the mortgage, was a duly-authorized agent of the defendant the Minnesota Type-Foundry Company in the matter of the execution of said mortgage. This mortgage was relied upon as a defense to plaintiff's claim. As a further defense the answer alleged that, at the times mentioned in plaintiff's complaint, plaintiff was the agent and officer of the First National Bank of Helena, Mont., that the note was payable to him simply as the agent of said bank, and that plaintiff had no personal interest in said indebtedness, and had acted only as the agent of said bank both in reference to the taking of said note and the mortgage securing the same. It also set forth as a further defense that plaintiff had full notice of the existence of the chattel mortgage executed to the Minnesota Type-Foundry Company, and was not a subsequent incumbrancer in good faith. For a further defense it also alleged that the chattel mortgage on which plaintiff relied embraced property not included in the mortgage attached to the answer. It prayed for a foreclosure of the mortgage to said last-mentioned corporation, and that plaintiff's mortgage be declared subsequent and subservient thereto. The plaintiff thereupon demurred to the answer on the ground that the same did not state facts sufficient to constitute a defense or counterclaim. The district court sustained the demurrer, and shortly afterwards granted a motion for judgment on the pleadings. The appeal is from this judgment.

McConnell, Gunn & McConnell, for appellants. Toole & Wallace, for respondent.

BUCK, J. (after stating the facts). The affidavit of March 14, 1895, attached to the chattel mortgage executed to the Minnesota Type-Foundry Company, was wholly insufficient. At the time said affidavit was made, section 1538, Comp. St. 1887, was in force. Said section required a chattel mortgage to be accompanied by an affidavit of all the parties thereto. The section is as follows: "No mortgage of goods, chattels or personal property shall be valid as against the rights and

interests of any other person than the parties thereto, unless the possession of such goods, chattels or personal property be delivered to and retained by the mortgagee, or the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent, an affidavit of those present and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged and filed as hereinafter provided." In *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580, this section was construed, and the court held that the absence of a party to a chattel mortgage should be clearly set forth in the affidavit itself before an agent could make the oath required by the law. Appellants urge that the fact that the Minnesota Type-Foundry Company was absent from the state at the time of the execution of the mortgage sufficiently appears from the recital in the body of the mortgage that it (said Minnesota Type-Foundry Company) is a corporation of the city of St. Paul, state of Minnesota. Plaintiff's complaint also avers that the Minnesota Type-Foundry Company is a corporation organized under the laws of the state of Minnesota. But neither the recital in the mortgage nor the said averment in the complaint can avail the appellants in this contention. While it is true that the domicile of a corporation is ordinarily the state of its creation, still a corporation organized in one state can acquire a domicile in another for the purpose of transacting its business. Moreover, it was expressly held in *Hardware Co. v. Sullivan*, 7 Mont. 307, 16 Pac. 583,—and the doctrine was reiterated in *Baker v. Power*, 7 Mont. 326, 16 Pac. 580,—that the body of a chattel mortgage cannot be looked to for the purpose of supporting or explaining the affidavit thereto. These cases on the subject of chattel mortgages impress us as somewhat narrow in their construction of the chattel mortgage laws of Montana in relation to affidavits, but they have been relied upon so long that we deem it our duty to substantially adhere to them. For another reason, also, this affidavit to the chattel mortgage executed to the Minnesota Type-Foundry Company is insufficient. In *Hardware Co. v. Sullivan*, supra, a chattel mortgage was considered by the court which recited that it was between "M. and P., partners under the firm name of Maxwell & Price, parties of the first part, and H., B., S. D., and C., partners under the firm name of Hoge, Brownlee & Co., parties of the second part"; and the court held that said mortgage was executed by individuals to individuals, and that the recitals of the firm names were mere descriptiones personarum. Tested by this rule, the mortgage we are now considering was executed to the Minnesota Type-Foundry Company by

Ross, Frank, and Eaves as individuals, and not as a firm. The affidavit purports to be made by the Ross, Frank & Eaves Publishing Company, per Eaves, Ross, and Frank. It should have been made by Ross, Frank, and Eaves personally. An oath cannot be taken vicariously. A. cannot go before an officer authorized to administer oaths, and swear that B. makes affidavit to a certain condition of facts. An oath is a purely personal act. An agent may swear in behalf of his principal when the law permits it, but the oath nevertheless is his own personal act.

We shall next consider the affidavit attached to the chattel mortgage executed by Eaves to Cope, cashier. We are of the opinion that this affidavit is sufficient under section 1538, Comp. St. 1887, supra. It is true that certain language in the case of *Leopold v. Silverman*, supra (see pages 280, 281, 7 Mont., and page 584, 16 Pac.), appears to indicate a contrary view. The court said in that case: "A further defect suggested in the affidavit is this: that there is nothing in the mortgage or affidavit to show the connection of Bohm Bros. & Co. therewith, and that, although the pleadings and accompanying affidavits show that the note secured by the second mortgage includes a sum of money due to Bohm Bros. & Co., no one even pretends to make oath to the mortgage in their stead. This objection is certainly fatal. It is not even attempted to comply with the law on their behalf, and for this reason, also, the affidavit must be held to be defective." This language was used after the court had held that the affidavit under its consideration was void. It was in no wise necessary to a decision of the case, and we think was used hastily. Where a chattel mortgage between two persons does not disclose any person or persons for whom one of them is a trustee, to hold that any other person than those named therein as parties should make the affidavit required by the statute would be contrary to the spirit of the statute requiring the affidavit. We therefore hold that this affidavit to the mortgage given by Eaves to Cope is sufficient.

We decide these questions raised in reference to the validity of these two mortgages for the guidance of the court below. This case must be reversed for the following reasons: Plaintiff's complaint nowhere alleges or suggests that the mortgage on which he relies was ever filed in the office of the county clerk and recorder of Lewis and Clarke county. Section 1541, Comp. St. 1887, is as follows: "Every mortgage of goods, chattels or personal property made, acknowledged and filed as provided by the laws of this state shall thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor or subsequent purchasers or mortgagees, from the time it is so filed until the maturity of the entire debt or obligation secured thereby and for the period of sixty days thereafter. Provided, that the entire

period of time such mortgage shall be valid and binding against the creditors of the mortgagor and subsequent purchasers and mortgagees shall not exceed one year and sixty days except by a compliance with the provisions of section 1542 of this act." Considering the complaint of plaintiff and the answer together, for all that appears plaintiff had never filed his mortgage for record. If he did not, how could it be claimed that his mortgage was superior to the one executed to the Minnesota Type-Foundry Company? It in no wise appears that plaintiff's mortgage was in force, as against the Minnesota Type-Foundry Company, at the time the latter corporation caused the sheriff of Lewis and Clarke county to take the chattels in controversy into his possession. From the averments in the first cause of action, which plaintiff attempts to set forth in his complaint, it does not appear that his mortgage was valid as to any one except Eaves, the mortgagor, or a bare trespasser. There is nothing to suggest any filing thereof, or to negative an inference that it had become inoperative through lapse of time, even on the assumption that it had been filed at the date of its execution. The allegation in what plaintiff attempts to set forth as a second cause of action, "That on the 26th day of June the said mortgage was extended to the 22d day of June, 1896," is the statement of a mere legal conclusion. There was no necessity even for any denial of it in the answer of appellants. Section 1542, Comp. St. 1887, is as follows: "Every mortgage of goods, chattels or personal property made, acknowledged and filed as provided by the laws of this territory may be renewed at or before the maturity of the debt or obligation secured thereby in case such debt or obligation or any part thereof be unpaid or unfulfilled by filing an affidavit showing the date of such mortgage, the name of the mortgagor and mortgagee, the date of filing the same, the amount of the debt or obligation secured thereby, and the amount of the debt justly owing at the time of filing such affidavit or the conditions of the obligation unfulfilled, the time to which the same is extended, which time shall not exceed one year, and that such debt or obligation was neither made nor renewed or extended to hinder, delay or defraud the creditors or subsequent mortgagees of the mortgagor, which affidavit shall be subscribed and sworn to by the mortgagee before an officer authorized to administer oaths, and filed in the office where such mortgage therein described is filed, and thereupon the clerk and recorder of deeds of such county shall attach such affidavit to the mortgage therein described and note the date of filing thereof opposite the entry of the mortgage therein described in the book provided by law for the entry of chattel mortgages and thereby such mortgage shall be renewed, continue and be valid and of full force and effect upon the goods, chattels or

personal property described therein for the time stated in such affidavit not to exceed one year." Under this last-quoted section, it was incumbent upon plaintiff to have alleged a compliance with this law in order to have established any right acquired thereunder. He says his mortgage was extended. Could the court have inferred from this that said section 1542 had been complied with? We think not. It is hardly necessary to cite authorities to show that this averment is a statement of a mere legal conclusion. They are numerous. We call attention, however, to the case of *Clark v. Lineberger*, 44 Ind. 224, as clearly pointing out the reasons why such an averment should be deemed insufficient. The lower court erred in sustaining the demurrer to appellants' answer. The cause is remanded, with directions to the district court to overrule plaintiff's demurrer. Reversed and remanded.

PEMBERTON, C. J., and HUNT, J., concur.

HOLLAND v. HUSTON.

(Supreme Court of Montana. June 30, 1897.)

WEIGHT OF EVIDENCE—EXPERT TESTIMONY—CONVERSION—EVIDENCE OF DAMAGES—NEW TRIAL.

1. Where a witness testified, on an issue as to the value of certain horses, that he was then using 18 horses in his business, knew the team in question, guessed he knew pretty nearly the market value of such horses, but did not know the market value of horses, and thought the team worth \$250, it was for the jury to determine whether such contradiction detracted from the weight of his testimony.

2. In order to determine the market value of horses, it is only necessary to show what they would reasonably have brought if sold, and therefore the opinion of a witness who has had a long experience with horses is competent, though he cannot recall any particular sales.

3. Defendant admitted that the horses in question were worth \$125. At forced sale, under execution, they had brought \$180. And a witness, qualified to express the opinion, testified that they were worth \$250. *Held* that, under such conditions, a verdict for \$207.39, including interest, in an action for their conversion, should not have been set aside for insufficiency of evidence as to value.

4. A showing of newly-discovered evidence, predicated on hearsay only, and containing material contradictions, is insufficient to justify the granting of a new trial.

5. The discretion of the trial court, in ruling on a motion for a new trial, will be controlled when it appears to have been exercised without any sufficient or substantial reason.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Louis Holland against Joseph E. Huston. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Reversed.

Respondent (defendant below), a constable at Great Falls, Cascade county, Mont., by virtue of an execution in his hands upon a judgment rendered against one Olson in a justice's court, levied upon and sold two horses

as the property of Olson. The appellant (plaintiff below), on March 8, 1895, brought an action against said defendant for the conversion of these horses, claiming that they belonged to him. The complaint alleged that the value of the horses at the time of the conversion was \$300. The answer denied plaintiff's ownership, and alleged that the value of the horses did not exceed \$100. A trial resulted in a verdict for plaintiff for \$267.39. Defendant filed a motion for a new trial. The specification of errors on the motion for a new trial is as follows: Specification of particulars in which the evidence is insufficient to justify the verdict: (1) "The jury found the value of said team of horses to be \$250, whereas the only evidence as to the value of said team was the fact that said team sold at the sale for \$180, and the testimony of witness Catlin that said team was worth only \$125." Specification of errors occurring at the trial, and excepted to by the defendant: "(1) The court erred in sustaining plaintiff's objection to the following question, asked witness Holland, by defendant: 'Q. Did you know or authorize Mr. Olson to tell around the country that those horses belonged to him?' (2) The court erred in denying the following motion made by Attorney Hoffman, representing one of the parties defendant in interest: 'I move to exclude all this testimony in regard to this conversation between this witness and Catlin, and move to strike it out so far as it is inadmissible against the defendant Sam Dean.' (3) The court erred in submitting the following instruction to the jury, to wit: 'The other question is the question as to the value of the property at the time of the conversion. The defendant, in his answer, denies that the two gray geldings were of the value of \$300, but alleges, on the contrary, that each of said geldings was not worth to exceed the sum of \$50 each. If you find for the plaintiff, under that allegation of the answer, you should return a verdict of damages in favor of the plaintiff in the sum of \$100, unless you find from the evidence that the property was actually worth more than that.' (4) The court erred in instructing the jury as follows: 'The measure of damages in this case is the value of the property at the time it was levied upon, with interest at ten per cent. thereon from the time it was taken. In arriving at the value of the property, you should take the evidence of the witnesses who have testified in this case; and you are the sole judges as to the weight you give to their testimony, and you also have the right to take into consideration, as bearing upon that question (not as prima facie evidence, but bearing upon the question of value), the cost of the team, the age, size, and condition of the team at the time of the conversion.'" As another ground for a new trial, the defendant filed the affidavit of one F. B. Catlin. In this affidavit, Catlin swore that he was one of the real parties defendant in interest in the action; "that, since the

trial of said cause, he has for the first time learned that, just a few days prior to the date of the attachment of the horses mentioned and described in the complaint in said action, plaintiff, Holland, met one John Handley near the town of Belt, Montana, and then and there told said Handley that he (Holland) had traded off said horses to Peter Olson, being the said Olson mentioned in the answer, but that he had not given said Olson a bill of sale of said horses because Olson was afraid that some of his creditors would attach said horses." The affidavit further recited that Handley, after the trial, had informed Catlin of this admission on the part of plaintiff, Holland. It also contained the following statement: "Affiant says that, long since the trial of said cause, he has learned for the first time that one George Pannick will testify that, soon after the attachment of said team of horses, he met said Holland, and was told by him that he had traded with said Olson for Olson's four cayuses, and had a bill of sale to them from said Olson. Affiant says that, prior to the trial of said case, he made inquiry of B. F. O'Neal, ex-sheriff of Choteau county, and tried to ascertain the whereabouts of said Pannick, but was unable to do so." Catlin also swore therein that, previous to the trial, he had made inquiry of numerous persons in order to ascertain who was the real owner of the horses in dispute, but had been unable to obtain any information in that respect. Another affidavit was filed by defendant, in which one S. T. Clark stated that he had heard Handley tell plaintiff of the conversation between Holland and himself. In opposition to these two affidavits, plaintiff filed the affidavit of said Handley, who flatly contradicted the statements contained in the affidavits of Catlin and Clark. The court granted a new trial. The appeal is from this order.

James Donovan, for appellant. Douglas Martin and M. M. Lyter, for respondent.

BUCK, J. (after stating the facts). It appears from the record that the only substantial conflict in the evidence on the trial was as to the value of the horses. The evidence on this subject was as follows: A witness for defendant, one Catlin, admitted that the value of the horses was \$125. The amount realized on the execution sale of them by the constable was \$180. A witness for plaintiff, one Wilber, testified that, in his opinion, the horses were worth \$250 at the date the constable seized them, on February 25, 1895. The respondent contends that the only evidence to sustain the jury in finding these horses worth \$250 is that of Wilber, and that one of the reasons of the court for granting a new trial was that said Wilber was not a witness qualified or competent to testify that these horses were worth \$250. A portion of the testimony of said Wilber is as follows: "I reside at Great Falls, and my business is transfer business, in which I have been en-

gaged for a little over seven years. I think I have eighteen horses now that I use in my business. I know the team in question. I know pretty nearly, I guess, what the market value of such horses as are in controversy here was in February last in the city of Great Falls and neighborhood. I do not know what the market value of horses was. I think this team was worth \$250." There was no objection to the testimony of Wilber, but, even if there had been, it should have been overruled. It is true that he apparently contradicts himself in what he says as to his knowledge of the market value of horses in Great Falls in the month of February. It was within the province of the jury, however, to determine whether this contradiction detracted from the weight of his testimony. From the record it is apparent that both the lower court and the attorney who tried the case for defendant misunderstood the rule of law applicable to the proof of the market value of these horses. This appears in several places. The examination of one McGovern, who knew the horses (a witness for plaintiff), was as follows: "My business in the past six or seven years has been general team work, freighting, and all kinds of team work. In my freighting I have been handling heavy horses, from twelve to sixteen hundred. I have been using those horses, freighting in the vicinity of Great Falls and Fort Benton, all through this country here. I have been engaged in that kind of work since 1887. That time has been put in in Montana in and about Great Falls. Q. State what, in your opinion, this team was worth at that time. (Defendant objects to the question, because the witness has not been shown competent to know the market value of horses in the vicinity of Great Falls at that time. Objection sustained.) Q. You may state whether or not you are acquainted with the value of such a team as the team in question on February last. (Defendant objects to the question, upon the ground that it is immaterial and irrelevant. The market value is the true criterion. Objection sustained.) Q. You may state what, in your opinion, this team was worth in February, 1895. (Defendant objects to the question, upon the grounds urged in the last objection. Objection sustained.)" The rulings of the court as to McGovern's testimony, and as to the testimony of other witnesses introduced by the plaintiff for the purpose of proving value, were clearly erroneous. It was impossible to determine the exact market value of these horses in the month of February. They had not been sold. All the law required of the plaintiff was to show what they would reasonably have brought had they been sold. The rule as to what qualifies or renders a witness competent to testify as to the market value of an animal so common as the horse is not the same as the one governing witnesses who are to give evidence as to some scientific subject with which experts alone are conversant. There are few persons of common understanding in any part of this state who do not possess some general knowledge both as to the charac-

ter and value of horses in their respective localities. The subject is one made generally familiar through the experience, personal or observed, of everyday life. Therefore it requires very little to qualify and render a witness competent to testify on the subject of the value of horses in the locality in which he resides. The witness McGovern, possessing, as he did, a long personal experience with horses in and about Great Falls, was fully qualified to express his opinion to the jury as to what this team was worth in the month of February; and whether he could recall any particular sales of horses in said month or not made no difference. It was proper for the jury to consider his opinion in determining the market value of these horses.

It would seem from these rulings that the lower court entertained the view that the only manner in which plaintiff could have established the market value of these horses was through witnesses who were both expert horsemen and familiar with the transactions in horses in Great Falls during the month of February. Such a view of the law is unsound. There was testimony to sustain the verdict of the jury in this respect. Defendant admitted that the horses were worth \$125. At a forced sale under an execution they had brought \$180. And the witness Wilber, who was unimpeached and qualified to express the opinion, stated that, in his opinion, they were worth \$250 at the time they were seized. Under these conditions, the lower court had no right to set aside the verdict for insufficient evidence as to value.

The question put upon cross-examination, as to whether the plaintiff, Holland, authorized Olson to tell it around the country that these horses belonged to him, was properly excluded. No evidence had been introduced by defendant to show that Olson was the owner of the horses. The answer pleads no estoppel as to Holland. It was not suggested that Holland, by allowing Olson to have the custody of these horses, had misled any one into giving the latter credit. The court stated that it would not permit the question at that stage of the trial, and defendant made no effort to lay a foundation for the introduction of any such testimony.

It is assigned as error that the court refused to strike out the testimony of a witness as to a conversation he had had with Catlin. The court instructed the jury that the conversation should not be considered as affecting defendant. The error in the admission of it, if any, was cured by the instruction.

The instructions objected to stated the law correctly. The instruction referred to in assignment of error numbered 4 does not comment upon the evidence; it simply mentions it.

Was the showing of newly-discovered evidence sufficient to justify the court in granting a new trial? We think not. It is stated by Catlin in his affidavit that he had

learned that one George Pannick would testify to certain things. For all that appears, his knowledge of what Pannick would testify to was obtained through hearsay sources only. Moreover, there is a flat contradiction in his statement that he had learned since the trial that Pannick would testify to certain facts, and the subsequent statement contained in his affidavit that he had tried to ascertain Pannick's whereabouts before the trial. He certainly must have had reason to believe that Pannick could furnish him with some evidence if he inquired for him before the trial. A mere inquiry of an ex-sheriff of another county, however, shows no sufficient diligence for obtaining the testimony Pannick might possibly have given at the trial. Handley, who, Catlin and Clark swear, told of having had a conversation with the plaintiff, Holland, swears positively that he did not make any such statement to Catlin; and we fail to see, under this condition of affairs, wherein the defendant would have been benefited by having Handley called as a witness on another trial. An appellate court does not, as a rule, interfere with the discretion possessed by a trial court in granting or refusing a new trial; but, when it appears that such discretion has been exercised without any sufficient or substantial reason, it must be controlled. The cause is remanded, with directions to the lower court to set aside its order granting a new trial.

PEMBERTON, C. J., and HUNT, J., concur.

WELCOME v. HOWELL.

(Supreme Court of Montana. June 21, 1897.)

APPEAL—TIME OF TAKING—DISMISSAL.

Under section 1723, Code Civ. Proc., unless an appeal from a judgment rendered on an appeal from a justice be taken within 90 days after the entry of the judgment appealed from, it is of no avail, and must be dismissed.

Appeal from district court, Park county; Frank Henry, Judge.

Action brought by George Welcome against Ed. Howell under the statute of forcible detainer. From the judgment of the court below, defendant appeals. Dismissed.

W. H. Poorman, for appellant. E. C. Day, for respondent.

HUNT, J. This action was brought by plaintiff before a justice of the peace, under the statute of forcible detainer. The defendant had judgment in the justice's court. From that judgment, plaintiff appealed to the district court. In the district court, plaintiff recovered judgment, and defendant attempts to prosecute his appeal from said judgment to this court. The record, however, discloses that there is no appeal before us which can be entertained. The judgment of the district court was duly rendered and

entered July 1, 1896. Defendant's notice of appeal from the aforesaid judgment was served October 7, 1896, or more than 90 days after the judgment of the district court was entered. Section 1723, Code Civ. Proc., provides that an appeal may be taken "from a judgment rendered, on an appeal from an inferior court, within ninety days after the entry of such judgment." It appears, therefore, that this appeal was taken after the expiration of the time limited by the statute, and on that account is of no avail, and must be dismissed. *Calderwood v. Peyser*, 42 Cal. 110; *Dooling v. Moore*, 20 Cal. 142. For lack of jurisdiction, the appeal is dismissed.

PEMBERTON, C. J., and BUCK, J., concur.

MILES v. COUTTS et al.

(Supreme Court of Montana. June 21, 1897.)

MECHANIC'S LIEN—RIGHTS OF SUBCONTRACTORS—CONTRACT TO BAR LIENS.

The building contractor and the owner of a building cannot, by contract between them, deprive all other persons who labor and furnish materials in the construction of the building of their right to claim a lien thereon, without their assent.

Appeal from district court, Park county; D. J. Rose, Judge.

Action brought by A. W. Miles against A. F. Coutts and others to foreclose a mechanic's lien. From the judgment of the lower court, plaintiff appeals. Reversed.

This is an action to foreclose a mechanic's lien, brought by plaintiff, who is a material man, and claims a lien as such. The complaint is in the usual form used in cases of this kind. The answers, after denying the several allegations of the complaint, allege: "And, for a further and separate defense to the said action, defendant alleges that on the 27th day of May, 1892, the defendant Frank Henry entered into a written contract with A. F. Coutts for the erection of a dwelling house upon lots named in the complaint, by the terms of which the said Coutts was at his own cost and expense to build and erect the dwelling house mentioned in the complaint, and was to furnish all labor and material for the construction thereof at his own proper cost and expense, under the direction of Galbraith and Fuller, architects, according to certain plans and specifications mentioned in the contract." It is conceded that the building contract provided for and included the furnishing of the glass to be used in the building, for which plaintiff sues in this action. Said Coutts, by the terms of the contract, was to have said dwelling house completed on or before the 1st day of November, 1892, and agreed to pay for all labor and material, and to allow no liens to be filed on said dwelling. Defendant Henry claims that, by the terms of said contract between himself and Coutts, the plaintiff is

estopped from claiming any lien for material furnished upon said premises, or any part thereof. The written contract referred to in defendant's answer is filed as an exhibit with the answer. The eleventh clause of said contract reads as follows: "Said contractor agrees to pay for all labor and material, and allow no liens to be filed on said building, and the said proprietor reserves the right to pay off and discharge any liens that may be filed, out of sums due said contractor, as hereinabove provided." To the answer the plaintiff filed a demurrer, on the ground that it did not state facts sufficient to constitute a defense. The court below overruled the demurrer, and, plaintiff declining to further plead, the cause came on for trial, and judgment was rendered against the plaintiff for costs. From this judgment, plaintiff appeals.

J. A. Savage and E. C. Day, for appellant.
A. J. Campbell, for respondents.

PEMBERTON, O. J. (after stating the facts). The plaintiff in this case is a material man, and, as such, is endeavoring to enforce a lien against the premises in question. It is conceded that he is entitled to the relief he seeks in this suit, unless he is estopped and barred from claiming a lien by the terms of the eleventh clause of the contract entered into by and between the original contractor and the owner of the building and premises in controversy, which clause is pleaded by the defendants. This clause is given in full in the statement above. It cannot be disputed that our lien law gives a material man a lien for the materials furnished by him in the construction of a building. He is as much entitled to a lien under the law as a contractor, subcontractor, or laborer. The material questions here presented are two: First. Are the terms of the clause in the contract between the contractor and owner of the building so explicit as to admit of but one interpretation, namely, to forbid the claiming of a lien by the original contractor and all other persons furnishing labor or material in the construction of the building? Second. Can the contractor and owner of the building, by contract, deprive all other persons who labor and furnish materials in the construction of a building of their right to claim a lien thereon without their assent?

It is not disputed that all persons to whom the law gives a lien may waive it by proper agreement. These questions have been very extensively discussed by the supreme court of Pennsylvania. The laws of that state are very similar to ours as to the persons who are entitled to a lien. In a number of cases the supreme court of that state has held, in effect, that, where a contractor covenants with the owner of the building not to file a lien or permit liens to be filed by others, the subcontractor and all persons furnishing

labor or materials were estopped or deprived by such contract from claiming liens on the premises. This holding is upon the theory that, "the only connection between the owner and the subcontractor being through and by means of the contract between the owner and the principal contractor, the subcontractor is chargeable with notice of all its terms and stipulations, and is bound thereby." *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632. In *Nice v. Walker*, 153 Pa. St. 123, 25 Atl. 1065, the court collate and discuss their former decisions on these questions. In the case just cited, the court, while it adheres to the doctrine as laid down in *Schroeder v. Galland*, *supra*, and other cases commented upon, says: "In order to prevent a contractor or subcontractor from filing a lien against a building, there must be an express covenant against liens, or a covenant resulting as a necessary implication from the language employed; and the implied covenant should so clearly appear that the mechanic and material men can understand it without consulting a lawyer as to its legal effect. If a contract is so worded as to be fairly subject to another construction, it is a sufficient reason why it should not be held to bar the right of the subcontractor to file a lien. It will be observed that the eleventh clause of the contract involved in this case, after stating that the contractor would pay for all labor and material, and allow no liens to be filed on the building, reserved in the same sentence the right to the owner to pay off and discharge any liens that might be filed out of sums due said contractor. Contracts containing the same or similar terms and stipulations have been held not to bar subcontractors, laborers, and material men of the right to claim liens upon a building. *Loyd v. Krause*, 147 Pa. St. 402, 23 Atl. 602, and other cases discussed in *Nice v. Walker*, *supra*. Some of these cases hold that the reservation of the right by the owner to pay off liens out of the money due the contractor, by implication, concedes the right to material men and others, under such contracts, to claim and file liens. In other words, such contracts are held to be capable of two interpretations, and are not so explicit in terms as to defeat the right to claim a lien by others than those who are parties to the contract. Such contracts are held to be defective according to the rule stated in *Nice v. Walker*, *supra*.

We doubt if the terms of the contract under discussion are sufficiently explicit to absolutely exclude the right to claim liens against the premises in controversy, under the authorities referred to. But, even if there was no doubt in our minds upon this point, we are still confronted with the graver question as to the power of the contractor and the owner of the building, by contract between themselves alone, to deprive all other persons who labor or furnish materials in the construction of the

building of their right to claim and enforce a lien thereon without their assent. Bolsot, in his work on Mechanics' Liens (section 747), says: "Admitting that a contractor may, by provision in the building contract, cut himself off from the benefits of the mechanic's lien law, his right to keep subcontractors and material men in the second degree from claiming liens is not so clear." After admitting that a majority of the decisions hold that a clearly expressed covenant between the contractor and owner to that effect will preclude the claiming of liens by any one, this author, in section 748, says: "The rule requiring agreements to waive mechanics' liens to be clearly expressed applies with even additional force when the agreement is invoked to cut off the rights of subcontractors or material men in the second degree." While it must be conceded that a majority of the decisions hold that a clearly expressed covenant in a contract between the contractor and the owner, that no liens shall be allowed against the building, will bind the contractor and all other persons performing labor or furnishing materials in the construction of a building, still that doctrine cannot be claimed to be the settled rule of law on the subject. In *Whittier v. Willbur*, 48 Cal. 175 (a suit by material men), where the contractor had contracted with the owner, among other things, to save the premises from any liens, and which contract was pleaded by the owner, the court said: "And in such cases the contractor and owner cannot deprive the material man of his lien by introducing a stipulation into the building contract, by which the contractor agrees to indemnify the owner against any lien by persons furnishing materials to be used in the construction of the building." *Norton v. Clark*, 27 Atl. 252, is a strong case in point. The suit was to enforce a mechanic's lien. Clark was the contractor. In the written contract between Clark and the owner there was an explicit stipulation "that no liens should exist or be claimed for any labor or materials furnished by Clark or others employed by him." On the trial the plaintiff introduced in evidence the contract between the contractor and owner, to prove the agency of the contractor to hire labor and purchase materials. In discussing the case the supreme court of Maine say: "The fact that such a contract was made clearly tends to prove that the owner consented to the furnishing of labor and materials by others at Clark's procurement. He could not reasonably have expected Clark to personally perform all the labor, and have on hand all the materials. He must have anticipated that Clark would procure much of the labor and materials from others. Hence his consent thereto may be reasonably inferred from his making such a contract. The written contract, when admitted and read in evidence, disclosed a stipulation by Clark that no liens should exist or be claimed for any labor or materials furnished by Clark or by others employed by him. The owner claimed that this stipulation barred the

plaintiff's lien, though he had no previous knowledge of it, he having acted under Clark, and having put in the contract as part of his evidence. The court ruled otherwise, and the owner excepted. The argument is that, having put the contract in evidence, the plaintiff is bound by its terms. Not so. The plaintiff did not put it in as his contract, but only as a written admission by the owner, tending to prove consent by him. The plaintiff, having no knowledge of the stipulation, cannot be deprived by it of any rights he had acquired by contract or by statute, even though he prove it as a circumstance to establish such rights. Neither does the fact that the plaintiff was in Clark's employ make him subject to any stipulations Clark might choose to make with others. This particular stipulation, like all other stipulations, binds only those who made it or assented to it. The plaintiff did neither." We think the conclusion reached by the court in the case just quoted, that the stipulation under discussion, "like all other stipulations, binds only those who made it or assented to it," is the only just and legal conclusion of which the case is susceptible. We are not prepared to hold, notwithstanding the majority of the decisions be that way, that rights conferred upon a person by statute may be contracted away by a contract made by others, to which he has never assented, and of which he has no knowledge. We think such a construction of our statute in relation to mechanics' liens is unauthorized, and would result in defeating the end had in view by its enactment, by practically depriving the persons sought to be benefited of all protection under its provisions. We think the court below erred in overruling the demurrer of plaintiff to the answer. The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer.

HUNT and BUCK, JJ., concur.

(19 Mont. 557)

RUMNEY LAND & CATTLE CO. v. DETROIT & MONTANA CATTLE CO.

(Supreme Court of Montana. June 24, 1897.)

APPEAL FROM ORDER—BRINGING UP EVIDENCE.

Under Code Civ. Proc. 1895, on appeal from an order the only mode of bringing up the evidence relied on before the court on the hearing of the motion for the order is by bill of exceptions, except where the Code authorizes another mode, and in the absence of such bill the evidence will not be considered as properly identified on appeal.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by the Rumney Land & Cattle Company against the Detroit & Montana Cattle Company, in which there was a judgment by default in favor of plaintiff. From an order denying a motion to set aside the default and judgment, defendant appealed. Plaintiff moves to strike from the transcript defendant's answer

and certain affidavits filed before the hearing of said motion. Motion granted.

The transcript on appeal contains the following papers: (1) A complaint filed April 14, 1896; (2) a summons showing personal service on April 17, 1896; (3) the entry of a default by reason of defendant's failure to answer within the time prescribed by law,—on June 2, 1896; (4) a decree signed August 19, 1896; (5) notice of motion and a motion to set aside the default and judgment on the ground of a mistake and excusable neglect, filed on October 2, 1896; (6) an answer marked, "Filed on Oct. 2d, 1896;" (7) certain affidavits filed prior to the hearing of the motion; (8) order denying motion, dated November 9, 1896; (9) notice of appeal, etc. The certificate of the clerk of the district court in the transcript is as follows: "I hereby certify that the foregoing is a full, true, and correct copy of the proceedings had in the cause in which the Rumney Land and Cattle Company is plaintiff and the Montana Cattle Company is defendant [enumerating the papers mentioned], and that this certificate is made after comparing the foregoing transcript with the original documents on file in my office." The appeal is from the order denying the motion to set aside the default and judgment.

Toole & Wallace, for appellant. Clayberg, Corbett & Gunn, for respondent.

BUCK, J. (after stating the facts). Respondent moves to strike from the transcript the answer of appellant and the affidavits. The ground for the motion is that there is no identification of these papers for the purpose of showing that they were used on the motion to set aside the default and judgment. On appeal every presumption is in favor of its correctness attaches to a decision or order of the district court. Hence it is incumbent on the appellant to show wherein any error has been committed by the lower court. The transcript must show the error directly, not by way of inference or presumption. If it is necessary to consider the evidence on which an order is based, to determine whether or not error has been committed, that evidence, properly authenticated and properly identified as having been used or as having been before the court at the time it made its order, must be in the record, or a motion to dismiss the appeal so far as any such evidence is concerned must be granted. On the same principle, a motion to strike from a transcript unauthenticated or unidentified matter must also prevail. The certificate of the clerk, so far as it authenticates the affidavits asked to be stricken out as true copies of the originals on file in the lower court, is sufficient, under section 1739, Code Civ. Proc. 1895. The answer of appellant, possibly tendered in the lower court when the motion to set aside the default was made, could not even have been a record of the lower court, for the date of the filing marked on it is subsequent to the date of the final judgment or decree. If it was tendered on the theory that it should be filed

in the event of the default being set aside, clearly the clerk had no authority to mark it "Filed" at the date of such tender. He might properly have marked it "Filed for the purposes of the motion to set aside the default," but he should not have marked it filed as a record in the action. It has been decided in this court in a recent case (*State v. Mills*, 48 Pac. 773) that under section 1739, supra, a clerk cannot certify evidence, oral or written, as having been before the court, or as having been the only evidence before it, on the hearing of a motion for an order after final judgment. This is the law under the Code of Civil Procedure of 1895. If the case of *Bookwalter v. Conrad*, 14 Mont. 61, 35 Pac. 226, and the previous Montana cases cited therein as authority, conflict with this rule, they must give way to it. These last-mentioned decisions were prior to the adoption of the Codes of 1895; and although section 438, Code Civ. Proc. 1887, under which they were determined, is substantially the same as sections 1737, 1739, Code Civ. Proc. 1895, nevertheless we do not think that a proper distinction was drawn between the clerk's certificate, as simply authenticating papers in a transcript as true copies of the originals on file, and the proper method of identifying them as evidence used on the hearing before the court. Many of the earlier Montana decisions adhered to this distinction, and many decisions of the supreme court of California could be cited to show it.

This brings us face to face with the question, what is the proper method, on appeal from an order,—when the respective attorneys have not certified to a transcript, or the statutes have not provided another mode,—of identifying the evidence, oral or written, before the lower court on the hearing of the motion for the order? This court intimated in *State v. Mills* that it was inclined to follow the view of the law entertained by Justice Works (with whom concurred Justices Fox and McFarland) in the case of *Somers v. Somers*, 81 Cal. 608, 22 Pac. 907. After careful consideration, we now adopt that view. Under the Code of Civil Procedure of 1895, on appeal from an order the only proper mode of bringing up for consideration the evidence relied on, whether oral or written, used or before the court on the hearing of the motion for the order, is by a bill of exceptions; and unless such evidence has been included in, and made a part of, the record by bill of exceptions taken in pursuance of, and prescribed in, said Code, it is not, and cannot be, considered as properly identified on appeal. Of course, the general rule does not govern cases where the Code authorizes another mode, as, for example, an order on a motion for a new trial. The supreme court of California, under statutes similar to the present statutes of Montana, had for some time held that the judge of the lower court could by his certificate identify the evidence used or before him on the hearing of the motion. In *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124, cited in *Bookwalter v. Con-*

rad, *supra*, the court apparently approved of such a practice. But Justice Works, in *Somers v. Somers*, *supra*, clearly shows that the only mode provided in the Codes of California (whose provisions on the subject are substantially the same as those of Montana) for such identification is by a formal bill of exceptions. We quote this applicable language from Justice Works' opinion, on page 613, 81 Cal., and page 968, 22 Pac.: "It is well said that counsel and their clients should be protected where they have followed the practice approved by this court, and we acknowledge the force of the suggestion. Strangely enough, courts of justice are expected to perpetuate their errors, instead of correcting them. There is a legitimate reason for this in some cases; for example, where property rights have grown up under a decision which is subsequently ascertained to have been erroneous. But such a doctrine has no application to decisions affecting mere questions of practice. If the matter were one which could be controlled by rules of law, and was not governed by positive law, we should be in favor of adopting a rule that hereafter all cases must be presented by bill of exceptions, but that cases now pending should not be affected thereby. But, as we do not believe that this court has any authority to regulate the mode of presenting papers on appeal where one is provided for by statute, we feel constrained to dismiss the appeal on the ground that the papers could only be presented to this court by bill of exceptions." We believe it is well to settle this question of practice as soon as possible in this state under its new Code, and that, in laying down the rule as we have stated it, many otherwise possible snarls in practice will hereafter be avoided. The motion to strike from the record the answer and affidavits asked to be stricken from it is granted.

PEMBERTON, C. J., and HUNT, J., concur.

CHENEY v. CALDWELL, Sheriff.

(Supreme Court of Montana. June 30, 1897.)

ATTACHMENT OF MORTGAGED PROPERTY—RIGHT TO EXEMPTIONS.

1. Civ. Code, § 3869, permitting the attachment of personal property which has been mortgaged, but requiring the officer to first pay off the mortgage debt, gives the officer no right, after paying the mortgage, to hold the property under attachment, if exempt.

2. The giving of a chattel mortgage upon exempt property does not preclude a man from claiming such property as exempt against the claims of all other persons.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action brought by D. A. Cheney against White Caldwell, sheriff of Gallatin county, to recover for the unlawful seizure of exempt property on a writ of attachment. From the

judgment of the court below, plaintiff appeals. Reversed.

This is an action to recover the possession of certain personal property described in the complaint. The defendant is the sheriff of Gallatin county, and as such sheriff took possession of the property in controversy under a writ of attachment issued out of the district court of said county in a case wherein one Power was plaintiff, and Cheney, the plaintiff in this case, was defendant. The action was tried by the district court upon an agreed statement of facts. The facts, as agreed upon, are: First, that plaintiff, Cheney, was the owner of the property in controversy, and entitled to its possession, before its seizure by the sheriff under the writ of attachment in the suit of Power against this plaintiff; second, that Cheney was indebted to Power, and also to one Koch; third, that Cheney had given Koch a chattel mortgage upon the property in controversy; fourth, that while said chattel mortgage was in force and effect, and a matter of record, Power had the property mentioned in the mortgage attached,—the sheriff, before levying the attachment, paying to Koch the amount due him, and secured by the chattel mortgage aforesaid; fifth, that the property was exempt from attachment or execution under the statute unless the giving of the chattel mortgage by Cheney to Koch had the effect of depriving Cheney of his exemption, and of subjecting the property to Power's attachment; sixth, that the value of the property in controversy is \$245; seventh, that Cheney promptly claimed his exemption when the property was attached by the sheriff, and that the sheriff released it to him as exempt, but afterwards retook it under the writ. The case was tried to the court without a jury, and the court found and rendered a judgment in favor of defendant. The plaintiff appeals from the judgment.

W. L. Hollaway, for appellant. Hartman Bros. & Stewart, for respondent.

PEMBERTON, C. J. (after stating the facts). The question presented for determination by this appeal is as to whether Cheney, by giving a chattel mortgage upon his exempt personal property to Koch, waived his statutory right to claim said property as exempt against the claims of all other persons. It seems that the court below held that the sheriff, by paying off the amount of the Koch indebtedness secured by the chattel mortgage given by Cheney, thereby became subrogated to the rights of the mortgagee. If so, he could only foreclose the mortgage. He acquired no right thereby to attach the property. Section 3869, Civ. Code, permits the attachment of personal property which has been mortgaged, but requires the officer serving the writ, before taking the property, to pay, or tender the payment of, the amount of the mortgage debt and interest to the mortgagee.

But this statute has no reference to property exempt from attachment. Our statute does not give any officer any authority to attach property exempt from seizure under a writ of attachment or execution. Authority is given to attach or levy upon property not exempt. Code Civ. Proc. § 893. The sheriff can only acquire the right to attach mortgaged personal property which is not exempt by paying off the mortgage debt. Because a person is willing to give a mortgage on exempt property, or by dire necessity is compelled to do so, a sheriff or other creditor cannot pay off this mortgage, attach and take the exempt property, and leave the exemption claimant and his family in absolute want. When exempt personal property is mortgaged, it is still exempt as to all the world except the mortgagee. In such case another creditor, or an officer for him, cannot, by voluntarily paying the mortgage debt, defeat the statute which was intended to keep such persons and their families from becoming public charges. No right exists in any one, under our laws, to take exempt property away from a claimant, against his will, by any writ. Consequently nobody can be subrogated to such right. It is absurd to suppose that there can be any such thing as the subrogation of a person to a right when no right exists. Koch never had any right to dispose of Cheney's exempt property against his will. He had a right to hold and dispose of such property under and in accordance with the terms of the mortgage. This was not against, but with, the consent of Cheney. Koch never had any right to attach the property. Consequently the sheriff could not be subrogated to such right. 1 Cobbey, Chat. Mortg. § 199; Thomp. Homest. & Ex. § 741; Buckley v. Wheeler, 52 Mich. 1, 17 N. W. 216; Irwin v. Walling (Okla.) 44 Pac. 219. The court erred in finding and rendering judgment in favor of the defendant. The judgment is reversed and the cause remanded, with direction to enter judgment on the agreed statement of facts in favor of the plaintiff for the value of the property. Reversed and remanded.

HUNT and BUCK, JJ., concur.

LAWLOR v. KEMPER.

(Supreme Court of Montana. June 14, 1897.)

APPEAL—REVIEW—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR—WITNESSES—EXAMINATION.

1. An objection that evidence was not admissible under the pleadings cannot be first raised on appeal.

2. It was not error to permit defendant to be cross-examined as to whether he had not testified in a certain case as a mining expert, where he had stated on direct examination that he was not a mining expert.

3. There was no error, in a partnership accounting, in excluding a book offered by defendant as containing a list of all property belonging to himself that he had turned in to be handled

by the firm; it not being a book of the firm, and it being conceded that certain property in controversy was not listed in it.

4. Whether certain instructions were erroneous will not be determined on appeal in a suit in equity for an accounting, as the findings of the jury are only advisory.

5. Improper conduct of counsel in the argument is also considered harmless in such a case.

Appeal from district court, Silver Bow county: W. O. Speer, Judge.

Action by William V. Lawlor against Simon V. Kemper. From an order denying a motion for a new trial, defendant appeals. Affirmed.

During the year 1891 and a portion of 1892, plaintiff, Lawlor, and defendant, Kemper, were partners dealing in real estate in Butte, Mont., under the name of Kemper & Lawlor. The written agreement of partnership between them provided "that all gains, profits, and increase that shall or may come, grow, or arise from or by means of said business shall be divided between them share and share alike." It also provided "that at all times during their co-partnership they, and each of them, will give their attendance, and do their, and each of their, best endeavors, and to the utmost of their skill and power exert themselves for their joint interest, profit, and advantage." The firm dealt chiefly in town lots which one or the other of its members owned individually, or to which the two jointly had acquired title. When a lot owned by one of them was disposed of, a commission on the selling price was credited to the firm as a profit. Each owned individually some mining ground. As a firm, also, they acquired some mining property, not for the express purpose of dealing in any ores to be extracted therefrom, but rather for the sake of the surface ground of the same for town-lot purposes. At the time they entered into the partnership, Kemper owned a tract of land known as the "Kemper Addition." It was a patented placer claim originally. There being indications of a quartz vein within its boundaries, Kemper had made a location on the quartz therein as the Ground Squirrel lode claim. He did this to prevent any possible question being raised as to the extent of the placer patent. The persons interested in this lode claim were Kemper, his brother, and their father and mother; the latter two, however, to a small extent only. Kemper had full authority from his brother and parents to deal with this lode claim as he saw fit. Before the time agreed upon for the beginning of the partnership between Kemper and Lawlor, a contract had been entered into between the owners of the lode claim and one Carter, under the terms of which Carter had acquired the right to purchase within a certain time a certain portion of the claim for the sum of \$15,000. After the partnership began, and during its existence, lots were sold in this Kemper addition, and commissions on the sales thereof credited to the firm as profits. It appears that Carter, under his contract, proceeded (with moneys furnished by Kemper alone) to develop this lode claim,

and as a result it was demonstrated during the year 1891 that it contained a mine of rich copper ore. Some time in June, 1891, Kemper sold this mine and certain lots in the Kemper addition for \$225,000. This price included the \$15,000 to be paid by Carter under his contract. This money was paid in installments; the last payment being made some time in July, 1892. The negotiations for the sale of the lode claim consumed a number of days, and, for the most part, were had in the real-estate office of Kemper & Lawlor. After some \$62,000 in payments were made, on December 26th, Kemper and Lawlor had a monthly settlement of the partnership accounts. At this last-mentioned date nothing was said about Lawlor's right to a part of any commission on the sale of the Ground Squirrel claim, although he (Lawlor), knew what amount of the purchase price thereof had been paid. Another such settlement was had in March, 1892, and the books of the firm contained this memorandum, in Kemper's handwriting: "March 18th, '92. Settled in full to date." At the times of said settlements there was no entry in said books as to the Ground Squirrel lode. Lawlor at the date of said last settlement paid Kemper a balance of \$228.40. The December settlement was made before any demand by Lawlor for a commission on account of the Ground Squirrel sale, and the March settlement after such demand. Kemper refused to credit Lawlor or the firm with any commission on the Ground Squirrel lode sale. Thereupon Lawlor instituted suit against Kemper on June 18, 1892. The complaint contained the following allegations: "That on or about the 7th day of April, A. D. 1890, plaintiff and defendant, at Butte, in the county of Silver Bow, state of Montana, entered into and formed a partnership for the buying and selling of real estate and loaning money, and as general estate agents, under the firm name and style of Kemper & Lawlor, and under certain articles of agreement, a copy of which is hereto annexed, marked 'Exhibit A,' and made part of this complaint, and that they thereafter, on said January 1, 1891, entered upon and commenced to transact the business of such co-partnership under their firm name; that under the terms of the said agreement each partner was to account to the firm for all receipts and commissions on all transactions of every nature, and for all loans or sales made by either of them, be the same collected from sale of their own individual property, or in their transactions for others; that since the commencement of said co-partnership the defendant has wrongfully, and without the assent of the plaintiff, applied some of the money or receipts and profits of their business to his own use, and has refused to account for the same to the plaintiff, and by reason thereof has become indebted to said co-partnership, and impeded and injured the business thereof; that plaintiff has repeatedly requested the defendant to pay said co-partnership the money so received by him and misappropriated as aforesaid, or account

to said firm therefor, but that defendant has heretofore neglected and refused, and still does neglect and refuse, so to account, and continues to appropriate the same to his own use." The prayer of the complaint was for a dissolution of the partnership and for an accounting. The answer specifically denied the allegations of the complaint. The case was tried to a jury. In the argument of the case before the jury, one of the attorneys for plaintiff persistently commented upon certain evidence which had first been admitted and then excluded by the court. Counsel for defendant objected to this several times, and the court admonished said counsel to desist. But no attention seems to have been paid to the admonition of the court, and the counsel continued to indulge in the comments forbidden. The court submitted special questions to the jury, and the answers or findings were in favor of plaintiff. The court adopted these findings. The appeal is from an order denying a motion for a new trial, and it also purports to be from the judgment of the court, although the record fails to disclose that any judgment was ever rendered on the findings.

Forbis & Forbis, for appellant. John J. McHattan and Geo. Haldorn, for respondent.

BUCK, J. (after stating the facts). The evidence is sufficient, in our opinion, to justify the action of the lower court in adopting the findings of the jury, and making them its own. The sale of the Ground Squirrel lode claim was not essentially foreign to the purposes of the co-partnership, and the evidence as to the general manner in which the business of the firm was conducted and the practical interpretation of their partnership contract by its members, amply sustain these findings. Lawlor states that the entry on the partnership books by Kemper: "March 18, '92. Settled in full to date,"—was made without his consent or knowledge, and the testimony reasonably supports the conclusion that the settlements of December, 1891, and March, 1892, between the two partners, only pertained to transactions other than the sale of the quartz claim. If Kemper, when he entered into the partnership, had desired to have his quartz claim excepted and treated differently from other real estate and interest therein owned by himself, it was incumbent upon him to have had a clear understanding with Lawlor to that effect. It is apparent from the evidence in the record that, had this lode claim been sold for a much smaller amount of money than it realized, Kemper would have made no objection to crediting the firm with a commission. It is in evidence that, when Lawlor spoke to Kemper about a commission on the sale of this property, the latter replied, "No, sir; that commission is too much," and then he said he would make Lawlor a present. The present that he contemplated, according to the evidence,—which the jury believed,—amounted to some \$250 only. From a casuistic standpoint, a possession of the ability

to discharge a just obligation to a fellow man should encourage the performance of the duty. This case, however, serves to illustrate how easily, through wealth, even when acquired in a sudden and unexpected manner, avarice can be substituted for conscience, and human nature made revolting at the very time when all its higher traits are placed in a position to readily assert themselves.

It is objected that evidence as to the sale of this quartz lode was not admissible under the pleadings. We fail to see on what tenable ground it was not. The complaint clearly states a cause of action, and the issues raised by the answer fully justified the admission of the evidence. Moreover, appellant made no objection to the complaint by demurrer, or to the pleadings by motion, and there was no objection to the admission of such evidence upon a trial.

It is claimed that the lower court erred in overruling an objection to this question propounded to the defendant on cross-examination: "Did you, or not, in that case [a controversy in the United States land office], swear, as a mining expert, that the ground you examined down there was placer ground and not agricultural ground?" Possibly the ultimate object of counsel in putting the interrogation was to place before the jury an immaterial matter, but it was not incumbent upon the court to anticipate any such motive, and therefore no error was committed in permitting the question. The defendant on direct examination had stated that the reason why he and his partner did not deal in mines was the fact that neither of them were mining experts.

Appellant offered in evidence a certain book, claiming that it contained a list of all the property belonging to himself which he had turned in to be handled by the firm. It was not a firm book, and it was conceded that the Ground Squirrel lode claim was not listed in it. The lower court did not err in excluding this book from evidence.

Appellant claims that the court gave erroneous instructions. Whether it did or did not, it is unnecessary for us to determine. This was an action for an accounting,—a suit in equity. Although the jury made findings, all findings in such cases are advisory only, and must emanate finally from the judge as a chancellor. He alone is responsible for the same. We agree with the supreme court of California that where special issues, in an equity case, are submitted to a jury, the instructions given should not be considered on appeal. See *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540; also, *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715, and *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579. In an equity case, also, when the trial court submits special questions to a jury as to the facts involved, it is only necessary to instruct as to the principles of law applicable to the determination of the particular questions. There is no sound reason for giving instructions covering the whole theory of the law applicable to the facts to be found. Such a practice is supererogatory.

The view we entertain as to the questions of error in these instructions also applies to appellant's objection that one of the attorneys for plaintiff on the trial commented in his argument upon matters not in evidence before the jury. From the bill of exceptions saved, showing that said counsel for plaintiff did this, it clearly appears that the conduct of said counsel in this respect was most reprehensible. It was the manifest duty of the trial court to have restrained him from making these comments, if possible. It was also the duty of said court to have punished such conduct summarily, if it could not have been prevented, for the contempt was gross and flagrant. But a different question is presented here from what would have been presented had this case been an action at law. It must be presumed that the trial judge, sitting as a chancellor, was in no wise influenced in making the findings of the jury his own by any improper argument of counsel. We are of the opinion that there was no error in the court's refusal to grant a new trial. Although this appeal also purports to be from a judgment, there is no judgment in the record. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 575)

ARNOLD v. PASSAVANT et al.

(Supreme Court of Montana. June 14, 1897.)

APPEAL—REPLICATION—WATER RIGHTS—ABANDONMENT.

1. Where a complaint to establish the right to use the entire waters of a stream was met by denials raising the general issue, and also an allegation that plaintiff was entitled to a certain number of inches of the waters, but to no more, the latter allegation did not require a reply, and hence evidence that plaintiff was entitled to all the waters was admissible.

2. Where 160 acres of a ranch comprising 320 acres were capable of being covered with water by means of the owner's ditches, the mere fact that the owner had only 45 acres under cultivation did not show him guilty of a lack of diligence in the application of the waters to useful purposes.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action by Walter W. Arnold against Walter Passavant and others to establish a claim to certain water rights. From the decree for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

In 1874, plaintiff and his partner, one Barnes, purchased two ranches, each 160 acres in area, and a water right appurtenant to one of them. A United States patent for one of these ranches was issued in 1875. The other ranch had not been filed on by the owner from whom it was purchased, but subsequently plaintiff filed on it as a homestead, and later obtained a patent. Plaintiff afterwards acquired the interest of his partner Barnes in all this property. At the time of the purchase, the previous owners of these ranches had diverted waters of Spokane creek by means of

two ditches, for the purpose of irrigating the ranch patented in 1875. In 1873 one Miller commenced the construction of a ditch tapping Spokane creek several miles above the head of plaintiff's upper ditch, to divert water from said creek for the purpose of irrigating a tract of 680 acres of land. Miller sold his land and water right to the defendants, the Passavants, in the year 1889. The complaint of plaintiff sets forth, among its other averments, the diversion of waters of Spokane creek by means of the two ditches aforesaid, for the purpose of irrigating the patented ranch, and the use of said water for said purpose. It also alleged that on the 28th day of February, 1879, plaintiff had entered, as a homestead, the other ranch acquired by him and his partner, and, ever since said last-named date, had used the waters of the creek, supplied by the larger ditch, for the purpose of irrigating said homestead. The answer denied that the smaller of plaintiff's ditches had ever tapped Spokane creek, and that water by means of it had ever been conveyed from said creek. There was a similar denial as to the larger ditch. The answer also denied that, for a period of 16 years, the plaintiff had ever used any of the waters of said creek for irrigating any of his land. For a separate defense, it set forth in paragraph 3 that prior to 1879 plaintiff was the owner of only 160 acres of land; that, of the 160 acres aforesaid, only 30 or 40 acres were susceptible of cultivation or irrigation; and that until 1879 the plaintiff had had no use for any greater quantity of water than 50 inches; and that any appropriation in excess of 50 inches was void. For another defense, it set forth Miller's water right, and a continuous use thereof. It alleged an adverse and exclusive use of all the waters of Spokane creek by the defendants, the Passavants, and their predecessor in interest, Miller, for a period of some 15 years (the period necessary under the statute being only 5 years). It further alleged as an estoppel that plaintiff had stood by and allowed Miller to expend money on his ditch without protest, and had acquiesced in the exclusive use of all the waters of the creek by Miller and the said defendants for a period of some 15 years. The replication denied that Miller had acquired his water right prior to 1891. It also denied in detail the allegations in the answer as to adverse possession and estoppel. On the trial the plaintiff was permitted, without objection, to introduce evidence to establish the fact that he himself had used the waters of Spokane creek both on his patented and his homestead ranch ever since 1874.

The case was tried with a jury. The jury made special findings substantially as follows: The carrying capacity of plaintiff's lower ditch was 50 inches. Water was used through this ditch in the year 1866. The carrying capacity of plaintiff's upper ditch was 150 inches. Water was used through this ditch on plaintiff's patented ranch in 1869, and on his unpatented ranch the same year.

Of the patented ranch, 125 acres could be covered by water from the upper ditch, and 15 acres by the smaller ditch. On plaintiff's patented ranch, at the time of Miller's appropriation of water, 30 acres of plowed land had been irrigated. On plaintiff's homestead ranch there were about 40 acres which could be covered by water from his upper ditch; and on said homestead ranch 5 acres of plowed land and 10 acres of hay land had been actually irrigated at the time of the Miller appropriation of water. Miller knew, at the time he commenced to construct his ditch, of the water right of plaintiff. Plaintiff did not suffer Miller to expend money in the construction of his ditch without giving him notice of his water right. Miller made his appropriation subject to plaintiff's right. Finding No. 16 was as follows: Question: "Did Miller, during the time he owned the ranch, claim in hostility to Barnes and Arnold, or Arnold, as himself owning the first right, or did he only claim and assert a second right subject to theirs?" Answer: "He claimed first right." Finding No. 17 was as follows: Question: "Was Miller's use of the water in defiance of plaintiff's right, or did he always admit that plaintiff had the oldest right?" Answer: "He used the water in defiance of Barnes' and Arnold's claim." The jury found that, in the low-water seasons before 1877, plaintiff had use for all the water naturally flowing down Spokane creek to him; also, that prior to 1882 plaintiff had irrigated only 45 acres of land on his two ranches, and that 45 inches was sufficient for their irrigation; that Miller commenced to construct his ditch in 1878, and completed it and used the water through it in 1881; and that the capacity of the Miller ditch was sufficient to take all the waters of Spokane creek at ordinary irrigating seasons. Finding No. 26 was as follows: Question: "Have defendants and their predecessor Miller, at all times since 1880, actually used and claimed all the waters of Spokane creek at the point where the Miller ditch taps said creek, openly and adversely against the plaintiff and all other persons?" Answer: "He claimed it, but did not use it continuously." Finding No. 27 was as follows: Question: "Have the defendants or their predecessor, Miller, ever recognized the claim of plaintiff to any of the waters of Spokane creek which flow down to the Miller ditch?" Answer: "Defendants did not, but Miller did." Finding No. 28 was as follows: Question: "Have the defendants or their predecessor, for a continued period of five years, at any one time since 1880, actually and openly and adversely held and used the waters of Spokane creek at the point where the Miller ditch taps said creek, against the claims of the plaintiff and all other persons?" Answer: "The jury is unable to say whether the defendants or their predecessor held the waters or not, but it is satisfied they did not use it continuously for five years." After the jury had returned their findings, and before the court adopted them,

the defendants moved the court to set aside certain of these findings, and to substitute different ones in place of others. They also asked the court to make additional findings on the following points: (1) "Are there any springs or other sources of supply below the ditch of defendants that furnish plaintiff with water for irrigating purposes, and, if so, how much water will said springs or other sources generally supply through the irrigating season?" (2) "Did the plaintiff and his predecessors use reasonable diligence in applying the water diverted by them from Spokane creek to some useful and beneficial purpose, and, if so, how much of said water was so diligently applied and used?" On July 2, 1895, the court overruled defendants' motion, adopted the findings of the jury, and signed a decree in favor of plaintiff. In this decree the court made an additional finding, to the effect that there were springs below the ditch of defendants, which sometimes furnished plaintiff with 70 inches of water for irrigating purposes. The decree awarded to plaintiff 110 inches of the waters of Spokane creek, as between him and the defendants the Passavants. It also awarded plaintiff 70 inches of the water furnished by springs rising in the channel of Spokane creek below the ditch of defendants. Appellants appeal from the decree and the order denying a motion for a new trial.

Smith & Ward, for appellants. Toole & Wallace, for respondent.

BUCK, J. (after stating the facts). Did the court err in admitting evidence for the purpose of showing that more than 30 or 40 acres of the ranch of plaintiff, patented in 1875, were susceptible of irrigation by means of plaintiff's two ditches? Appellants insist that, inasmuch as the replication failed to deny the averment in paragraph 3 of their answer that plaintiff prior to 1879 had no beneficial use for more than 50 inches of water, said evidence should have been excluded. The defenses as set forth in the answer are somewhat inconsistent; that is, there is an inconsistency between the theory of the defense in the direct denials of the averments of the complaint and the other defenses. Including the one embraced in paragraph 3. The mootable question of whether a defendant can set forth in his verified answer a defense absolutely contradictory of denials therein is not before us. But any toleration by the courts of inconsistent defenses in the same answer is due only to a desire to fully protect a defendant's interests. By setting forth inconsistent pleadings, a defendant should never be allowed to lay a snare for his adversary. This, however, is simply a suggestion so far as the actual merits of this case are concerned. Plaintiff's complaint, in our opinion, contained averments sufficient to tender a general issue. Defendants' denials raised a general issue. The admission of paragraph 3 of the answer,

that plaintiff was entitled to 50, but no greater, number of inches of the waters of Spokane creek, was simply an attempt to eke out the absolute denial that he was entitled to any of the waters of said creek. Regarded as a defense by itself, said paragraph 3 is also incomplete. Therefore it did not set forth any new matter requiring a specific denial in the replication. Nor does paragraph 3 plead sufficiently any abandonment of any part of plaintiff's originally acquired water right, or any lack of diligence in the application of any of the water to a useful purpose, which would be in the nature of an abandonment. Without deciding whether any lack of diligence or abandonment in respect to plaintiff's water right should have been pleaded in order to admit evidence to establish the same, nevertheless we think that it would always be the better practice to plead such a defense.

But, even conceding that any lack of diligence on plaintiff's part might have been shown under the general issue, the evidence fails to show that plaintiff was guilty of any unreasonable delay in the application of any water to a useful purpose. Plaintiff testified, and he was not contradicted, that he cultivated his land, and used water to irrigate it, as he and his partner got money in their pockets. For all that appears, he was a farmer, struggling for a livelihood, and clinging to his water right for the benefit of the lands for which it was originally acquired. There had been no diversion of water from this creek by plaintiff or his predecessors for speculative purposes. These lands and this water right appurtenant to them had been acquired prior to any appropriation of any of the waters of Spokane creek by Miller, defendant's predecessor. The jury found that 140 acres upon plaintiff's first patented ranch, and 40 acres on his other ranch, were capable of being covered with water by means of the two ditches as early as 1889. By inference from the mere fact that plaintiff had only 45 acres on his two ranches under cultivation, alone, could he have been held guilty of a lack of diligence. The jury found that prior to 1877, in the low-water season, plaintiff had use for all the water of Spokane creek naturally flowing down to his ditches. If this be true, would he have been justified in attempting to bring more acreage under cultivation? The trial court, under this condition of affairs, committed no error in refusing to find that plaintiff had, or had not, used reasonable diligence in applying any part of the water to a beneficial use. It follows that the objection that the court refused to instruct the jury on the ground of whether or not plaintiff had used reasonable diligence is also without merit.

Are the findings contradictory? Not in any material respect. It is true, the jury found that Miller and defendants claimed first right and used the waters of Spokane creek in de-

fiance of plaintiff's claim, but they also practically found that the defendants had not established their defense of adverse possession. We think the evidence is sufficient to justify the findings of the jury and the decree of the court. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

KINNEY v. HYNDS.

(Supreme Court of Wyoming. July 7, 1897.)

GAMING—TRANSFER OF SECURITIES—RECOVERY
BACK OF LOSSES—INTEREST.

1. Certificates of deposit were cashed for the holder, who was engaged in gambling, by the keeper of the gambling room. At the time of cashing the certificates, the holder was not indebted for past losses, and the full amount of the certificates was paid him, and most of it thereafter lost in gambling. *Held*, that the transfer of the certificates was not "for the consideration of money won" from the holder (Rev. St. § 1001), so as to be void.

2. The cashing of such certificates was not brought within the statute by the fact that from the proceeds the holder repaid money which had been loaned to him by a bystander, and lost in gambling.

3. The cashing of such certificates, not being a pledge, but an absolute transfer, was not within Rev. St. § 1001, making void contracts for the repayment of money loaned to one engaged in gambling.

4. Under Rev. St. § 1462, providing for licenses "authorizing" and "entitling" the licensees to carry on certain games, and section 1001, making void contracts to pay gambling debts or repay money loaned for the purpose of gambling, but not providing for the recovery back of money lost, losses at a licensed game cannot be recovered back.

5. One who takes, in payment of an antecedent debt, and with notice of its dishonor, a certificate of deposit drawing interest only until its maturity, cannot recover interest after maturity, in an action on the certificate, where the bank is willing to pay the certificate; the original holder contesting the indorsee's title, and no damage by delay in payment being alleged.

Error to district court, Sweetwater county; Jesse Knight, Judge.

Action by Harry P. Hynds against M. Kinney, substituted for the First National Bank of Rock Springs. Judgment for plaintiff, and defendant appeals. Modified.

Nellis E. Corthell, for plaintiff in error. W. R. Stoll, for defendant in error.

CORN, J. The defendant in error brought suit in the district court of Sweetwater county against the First National Bank of Rock Springs upon four certificates of deposit issued by the bank to M. Kinney, the plaintiff in error. The bank filed its affidavit under the statute, showing that Kinney claimed the money due upon the certificates, and averring its readiness to pay the same as the court might direct. Kinney subsequently appeared, and was substituted as defendant in place of the bank. The cause was tried by the court without a jury, and judgment rendered for the plaintiff below for the amount of the certificates, with interest to the date of the judgment. The evidence—about which

there is no dispute between the parties—shows: That in October, 1890, Bingham & Rumpf were the proprietors of a saloon in the town of Green River. That, in the same room where the bar or counter was, Turpin & McDonald were carrying on a licensed faro game and a licensed game of roulette. Bingham & Rumpf, the saloon keepers, had no interest in the gambling; Turpin & McDonald simply having a place in the saloon for their games, paying no rent. On the night of the transactions out of which this suit arises, Kinney, the plaintiff in error, was in the saloon, playing at faro and drinking. He lost at the game, and then borrowed \$25 from an acquaintance named Sowadski, which he also lost and expended in drinking and treating others. Afterwards he requested Rumpf, who was attending the bar, to cash one of the certificates in question for him. Rumpf had him indorse the certificate, indorsed it himself with the firm name of Bingham & Rumpf, and, not having the money himself, obtained it from McDonald, who was dealing the faro game, delivered the certificate to McDonald, and handed the money to Kinney, the certificate being cashed at its face value. This money was disposed of in paying the money borrowed, buying drinks for himself and others, and playing faro,—most of it being lost at the faro game. Two others of the certificates were cashed in precisely the same way, and the money lost principally at the faro game, some of it being expended for drinks. The fourth certificate was cashed for Kinney by McDonald directly, Kinney indorsing it and delivering it to him, and he giving to Kinney its face value in money. A portion of this, also, was lost at the game and expended for drinks; but just how much does not appear from the evidence, as Kinney had some money when the game closed. Kinney was in the saloon five or six hours that evening, being out three or four times, but most of the time in the saloon. Three of the certificates are indorsed, "M. Kinney," and "Bingham & Rumpf." The fourth, for \$134.60, is indorsed "M. Kinney," and "John McDonald."

Several defenses are set up, though they are not very definitely separated in the answer. The first is a general denial that the plaintiff acquired any ownership or interest in the certificates. The second sets out that the indorsement and delivery of the certificates was procured by means of fraudulent devices and cheating in connection with the faro game; that the game was played unfairly and unlawfully, and was what is termed a "brace game." What is numbered as the third defense sets out—First, that the consideration for the indorsement and transfer of the certificates was money won from the defendant at faro; and, second, that the consideration for such indorsement and transfer was for reimbursing money and faro chips knowingly advanced by McDonald and Bingham & Rumpf to Kinney for the purpose of betting upon the game, and that the money and chips

were employed for that purpose, and that Kinney was engaged in playing the game when the advancements were made.

This case is involved in some difficulty from the fact that our statutes upon the subject of gambling are entirely out of line with the legislation of most of the other states. In England and in the states to whose decisions we are cited as authority by counsel, gaming and the keeping of gaming houses are criminal offenses, and visited with heavy penalties. In this state these acts are permitted by law, and what are known as "banking games," including faro and roulette, are licensed. Sections 1459 and 1467 of the Revised Statutes prohibit gaming without a license, and designate what games may be licensed. Sections 1460 and 1462 provide how a license may be obtained, and protect the licensee from prosecution. Section 1468 provides a penalty for playing unfairly, with the intention of winning in any way more than the fair percentage of the game. Section 1001 is as follows: "All contracts, promises, agreements, conveyances, securities and notes made, given, granted, executed, drawn, or entered into, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing won by any gaming, or by playing at cards, or any gambling device or game of chance, or by betting on the side or hands of any person gaming or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of any such play, to any person or persons so gaming or betting, shall be utterly void and of no effect. No assignment of any bill, bond, note, or other evidence of indebtedness, where the whole or any part of the consideration for such assignment shall arise out of any gaming transaction, shall in any manner offset [affect] the defense of the person or persons making, entering into, executing, or giving such instrument so assigned, or the remedies of any person interested therein."

The second defense, that the game was unfairly dealt, entirely failed upon the proof; and it is conceded by counsel for the plaintiff in error that the evidence shows that he was given a fair deal, and that the game was up to the recognized standard of a "square faro game," under the laws and customs of the gambling fraternity.

Under the third defense it is alleged that the indorsement and transfer of the certificates were made for "the sole consideration of money won from the defendant by one McDonald." If the evidence sustains this allegation, then the indorsement is void, under the statute, and the property in the certificates remains in Kinney. The evidence shows clearly that, upon the cashing of each of them, Kinney was paid the face value in money. He was at liberty to do with it as he pleased. The evidence shows that it was not an unusual thing for the proprietors of the saloon or the gambling tables to cash checks or other papers after banking

hours, as a matter of accommodation. There is nothing tending to show that, at the time he cashed any one of the certificates, Kinney had made any bets upon credit, or that he owed the game, or Bingham & Rumpf, for any money won by any of them. Certainly, upon the face of the transaction, the consideration for the indorsement and transfer was the payment in money of the full face value of the certificates. There is no intimation anywhere in the evidence that, in cashing the certificates, any amount was held back or kept out in payment of any debt whatever. The evidence does show that, after cashing one of the certificates, Kinney paid to Sowadski the \$25 he had borrowed from him during the evening. It is also probable, from the evidence, that all or part of this \$25 was lost by Kinney at the faro game. But a contract made to obtain money to repay this loan could not be said, in any possible view of the law, to have for its consideration money won at gaming; no more, I think, than if Kinney had executed his note for \$25 at the bank the next day for money to pay the same debt. Rumpf states, also, that, out of the proceeds of one of the certificates, Kinney paid him \$20 borrowed money. There is nothing in the evidence tending to show that the borrowing of this money was connected in any way with the transactions of that night, or with any gaming transaction. Indeed, as neither Kinney nor any of the other witnesses makes any mention of the borrowing of any money from Rumpf that night, it is probable that it was borrowed at some other time. I think, therefore, the evidence does not show, or tend to show, that the indorsement or transfer of the certificates "was made for the consideration of money won from the defendant," but tends very strongly to disprove that allegation.

The statute further provides that all contracts, etc., made for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play to any person or persons so gaming or betting, shall be utterly void and of no effect. "Money lent" is an expression that is popularly quite well understood, and it has no different legal or technical definition. It means a delivery of money to another, to be returned or repaid, and differs from the lending of any other property, in that it is not ordinarily expected that the identical money will be returned, and also that ordinarily, in the case of a loan of money, some compensation is provided for, in the way of interest or otherwise, while the lending of other property for a compensation is termed a "hiring" or "letting." To "advance" money is to pay it before it is due, or it is to furnish money for a specified purpose, understood between the parties; the money or some equivalent to be returned. In every case of either a loan or advancement, as mentioned in this statute, there must be contemplated a return or repayment in some form. This definition is emphasized, and that the words are used in the statute in this sense is made clear, by other words employed in immediate connection; for

the prohibition of the statute is against contracts "for the reimbursing or paying" money lent or advanced. The intention and purpose of this clause of the statute seem to be quite clear: That having legalized these games, in deference to some supposed sentiment or condition of society, and provided that persons might win or lose money or property staked upon them, it was sought to hedge against some of the more pernicious results of such legislation, and guard persons against the greater folly of using their credit and incurring debt under the fever and excitement of gaming. The transaction here, as revealed by the evidence, does not come within the above definitions, nor within the mischief sought to be guarded against. There is nothing in the evidence to indicate that these certificates were pledged or were to be redeemed, or that there was to be any return or reimbursement or payment of the money obtained by Kinney. The certificates were simply "cashier"; the assignees taking them, and the indorser the money. The transaction was the exchanging of them for money, similar to the exchanging of a large coin or bank note for smaller ones, more convenient for his use. It was not a loan or an advance, nor did the indorser contract for the reimbursing or paying of any money. But counsel for the plaintiff in error contends that any theory in regard to the advance of money on the certificates is largely artificial and technical, and that, in substance and in fact, the certificates themselves were lost at the game. He says this is established by the fact that at the beginning Kinney had the certificates, and McDonald the money, and at the end McDonald had both money and certificates. It is approximately, though not accurately, true that at the end of the game McDonald had both money and certificates. But this falls very far short of establishing that the certificates were lost on the game, as distinguished from money lost on the game. So far as the distinction is of any value in the case, the evidence shows conclusively that it was money, and not the certificates, that was lost on the game. But it makes no difference. If certificates so lost are recoverable by the loser, so is money as well. I am unable to discover any difference in that respect, or any advantage that the law gives to the one over the other.

Is, then, money or property lost at faro, and paid over, recoverable by the loser in this state? Plaintiff in error contends that it is, and relies upon section 1001 of the statute, and adds further: "The substantive law invoked is of long standing, and was an early enactment in the statutes of England and of many of the states, where it has received a uniform and unvaried construction adapting and applying it to every device and subterfuge which the ingenuity of gamblers could invent in the vain hope of defeating a wise public policy." And we are referred to a great many cases in support of the claim of the plaintiff in error that it may be so recovered. These cases, with three excep-

tions, are from states where gambling and the keeping of gaming houses is unlawful. They are in no sense parallel, and furnish very slight assistance in determining the question here at issue. We are specially referred, however, to three cases (Bryant v. Mead, 1 Cal. 441; Carrier v. Brannan, 3 Cal. 328; Scott v. Courtney, 7 Nev. 419) which, it is urged, were "in regard to a licensed faro game, and under a statute the same as ours." Each of these cases was a suit by the keeper of a licensed gaming house against a player for money won from him at faro, but not paid. And in each of them it was decided that a statute authorizing the granting of a license to carry on a faro game should not be construed as conferring a right to sue for a gaming debt, but as a protection solely against a criminal prosecution; there being no statute in those states prohibiting the recovery of money won at play, but not paid. As section 1001 of our statute, already quoted, expressly provides that all contracts where any part of the consideration thereof shall be for any money or property won by any gaming shall be utterly void and of no effect, thus settling by statute the very question at issue in those cases, it is a little difficult to see why they should be relied on as decisions "under a statute the same as ours," and especially when the question there decided is entirely different from the case at issue here. We have no statute authorizing the recovery by the loser of money lost at gaming, and it could not be recovered at common law. Nor is it recoverable as illegal or contrary to public policy in this state. The price provided to be paid for a license to carry on one of the permitted games is not a mere tax. Section 1462 provides that each license shall contain a description of the room in which the game is to be carried on, and shall, by its terms, authorize the licensee to carry on one of the games mentioned (specifying it by name), in the room described therein, for the period of three months. And it further provides that the licensee shall be entitled to carry on two or more games in the same room, by paying a license for each game so carried on. This language, in my opinion, does not admit of any other construction than that the licensee is authorized and entitled to carry on the game for the ordinary purposes for which such a game is conducted; that is, to win money or property staked, and to retain it as his own. It is absurd to say that an act expressly authorized by statute is illegal or contrary to public policy. The legislature had the power to declare the public policy of the state, and what should be legal in the premises, and it has done so. That it is a very bad public policy, and a relic of a condition of society no longer existing in this state, does not affect the validity of the statute.

But the court below gave judgment against the defendant for interest. The plaintiff took these securities, with notice of their dis-

honor, in payment of an antecedent debt, and stands in no better condition than the original indorsees. The plaintiff in error was a substituted defendant, standing in the place of the bank, the maker of the certificates. The bank has held itself in readiness at all times to pay to whomsoever should be found entitled to receive payment, and is liable on its contract only for interest to the maturity of the certificates at the rate of 6 per cent. per annum. The suit being upon the certificates, and they ceasing to draw interest at maturity, six months from date, there is nothing in the pleadings upon which to base a judgment for interest against the plaintiff in error. Moreover, this was not money loaned or due, and withheld by unreasonable delay of payment, or money received to the use of another, which would bear interest under the statute. The evidence shows, and we have decided, that this transaction was not a loan to the plaintiff in error. If it were, under the statute, there could be no recovery of either principal or interest. If this were a suit against plaintiff in error upon his indorsement, a different question would be presented, though we are not prepared to say that our conclusion from the evidence would be different. Under the case as presented here, however, it is clear that the plaintiff in error is not liable for interest as such. Interest at the legal rate is adopted in many cases as the only available measure of damages, and, if it were allowed in this case, it could only be by way of damages. Damages are not claimed, there is no allegation in the pleadings upon which a claim for damages could be based, and it is not a case in which damages should be awarded.

The cause is remanded, with instructions to the court below to enter judgment in favor of the plaintiff for the sum of \$452.37, being the amount of said certificates with interest at the rate of 6 per cent. per annum for the period of six months, ordering the First National Bank of Rock Springs to pay said amount forthwith to the plaintiff, Harry P. Hynds, with judgment against the defendant, M. Kinney, for costs of the action.

CONAWAY, C. J., and POTTER, J., concur.

BANK OF CHADRON v. ANDERSON.
(Supreme Court of Wyoming. July 7, 1897.)

APPEAL.—RULES.—REHEARING.

1. Rules 23 and 26 (26 Pac. xiii.), providing that a petition for rehearing must be accompanied by a brief, and be filed within 30 days, and that at the expiration of that time a mandate will issue, have the force of statutes, and cannot be suspended, unless it be in a case where compliance is prevented by overwhelming necessity.

2. A motion to strike out a petition for rehearing must be made on notice.

On petition for rehearing. Denied.
For former decision, see 48 Pac. 197.

CONAWAY, C. J. This petition for rehearing was filed after the expiration of the time allowed by rule 23 (26 Pac. xiii.), and after defendant in error had become entitled, under rule 26 (26 Pac. xiii.), to a special mandate to the trial court to enforce the judgment. These rules have the force of statutory law, and parties have a right to rely upon them as such for purposes of terminating litigation, and for other purposes. This is fully discussed, and the authorities upon the point reviewed, in *Cronkhite v. Bothwell* (Wyo.) 31 Pac. 400. It is there intimated, however, that where compliance with the rules is prevented by an "overwhelming necessity," this court may have power to grant appropriate relief. No such showing is made in that case or in this case, or in any reported case, I believe, in this state. A motion to strike this petition for rehearing from the files has been filed. This motion cannot be considered now, because the plaintiff in error has not had notice of the motion. Neither is the petition for rehearing properly before us for consideration on its merits for two reasons: (1) The reason already given, that it was not filed in time; (2) It is not accompanied by any brief. The petition for rehearing is an ex parte proceeding, and the argument in support of it is by brief only, unless oral argument be requested by the court. See rule 23 (26 Pac. xiii.). We have, however, glanced at the petition for rehearing, to ascertain if, possibly, a case of failure of justice be shown. It seems that all the points made by it were presented on the original hearing. It is, in effect, merely a reassignment of alleged errors already passed upon. And the case was carefully considered, and we are still of the opinion it was decided rightly. Rehearing denied.

POTTER and CORN, JJ., concur.

FIRST NAT. BANK OF SHERIDAN v. C. D. WOODWORTH CO.

(Supreme Court of Wyoming. July 7, 1897.)
SALES—WHEAT CONSTITUTES—CHATEL MORTGAGE—VALIDITY—SALE BY MORTGAGOR.

1. A buyer cannot, in an action for the price, attack the seller's title on the ground that the sale by which such title was acquired was in fraud of creditors of the first seller, where the buyer, though a creditor of the first seller, had no lien on the goods.

2. A debtor promised to secure his creditor by bill of sale or mortgage, and thereafter made and recorded a bill of sale of his stock to the creditor, but did not notify the creditor thereof; leaving his employé in charge, with instructions to sell as usual, and remit the proceeds to the creditor. The president of the creditor corporation testified that the bill of sale was not absolute, but for security. *Held*, in an action by the creditor against a purchaser on credit from the debtor's employé while he was in charge of the goods, for the price, that the creditor took no title by the bill of sale, the minds of the parties never having met on a sale.

3. Such bill of sale being invalid as a mortgage, because not stating that it was given as

security (Laws 1890-91, c. 7, § 1), the purchaser may take advantage of such invalidity in an action by the creditor for the price.

4. It is immaterial to the right of the purchaser to attack the bill of sale that he had notice thereof before purchasing.

Error to district court, Sheridan county; W. S. Metz, Judge.

Action by the C. D. Woodworth Company against the First National Bank of Sheridan for goods sold and delivered. Judgment for plaintiff, and defendant brings error. Reversed.

N. K. Griggs and E. E. Lonabaugh, for plaintiff in error. A. M. Appelget, for defendant in error.

POTTER, J. This action was brought by defendant in error, as plaintiff below, to recover an alleged indebtedness for goods sold and delivered to the plaintiff in error; and judgment was rendered in favor of the defendant in error for the amount claimed, the case being tried to the court without a jury. There is no real conflict in the evidence, but counsel for the respective parties draw different conclusions therefrom. The facts are that one C. E. Moore was engaged in the harness and saddlery business at Sheridan, in this state, and was indebted to the defendant in error, a corporation doing business at Omaha, Neb., for goods which he had bought from them. The president of the defendant in error company testified that on May 4, 1895, such indebtedness approximated \$1,200. He was asked if any arrangements were made on that date relative to the securing of his claim, and testified as follows: "It was in March that I saw him. He had been slow, and I came up to see what was the matter with him. He told me that business had been quiet, and collections were slow, and that he would pay me \$475 now, and as soon as he could make collections he would pay me more, and that, in case anything would happen that he could not pay, he would protect us for the amount of our claim, either by mortgage or bill of sale." This promise on the part of Moore seems to have been entirely voluntary. It was not an agreement entered into at the time the indebtedness was contracted, and it does not appear that any new consideration existed for such an agreement. Although it is true, so far as the record discloses, that there was actual forbearance, there was not an agreed forbearance, or any extension of time expressly granted, on account of such promise of security. On the 4th day of May, 1895, Moore executed a bill of sale, absolute in form, reciting a consideration of \$1,000, conveying to the Woodworth Company all his stock of harness, goods, saddles, etc., situated in the Eads building, in the town of Sheridan, and said bill of sale was recorded on that day in the office of the county clerk and ex officio register of deeds. It was not otherwise delivered to the grantees named there-

in, nor to any other person for them. Indeed, it is a mere matter of presumption that Moore personally left the paper for record, or authorized it to be recorded, the evidence being entirely silent respecting that matter. The bill of sale is found on record, and the record thereof is offered and received in evidence, and a copy of it as so recorded is incorporated in the bill of exceptions; and that is the extent of the information which is to be obtained from the record in this case. Whether it ever came into the manual possession of the Woodworth Company does not appear. No notice of the execution or recording of the instrument was given to them by Moore at any time, and they had no knowledge thereof until the 21st or 22d day of May, but more probably the 22d; such knowledge being obtained by means of a telegraphic message from one Innis, who at some previous time, it incidentally appears, had been employed in some capacity, not stated, by Moore. On the 23d day of May they wired instructions to an attorney at Sheridan to take possession of the stock, and he did so at once upon receipt of such instructions. At that time, and also on the two preceding days, the stock and store were in charge of one Rohleder, who had entered Moore's employ on the 2d or 3d day of May. We are unable to discover anything in the evidence to indicate the time when Rohleder was first left in charge. Neither does it appear whether Moore remained in town, or if he had gone when he departed, or under what circumstances; although the briefs of both counsel state that he had gone to the National Park. Rohleder testifies that after he went to work for Moore the business ran along the same way until he saw Mr. Burrows, which was the 21st, and that the store was kept open all the time until possession was taken by Woodworth Company, with the exception of a few days, when they were invoicing. On the 21st day of May, Mr. Burrows, the cashier of the plaintiff in error bank, went to the store, and found Rohleder in charge. He then purchased for the bank the goods in controversy, except a bill of \$14 the following day. That circumstance is related by Rohleder as follows: "He wanted to buy the goods, and he made some remark, and asked who I was working for, and I said, 'Mr. Moore;' and he wanted to know if I would sell him goods, and I said, 'Yes;' and he wanted to know if I would sell on time, or trust him, and I said, 'Yes;' and he said, 'Who are you working for?' and I said, 'Moore;' and he said, 'What are your instructions?' and I said, 'To sell for cash, or to responsible parties;' and he asked me if the bank was a responsible party, and I said, 'Yes;' and he wanted to know if I would sell the goods, and I said, 'Yes.'" The same witness informs us that his instructions were to make remittances to C. D. Woodworth when goods were sold. He made no such remittances prior to their taking possession, and

had no communication with them; and, so far as the evidence discloses, he may have been ignorant of the fact of the execution of the bill of sale. The answer of the plaintiff in error (defendant below) alleged that the goods had been purchased from Moore and fully paid for, and that is the contention here. Mr. Burrows so testified, but, in reference to payment, his cross-examination developed the fact that prior to May 21st the bank had made a loan to Moore, and held the notes of Moore and another party, and that constituted the payment; the notes however, some of which were due, and some not, remaining in its possession. It was alleged in the reply that the bank had notice of the bill of sale, and such notice was attempted to be shown by the county clerk, who testified that it was his custom to mail weekly statements to the bank of all instruments of that character, and he thought he had mailed them a notice of this particular instrument. That such a notice was given is not denied in the evidence. The case resolves itself into this inquiry: When the goods were purchased by the bank, did the Woodworth Company have such a title in them as to support a recovery in this action? Counsel for defendant in error insists that the bill of sale amounted to an absolute transfer of the goods, and was a completed sale, and that the conduct of Moore demonstrates that such was his intention. On behalf of plaintiff in error, on the other hand, it is contended that the conveyance was intended as a chattel mortgage, and is void under our statute, and also that, if its purpose was to effect a transfer as on a sale, the transaction was ineffectual as such.

Counsel for plaintiff in error discuss in their brief at some length the questions affecting the validity of a sale of personal property without change of possession, as against creditors. Those questions are not applicable, and cannot determine the relative rights of the parties in this case, for the reason, if no other, that the bank does not appear here in the attitude of a creditor. The issue which is submitted by its answer was that it had made a direct purchase from Moore, and had paid him for the goods. On cross-examination, indeed, the fact was brought out that it was a creditor, but it had not obtained any lien upon the goods by any judicial process, nor brought itself in any way into such privity with the goods as would entitle it to attack a mortgage valid upon its face, or a sale completed as between vendor and vendee, for fraud. *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679. The determination of this case depends upon entirely different considerations. If there was a sale perfected, so as to pass the title, the judgment was correctly rendered. We are satisfied that the transaction between Moore and defendant in error did not amount to a sale. Contracts for the purchase and sale of chattels, if complete and unconditional, and not within the statute of frauds,

or if within such statute, if there is a sufficient memorandum thereof in writing, properly signed, are sufficient, as between the parties, to vest the property in the purchaser, even without delivery; the rule being, as said in *Hatch v. Oil Co.*, 100 U. S. 124, 128, "that such a contract constitutes a sale of the thing, and that its effect is, if not prejudicial to creditors, to transfer the property to the purchaser against every person not holding the same under a bona fide title for a valuable consideration without notice." This rule, however, implies a contract which is complete and unconditional, and it is elementary that there cannot exist such a contract without the mutual assent of the parties. *Hatch v. Oil Co.*, supra; *Wittkowsky v. Wasson*, 71 N. C. 451. We fail to observe any such mutual assent in this case. The promise of Moore, made without consideration, was to protect by mortgage or bill of sale, not to sell outright and by complete transfer of title. He gave no notice of the execution of the conveyance, but contented himself with a recording of the same, if he caused that to be done. He retained possession and control over the goods and store, gave instructions relative to the disposition of the goods and the remittance of the proceeds, and authorized sales upon credit to responsible parties. Such instructions are given to his own employé, who remains in charge, representing him, with probably no knowledge of the bill of sale. On Moore's part, these facts are all consistent with the theory of a mortgage, but utterly inconsistent with that of a sale. It seems to me that his conduct admits of no other construction than that he intended the conveyance as security only. Again, the president of the Woodworth Company testified that the bill of sale was not absolute as a transfer, but was given as security only. It is suggested by counsel, with reference to this item of testimony, that witnesses do not deal with nice legal discriminations, and that we are not to expect conciseness of expression from persons not learned in the law; that witnesses consider rather the effect than the means used. We are of the opinion that, however appropriate the argument of counsel may be in dealing with certain expressions of witnesses under some other circumstances, the testimony of the witness above alluded to indicates about as clearly as anything could that the defendant in error had not assented to any contract of sale. The conclusion is irresistible that there had not been a meeting of minds, or that mutuality of purpose and understanding without which a complete contract of sale is impossible. This essential feature of a sale being absent, it is unnecessary to consider the effect of the recording of the bill of sale as a delivery. Without deciding that question, I am strongly impressed with the difficulty which would be experienced in an endeavor to bring the facts of this case as shown by the evidence within the limits of those judicial authorities which hold

that a delivery for record may constitute a sufficient delivery to the grantee,—particularly so as our statutes do not require a bill of sale, intended as evidence of a sale of the kind of chattels in controversy, to be recorded. The defendant in error was out of possession when the purchase of the goods in question was made.

The transaction not amounting to a sale, did the recorded conveyance, assuming it to have been delivered on the day of its date, without possession of the goods in the vendee named therein, constitute a valid chattel mortgage? The legislation of this state has undergone many changes upon the subject of mortgages of personal property, and an examination of the various stages of that legislation affords us a reasonably accurate knowledge of the purpose which ultimately found expression in the statutes, as well as the evils which were sought to be prevented, and the good desired to be accomplished. With that information, a construction of section 1 of chapter 7 of the Laws of 1890-91 is not difficult. That section provides the method of executing any conveyance intended to operate as a mortgage of chattels, and contains a proviso as follows: "Provided, that no instrument shall operate as a chattel mortgage unless it shall state distinctly upon its face that it is intended for security, and shall also state the amount for which said instrument is security." This is a requirement of a substantial matter. The instrument must, on its face, show that it was intended for security. In *Graham v. Blinn*, 3 Wyo. 746, 30 Pac. 446, this court held that no particular form of words is required to comply with the statute. It is clear, however, that there must be some statement contained in the body of the conveyance which will unmistakably indicate its character. Where that is lacking the statute forbids its operation as a mortgage. The bill of sale executed by Moore is absolute in form, and devoid of the slightest indication that it is intended for security. It cannot, therefore, be regarded as a chattel mortgage. Being invalid on its face as such, the plaintiff in error may take advantage of that fact. The goods were purchased from Moore, and not from the Woodworth Company; the latter at the time having no legal right in the goods as purchased. The matter of notice is not material. Other provisions of the statute require the mortgage to be filed in the proper public office. If not so filed, and there is not a change of possession, it is declared by statute to be void as against subsequent mortgagees or purchasers in good faith; but these provisions refer to an instrument intended to operate as a mortgage, in the execution of which the requirements of the proviso of section 1 aforesaid have been observed. Similar conclusions were reached in *Ridgely v. Bank*, 75 Fed. 808, by Judge Hallett, sitting in the United States circuit court for this district, in respect to a chattel mortgage of the property of a co-partnership, which had not been sign-

ed by all of the co-partners, as is required by section 2 of the act referred to.

Our conclusions are, therefore, upon the evidence and the law applicable thereto, that the plaintiff in error was entitled to a judgment in its favor, and the judgment of the district court was error. That judgment must be reversed, and a new trial ordered.

CONAWAY, C. J., and CORN, J., concur.

DUNBAR v. BOARD OF COM'RS OF CANYON COUNTY.

(Supreme Court of Idaho. June 30, 1897.)

COUNTIES—POWERS OF COMMISSIONERS—BRIDGES—DEBTS—BONDS—INJUNCTION—PARTIES.

1. A demurrer may be amended, but leave to do so should first be obtained.

2. The building of a bridge is not an ordinary and necessary expense.

3. County commissioners have no authority to contract for the building of a bridge, the cost of which will exceed \$1,000, without a petition asking it is presented to them, signed by at least one-third of the taxpaying voters of the county; and then, if the cost, added to the other ordinary and necessary expenses, will exceed the county's revenue for the year, the commissioners cannot contract for such bridge without being authorized by a two-thirds vote at an election called and held for that purpose as provided by section 3, art. 8, of the constitution.

4. The provisions of the constitution relative to the creation of public debts are mandatory.

5. Boards of commissioners in creating debts must keep within the provisions of the constitution, and, if they fail to comply with the requirements of the constitution, their acts are void.

6. A taxpayer, resident of the county, may sue to enjoin the issuance of funding bonds which are about to be issued for debts contracted in violation of provisions of the constitution.

7. To uphold the validity of a proposed issue of county bonds, it must affirmatively appear by the record that the provisions of the constitution were complied with by the commissioners in creating the debt or debts about to be funded. (Syllabus by the Court.)

Appeal from district court, Canyon county; J. H. Richards, Judge.

Action by W. C. Dunbar against the board of commissioners of Canyon county to enjoin the issuance of county bonds. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Charles H. Reed, for appellant. R. E. McFarland, Atty. Gen., Tremont Wood, and Edgar Wilson, for respondents.

QUARLES, J. The appellant, a resident taxpayer of Canyon county, commenced this action in the district court of the Third judicial district of Idaho, in and for Canyon county, on the 25th day of April, 1896, to obtain a perpetual injunction restraining the defendant board of commissioners from issuing bonds to fund \$46,445.20 of alleged indebtedness of said county incurred during the years of 1894 and 1895. On May 5, 1896, C. M. Hays, district attorney for said district, filed a general demurrer to the complaint; averring that "the complaint does not state

facts sufficient to constitute a cause of action." Thereafter, and on September 30, 1896, said district attorney filed, without leave of court, so far as is shown by the record, another demurrer to said complaint, alleging the following grounds: "(1) That the complaint does not state facts sufficient to constitute a cause of action. (2) That several causes of action have been improperly joined in this, to wit: First, that the complaint seeks, in one action, without separating the various causes of action, to enjoin the issuing of bonds to pay the current and necessary expense warrants of said county; second, to pay scalp-fund warrants; third, to pay road-fund warrants. (3) That the complaint is ambiguous, unintelligible, and uncertain, in this: From the complaint it cannot be determined whether the plaintiff brings this action to enjoin the issuing of bonds to pay current and necessary expense warrants, to pay scalp-fund warrants, or road-fund warrants, of said county. (4) That the complaint does not state a cause of action as to why the scalp-fund warrants are illegal and void." Afterwards the following order was made, to wit: "This cause coming on to be heard regularly this 23d day of December, 1896, upon the demurrer to the complaint herein, it is ordered that the demurrer herein be, and is hereby, sustained. [Signed] J. H. Richards, Judge." And the said order, and a judgment dismissing the action, were filed and entered in the cause on the 30th day of December, 1896.

We are unable to ascertain from the record upon which of the demurrers the court acted, or on what grounds the complaint was held to be bad. A demurrer, like any other pleading, may be amended; but, if amended, it should show on its face that it is an amended demurrer. We think that leave to file an amended demurrer should be first obtained, but, as to a first amendment prior to a hearing on demurrer, the leave should be granted as a "matter of course." The practice of filing a number of demurrers to the same pleading by the same party is not permissible, nor is the court called upon to look through the files to see how many demurrers have been filed. Without attempting to solve the question as to which demurrer was argued, or on what grounds the demurrer was sustained, we express the opinion that the plaintiff stated a cause of action, and that the order sustaining the demurrer and the judgment were erroneous.

Section 3, art. 8, of the constitution, is in words as follows: "No county, city, town, township, board of education, or school district, or other sub-division of the state, shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made

for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state." Paragraph 12 of the complaint is as follows: "The plaintiff alleges further that the said board of county commissioners have made no provision for the collection of an annual tax sufficient to pay the interest on the proposed bonded indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same," etc. Attached to the complaint, as Exhibit A, is a statement of the outstanding warrant indebtedness of the county sought to be funded, and from said exhibit it appears that the alleged indebtedness of the county incurred during said two years increased to the extent of \$46,455.20; said increase being on the following funds, to wit: General expense fund, \$16,146.52; road fund, \$27,110.11; scalp fund, \$3,198.57 (the latter being warrants issued for bounties on rabbit scalps). For all of said alleged indebtedness, warrants were drawn on said respective funds. From said exhibit it appears that on the 23d day of December, 1895, the following warrants were drawn on the road fund, viz.: No. 1, amount \$2,500, part payment of Caldwell bridge contract; No. 2, amount \$1,400, part payment Caldwell bridge contract; No. 219, amount \$1,000, balance on Caldwell bridge contract; No. 3, amount \$100, Parma bridge contract; No. 214, amount \$4,444, Parma bridge contract; and on April 15, 1895, No. 92, amount \$5,350, balance on Parma bridge. Thus, it will be seen that in the construction of the two bridges there was an attempt to create an indebtedness aggregating \$14,794.

But it is insisted that the judgment below was proper for the reason that the complaint does not show what the revenues for the different funds were for the two years named. It would have been better for the complaint to have shown this, and, while the complaint is imperfect, yet we think it shows a cause of action. It is alleged in the complaint that warrants, as above mentioned, to the extent of \$46,455.20, were issued during the years of 1894 and 1895, and that the respondent commissioners were threatening to issue and about to issue and sell bonds of said Canyon county to fund the said warrants. It does not appear what the aggregate warrants issued by the officers of Canyon county for said two years are. So far as the pleadings are concerned, we cannot tell how much revenue was paid into the county treasury during said two years, how much was paid out, or how much was left in the

treasury. But a reasonable inference from the facts pleaded is that the expenditures exceeded the revenue to the extent of the proposed bond issue; and, if this is not correct, but, on the other hand, it be true that there remained a sufficiency in the treasury to pay said warrants, then the authority to issue said bonds does not exist, and their issuance should be restrained. If, on the other hand, the expenditures for said two years exceeded the revenue for those years to the amount of the proposed bond issue, then the authority to issue said bonds cannot be recognized, unless the requirements of the constitution and laws have been complied with in incurring the debts sought to be refunded. In solving this question it is necessary to determine whether the building of a bridge, and the payment of bounties for rabbit scalps, are ordinary and necessary expenses of a county. It will be seen that the two terms are used conjunctively; hence, to come within the constitutional proviso or exception, expenditures made in excess of the revenues of any current year must not only be for ordinary expenses, such as are usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, but there must exist a necessity for making the expenditure at or during such year. In the case of *Bannock Co. v. C. Bunting & Co.* (Idaho) 37 Pac. 277, this court, in construing section 1762, Rev. St., held that the purchase of a site for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county." In that case this court further said: "It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of \$4,000, they might purchase one at a cost of \$10,000, and proceed to erect a courthouse at a cost of \$20,000, all of which would be in direct violation of the constitution. It is, of course, the duty of commissioners to provide a suitable place for holding of the courts and public offices, jails, etc.; but such rooms must be temporarily provided, at as little expense as is consistent with providing suitable quarters, until the question can be submitted to the people." What has been said with reference to building a courthouse applies to the building of a bridge or other public improvement, within the letter and spirit of the constitution and statutes. We conclude that the building of a bridge and the payment of scalp bounties are not ordinary, but extraordinary, expenses, and, being such, cannot be created in excess of the revenue for the fiscal year in which they may be incurred without the assent of two-thirds of the electors of the county voting at an election duly called and held. It is true that an election was held to ascertain the will of the electors of Canyon county as to whether bonds should be issued "for the purpose of funding the outstanding indebtedness of said Canyon county incurred prior to January 14, 1895, and as evidenced

by the outstanding warrants of said Canyon county." But the record does not show that the question of incurring the debts for building the Parma and Caldwell bridges, amounting to about \$15,000, was submitted to the electors by petition or otherwise. Under section 1762, Rev. St., a bridge cannot be built at a cost to exceed \$1,000 unless one-third of the taxpayers who are voters of the county petition therefor, but since the adoption of our constitution this provision of the statute only applies when the revenues for the fiscal year are not exceeded; for if such expenditure exceeds, when added to the necessary expenditures of the county for the fiscal year, the revenue for that year, then such bridge cannot be built without a two-thirds vote, as provided in section 3, art. 8, of the constitution. We are aware that bridges are useful and important and of great convenience to the public. But the authority of boards of commissioners in creating debts is limited by the constitution and statutes of the state, and must be exercised within those limits, and at least with a substantial compliance of the mode prescribed by such constitution and statutes. It is not only the duty of ministerial officers, but of judicial officers as well, to support the constitution and laws of the state, but all of such officers are bound, under the solemn obligations of the official oath, so to do. No officer can support the constitution by ignoring and violating its plain provisions. The duty of saying that the commissioners of Canyon county have violated the constitution, while a painful one, is nevertheless a duty which cannot and should not be evaded. In passing upon the question before us, we do not desire to be understood as passing on the material facts of the case, or as deciding the validity or invalidity of the warrants in question. The demurrer confesses the fact that the commissioners of Canyon county failed to make provision for paying the principal and interest of the alleged indebtedness as required by the constitution. For this reason, if for no other, the demurrer should have been overruled. The provisions of the constitution are mandatory in this regard, and must be complied with. If boards of county commissioners are permitted to violate, disregard, and set at naught one plain provision of the constitution, then they may violate any and all provisions of that instrument, and the people who pay the taxes and bear the burdens of government are without protection, and at the mercy and whims of county commissioners. In the case at bar it appears that one plain provision of the constitution has been disregarded. On the other hand, it does not appear that in incurring the extraordinary expense of building the bridges at Caldwell and at Parma, and in rewarding rabbit destroyers, the provisions of the constitution and of the statutes have been complied with. In such case, it appearing that the commissioners have violated their duty in one mat-

ter, we will not presume that they have performed their duty in other matters pertaining to the same subject. But counsel for both parties say that this is a friendly suit, brought to determine in advance the legality of a proposed issue of bonds, and that the facts are not all before the court, and for that reason the court should presume that all of the proceedings were regular. In such cases this court will not say that the proposed issue of bonds is legal unless it affirmatively appears by the record that all of the provisions of our constitution and statutes in force relating to the subject-matter have been complied with. It was admitted by the attorney general on argument, that the record in this case did not show all the facts which should appear. And he contended that there was not enough in the record to justify this court in passing on the validity or invalidity of the proposed issue of bonds.

The decision in *Morgan v. Board* (decided by this court April 6, 1895) 39 Pac. 1118, is somewhat in conflict with the views herein expressed, and we think should, to some extent, be modified. The remedy to correct errors and irregularities in the action of a board of commissioners acting in a matter over which such board has jurisdiction is solely by appeal. But where a board of commissioners, in violation of the constitution, incurs a large debt in excess of the revenues for the fiscal year in which they assume to incur such debt, without submitting the question of incurring such debt to the voters, and providing for payment of the interest and principal thereof, as provided by the plain provision of the constitution and statutes of the state, such board is not acting within its jurisdiction; and the action of the board in making such an order is void, and may be attacked directly, indirectly, or collaterally, at any time or place. To hold otherwise would give the boards of commissioners power to do indirectly what the constitution forbids. The case of *Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805, and that of *Rogers v. Hayes* (Idaho) 32 Pac. 259, have no application to the case at bar. In the former the plaintiff sought to enjoin the county treasurer from paying a number of warrants, and in the latter case the plaintiff was seeking by certiorari to review an order made by a board of commissioners in disregard of the appeal provided by statute. In *County of Ada v. Bullen Bridge Co.* (Idaho) 47 Pac. 825, this court held that the county could not sue in equity to cancel warrants issued without authority, but should sue at law, under section 4928, Rev. St., and compel the holder of the warrant to establish his rights therein. In the case at bar the relief sought is not to cancel written instruments, nor to review the action of the board of commissioners in making an appealable order, but to prevent the county commissioners from doing the threatened act of changing nonnegotiable instruments, whose validity is questioned, into negotia-

ble instruments. This relief is purely equitable, and we know of no remedy at law to prevent such act. If the county commissioners may, in the face of the constitution, create a debt that the constitution pronounces void, and then change the form of the debt into a negotiable instrument, thus endangering the county, to at least expensive litigation, then the object and intent of the constitution is thwarted, and the commissioners possibly permitted to do indirectly what they are positively prohibited from doing directly. In *Bannock Co. v. C. Bunting & Co.*, supra, this court suggested to the commissioners of Bannock county that they should rent suitable rooms for the courthouse and officers until they should submit the question of building a courthouse to the voters of their county. We now suggest to all county commissioners that they should not incur any debt by building bridges in excess of the public revenue of their county without submitting the question of building such bridges to the voters of their county. The framers of the constitution intended that the several counties of the state should be placed upon a cash basis, and that the incurring of heavy debts by the counties should not occur unless the people of the county should so authorize. The judgment appealed from is reversed, and the cause remanded, with instructions to overrule the demurrer, and for other proceedings consistent with this opinion.

SULLIVAN, C. J., and HUSTON, J., concur.

RICE v. GWINN.

(Supreme Court of Idaho. June 24, 1897.)

MUNICIPAL CORPORATIONS—DUTIES AND POWERS OF MAYOR AND COUNCIL.

1. Where the council of a city organized under the "Act for the organization of cities and villages" (Laws Idaho [2d Sess.] p. 97) have passed upon and allowed a claim against such city, and ordered a warrant upon the city treasury to issue for the amount thereof, it is the duty of the mayor, on the presentation of such warrant to him for that purpose, to sign the same, and the performance of such duty may be enforced by mandamus.

2. When an exigency arises involving the corporate existence of a city, and such city finds itself without an attorney, it is within the powers of the mayor and council of such city to employ counsel to protect its interests in such contingency, and their action therein will not be defeated on account of a failure to comply with all the technical details incident to the employment of counsel in ordinary cases.

(Syllabus by the Court.)

Appeal from district court, Canyon county; J. H. Richards, Jud. e.

Mandamus by John C. Rice against Monte B. Gwinn. From a judgment for plaintiff, defendant appeals. Affirmed.

Lot L. Feltham, for appellant. Rice & Griffiths, for respondent.

HUSTON, J. On April 21, 1896, an action was commenced in the district court for the county of Canyon for the purpose of testing the legality of the municipal corporation known as the city of Caldwell as a city of the second class, under the provisions of the laws of Idaho. Laws Idaho (2d Sess.) p. 97. Such proceedings were had in said action as resulted in a judgment by said district court to the effect that said city of Caldwell had no legal existence, and that certain parties therein named and designated as trustees of the town of Caldwell were the persons entitled to the offices to which they had been elected under the town organization. And, acquiescing in the judgment of the district court for the time being, the officers of the city of Caldwell yielded up the administration of the affairs of the city of Caldwell as directed by the judgment of the district court. But, not having infinite trust and confidence in the correctness of said judgment, the said council of the said city of Caldwell proposed to go further, and appeal from said judgment of the district court to the supreme court of the state. In furtherance of this purpose, they called upon the regularly appointed attorney of said city, one John T. Morrison, who was also a trustee of the town or village organization to whom the judgment of the district court had relegated the government and control of the said city of Caldwell, and said attorney positively refused further to represent said city of Caldwell in said litigation beyond filing and serving a notice of appeal from said judgment of the district court. In this condition of affairs, the mayor of the city of Caldwell, under and by direction of the council of said city, employed the respondent herein to represent said city in said action in the supreme court of the state, and agreed to pay him a certain compensation therefor. The respondent appeared for the said city of Caldwell in the supreme court upon said appeal, and by the judgment of said supreme court the judgment and decision of the district court was reversed, and the legal existence of said city of Caldwell was affirmed. On the 11th day of August, 1896, the respondent presented his account for services rendered as aforesaid under his agreement with said mayor of the city of Caldwell, acting under and by direction of the council of said city, and on the 7th of September said council duly allowed said account, and ordered a warrant for said service to be drawn on the general expense fund of said city, payable to respondent, which warrant was duly drawn by the clerk, and presented to the mayor of said city of Caldwell (the appellant herein) for his signature, and the said mayor then did, and ever since has, refused to sign said warrant, alleging, in excuse of such refusal, that the claim for the payment of which said warrant was allowed is not a legal charge against said city. Thereupon said respondent applied to the district court for writ of mandamus commanding said mayor to sign said warrant. The district court ordered the issuance of said writ in accordance with the prayer of the petitioner,

and from such judgment and order this appeal is taken.

Counsel have expended much time and labor and have evinced considerable legal learning and research in the presentation of this case. There is but one question in the case: Has the mayor the right or authority to negative or defeat the action of the council by refusing to perform the purely ministerial function of signing a warrant when the issuance of the same has been ordered by the council? It is contended by appellant that the employment of an attorney to represent the city must be made by special contract, which must be evidenced by the records of the council, and it is upon the alleged want of a record of a contract with the respondent that the appellant mainly relies in his contention in this case. We cannot find any support for this contention, as applicable to the facts in this case, either in principle or authority. A municipal corporation had been organized under the provisions of the statute. It had entered upon the discharge of the duties incumbent upon it as prescribed by law. Its legal existence was assailed by certain citizens of the corporation. This proceeding against the municipal corporation had resulted in a judgment of the district court declaring such corporation invalid and nonexistent. To this conclusion, while acquiescing for the time being in the judgment of the court, the officers of the municipal corporation, in the performance of what they conceived to be, and what undoubtedly was, both their right and their duty, concluded to appeal from said judgment of the district court. In pursuit of that purpose, they called upon the person who was, by due appointment, the attorney of said municipal corporation, to proceed and prosecute such appeal; but such person positively and emphatically declined to act or move in said matter further than to file and serve a notice of appeal. In this condition of affairs, what was the duty of the officers of the city of Caldwell? They might perhaps, if they had seen fit so to do, have sat quietly down and acquiesced in the decision of the district court; and, had they seen fit to adopt such a course of action, or rather inaction, whether such appeal might or might not have been prosecuted by any taxpayer of the city residing therein it is not necessary here to inquire. It is enough that the officers of the city saw fit to prosecute the appeal, and they further saw fit, through their mayor, to employ the respondent to conduct said appeal on the part of the city. That in such employment of respondent some of the technical details may have been overlooked, or that such employment may have been technically irregular, may be conceded; still it is undeniable that the services were rendered, and that the appeal resulted in the reversal of the judgment of the district court, and the establishment of the corporate identity of said city of Caldwell; and, further, that after such judgment of the supreme court the city council of said city of Caldwell, to wit, on the 7th day of September, 1896, allowed the claim of respon-

ent for said services as per said agreement with him made by said mayor under and by direction of said council. All of these facts are found by the district court.

The only objection raised by the appellant which we deem it important to consider is that in the employment of the respondent the council did not follow explicitly and literally the provisions of section 70 of the act concerning the organization of cities and villages. In the view we take of this case, the consideration of this proposition becomes unimportant. That the right to employ counsel, under the facts as found in this case, was inherent in the city council, is, it seems to us, too clear to require argument. That the preliminary steps in the employment of such counsel were irregular would not be sufficient to defeat the claim in the first instance; but the body upon which the law has imposed the duty of passing upon and allowing the claim have acted, have allowed the claim, and ordered the warrant for the amount to be issued. Assuming that under the provisions of section 11 of the act above referred to the mayor might have the authority to veto the allowance of that claim, that would be the utmost limit of his power in that regard. If the city council have passed an illegal claim, the law provides a remedy; but such remedy is not found in the assumption of despotic power by the municipal executive. Section 66 of the act of the second session above referred to provides that "all warrants drawn upon the treasurer must be signed by the mayor." The powers of the mayor are defined by said act, and the right to clog or impede the operations of the city government by refusing to perform a duty imposed upon him by the organic law of the municipality is not among them. It is the duty of the council to pass upon all claims against the city, and in this action the mayor has no part, except in the case of a tie vote. The veto power of the mayor would seem to be limited to ordinances, and it is provided by section 11 of the act referred to: "That any ordinance vetoed by the mayor may be passed over his veto by a vote of two thirds of the members of the council elected, notwithstanding the veto, and should the mayor neglect or refuse to sign any ordinance and return the same with his objections in writing at the next regular meeting of the council, the same shall become a law without his signature." In this case the mayor did not veto; he just "stood pit." On the presentation to him of a warrant duly issued upon the city treasury by order of the council of such city it is the duty of the mayor to sign the same, and the performance of such duty may be enforced by mandamus. The judgment of the district court is affirmed, with costs.

SULLIVAN, C. J., and QUARLES, J., concur.

On Rehearing.

(July 12, 1897.)

QUARLES, J. We have given the petition for rehearing in this case careful attention.

The fact that the former city attorney testified that he had resigned does not take the case out of the application of the rules under which it was decided. The facts warranted the city council in employing counsel to prosecute the appeal without appointing a city attorney. The situation was such that it was not advisable to appoint another city attorney without first procuring a reversal of the judgment of the district court which declared the invalidity of the municipal corporation. Until that judgment should be reversed, there was no occasion for the services of a city attorney. The legal existence of the municipality depending upon a successful appeal from the judgment, a necessity for the employment of the plaintiff, or some other competent attorney, existed, and the council were authorized to make the employment. The employment was irregular. It is true; still the council ratified it by allowing the claim, and it was the duty of the appellant, as mayor, to sign the warrant,—a duty that he had no right to refuse to perform. The decision is fully warranted by the authorities cited in the original opinion, as well as by other authority and by the exigencies of the case. A rehearing is denied.

SULLIVAN, C. J., and HUSTON, J., concur.

BANK OF WOODLAND v. DUNCAN. (Sac. 220.)

(Supreme Court of California. June 24, 1897.)

CHATTEL MORTGAGES—TRANSFER AS COLLATERAL—VALIDITY—REPLEVIN BY MORTGAGEE.

1. The indorsement by the payee of notes secured by chattel mortgages, and delivery thereof, with the mortgages, without formal assignment thereof, to a bank as collateral security, were not invalid for want of conformity with the statutory requirements concerning chattel mortgages, but the mortgages passed with the note as valid collateral.

2. A debtor gave notes secured by chattel mortgages on growing crops. The payee orally agreed to advance money "upon the security of the mortgages" for the harvesting expenses. The notes were due in one month,—long before any advances could be required for harvesting the crops. *Held*, that a breach by the payee of such contract for advances was independent of that evidenced by the mortgages, and could not release the lien, or nullify the effect of the latter.

3. A chattel mortgagee, entitled by the terms of a mortgage to take immediate possession of the mortgaged property, can maintain replevin, though he was not the absolute owner of such property.

4. A provision in a mortgage on growing crops for immediate possession, as allowed by Civ. Code, § 2927, is not inoperative because it is an agreement for the future pledging of chattels, and invalid against third persons without delivery.

5. Civ. Code, § 2972, providing that the lien of a mortgage on a growing crop continues after severance so long as the crop remains on the land of the mortgagor, does not bar replevin by the mortgagee where the crop is wrongfully removed by the mortgagor from the premises.

6. The fact that an assignee of notes secured by chattel mortgage reassigns them after crediting proceeds of sale of the mortgaged property, is not a bar to replevin by such assignee against

the mortgagor to recover mortgaged property wrongfully taken from the possession of the assignee.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by the Bank of Woodland against B. F. Duncan. Judgment for defendant. Plaintiff appeals. Reversed.

Craig & Hawkins and R. L. Simpson, for appellant. E. R. Bush and E. E. Gladdis, for respondent.

BRITT, C. Replevin for 450 sacks of wheat, part of the crop grown during the cropping season of 1892-93 by J. R. and B. F. Davisson on certain large tracts of land farmed by them as co-partners in Yolo county. Said co-partners made two negotiable promissory notes in favor of one Wolf Levy, —the first dated November 9, 1892, for the sum of \$4,500; and the second dated April 5, 1893, for \$2,958.78,—each payable, with interest, one month from its date, and each secured by a separate mortgage executed by the Davissons upon their said crop growing and to be grown. It was provided in each mortgage that the mortgagors would care for and protect the mortgaged crop while growing and until fit for harvest, and then faithfully harvest, thresh, sack, and deliver the same immediately into the possession of said Levy or his assigns, to be held and disposed of for the payment of the debt secured thereby; that in case of the default of the mortgagors in any of those particulars the mortgagee or his assigns might protect, harvest, etc., the crop, and the expenses incurred in that behalf should be secured by the mortgage, and be first payable from the proceeds of sale; that the mortgagee or his assigns should, upon the harvesting of the crop, be entitled to the immediate possession thereof, and to haul and store and sell the same, applying the net proceeds to the payment of the note secured by the mortgage, and rendering the overplus, if any, to the mortgagors. Both mortgages were duly recorded. The consideration was prior indebtedness of the Davissons to Levy at the date of the notes, respectively. Levy in turn was indebted to the Bank of Woodland, plaintiff here, in a large amount, and forthwith after the receipt of each of said notes, and before the maturity thereof, he indorsed and delivered the same, together with the mortgage by which it was secured, to the plaintiff as collateral for his indebtedness to the latter. There was no formal assignment of the mortgages apart from the indorsement and delivery of the notes. Concurrently with the execution of the mortgages, Levy orally agreed with the Davissons that he would advance to them money "upon the security of the mortgages" for the purpose of harvesting their crops, and threshing, sacking, and otherwise protecting the same; and it had been his custom to make to them ad-

vances for similar purposes during a series of six or eight years before the transactions here in question. In June and July, 1893, Duncan, the defendant, under employment of the Davissons, headed the crop, for which service they became indebted to him in the sum of \$590. They gave him an order for this sum on Levy, who refused payment, though it seems that previous to this time—the close of July, 1893—he had honored some similar demands of the Davissons. Thereupon the Davissons directed defendant to take from the grain—which had then been threshed and sacked, but was yet lying in the fields where it was grown—enough to secure his said account. Accordingly he removed the wheat for which he is now sued. It was not taken from that part of the crop headed by him. Defendant took the wheat against the protest of plaintiff's agents. Plaintiff was asserting claim to it, and was itself preparing to remove the same. Whether it had acquired actual possession is a disputed point, but not important to be decided. Upon the commencement of the action plaintiff obtained possession of the wheat by process of claim and delivery, and before the trial sold the same, together with the rest of the crop, credited the proceeds on the notes, and also to Levy's account, and reindorsed the notes to Levy without recourse; there being a balance unpaid on them. Defendant pleaded the facts of such sale and retransfer by way of supplemental answer. He also filed a cross complaint asserting his right to possession of the wheat in controversy, and that plaintiff wrongfully took the same, to his damage to the amount of his account against the Davissons, for which he prayed judgment. The judgment was that plaintiff take nothing, and that defendant recover as prayed in his cross complaint.

We cannot assent to the theory advanced by respondent that the indorsement of the notes and delivery thereof with the mortgages by Levy to the bank was but an attempt to create a new mortgage, and abortive for want of conformity with the statutory requirements concerning the execution of chattel mortgages. On the contrary, the mortgages passed with the notes as valid collateral to the bank, which thus became vested quoad hoc with the rights of the mortgagee. *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799; *McArthur v. Magee*, 114 Cal. 126, 130, 45 Pac. 1068. Whether the bank, under the circumstances in proof, as indorsee in due course of the notes, obtained a title free of any equities in favor of the makers against Levy, and whether the mortgages partook in this respect of the negotiable quality of the notes, are questions argued by counsel, but which are not necessarily involved in the case. Aside from any difficulty of making the mortgages stand good for advances under the oral agreement (*Civ. Code*, § 2922), it is evident that the covenants of the Davissons contained in the notes and mortgages, and the promise of Levy express-

ed orally to make future advances for the use of the Davissons, were in no wise dependent. The sums promised to be paid by the Davissons were due in one month from the date of the notes, respectively,—long before any advance could be required for harvesting the crop; and the consideration for their promises had accrued to the mortgagors prior to the execution of the papers. Therefore Levy's refusal to pay the mortgagors' order in favor of defendant, though it seems to have been unjust, and may have given them a ground of cross action against him, was yet the breach of a contract independent of that evidenced by the mortgages, and could not operate to release the lien or nullify the effect of the latter. The mortgagors and the defendant mistook in assuming that it did. This conclusion is illustrated—if, indeed, authority is necessary—by *Coursen v. Canfield*, 21 N. J. Eq. 92; and accords with the doctrine of *Railroad Co. v. Butler*, 50 Cal. 574; *Deacon v. Blodget*, 111 Cal. 416, 44 Pac. 159; *Railroad Co. v. Allen*, 112 Cal. 455, 44 Pac. 796.

It was not essential to the maintenance of the action that plaintiff should be the absolute owner of the wheat. By the terms of the mortgages it was entitled to the immediate possession thereof, and this was sufficient. *Lazard v. Wheeler*, 22 Cal. 139; *Holly v. Helskell*, 112 Cal. 174, 44 Pac. 466. Respondent contends that this clause of the mortgages is inoperative in plaintiff's favor, for the alleged reason, among others assigned, that it is but an agreement for the future pledging of chattels, and was invalid against third persons until consummated by delivery. The statute, however, allows the insertion of such provision in a mortgage, and we see no ground for denying it effect here. Civ. Code, § 2927. It is also contended that by defendant's removal of the wheat from the premises where it was grown plaintiff is precluded from maintaining the action; this because of the language of section 2972, Civ. Code, that the lien of a mortgage on a growing crop continues after severance "so long as the same remains on the land of the mortgagor." Plaintiff had the right of possession. Defendant's act was tortious, and he cannot thus take advantage of his own wrong. See *Chittenden v. Pratt*, 89 Cal. 179, 26 Pac. 626, and cases cited.

The fact that the notes were reassigned to Levy before the trial is no defense. The injury on which the suit is founded was done to the plaintiff. The proceeds of plaintiff's sale of the wheat were credited on the notes and also to Levy's account; hence the cause of action did not pass to Levy with the reassignment of the notes, but was reserved to the plaintiff.

Respondent suggests that certain findings made by the court on the averments of his cross complaint are not assailed in the specifications of insufficiency of evidence annexed to the bill of exceptions. The findings, however, which pertain to the cross complaint,

and affirm defendant's right of possession, are but iterations in different form of other findings adverse to plaintiff's right. These latter are attacked by the specifications, and it was not necessary to repeat objections to meet a repetition of substantially the same conclusions. The judgment and order denying a new trial should be reversed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

(15 Utah 170)

WHITE v. PEASE et al.

(Supreme Court of Utah. June 7, 1897.)

CONVERSION—FINAL JUDGMENT—SALE AND DELIVERY—RES GESTÆ—EVIDENCE OF VALUE—SELF-SERVING DECLARATIONS.

1. An order refusing to grant a new trial is not a final judgment from which an appeal will lie, under section 9 of article 8 of the constitution, although any errors committed by the trial court in granting or refusing to grant a new trial, and any affidavits used on said motion, if properly identified, and embodied in a bill of exceptions, or otherwise properly preserved in the record, may be reviewed on appeal from the judgment.

2. Plaintiff received a bill of sale for a quantity of grain in a locality remote from transportation and from where plaintiff lived. *Held*, that whether the delivery was made within a reasonable time, when plaintiff drove 45 miles in order to obtain teams with which to remove the grain, is a question of fact for the jury.

3. A conversation with one R., in which the vendor said he had sold his grain, but which was not had at or during the negotiations for the sale, is a self-serving declaration, no part of the *res gestæ*, and should not be admitted as evidence to corroborate the vendor's testimony.

4. Evidence of the price paid for part of the grain at the execution sale is admissible, as having some tendency to prove value, and the judgment roll, with the return of the marshal attached, showing the sale of the goods in question, and what they sold for, is *prima facie* evidence of the value, and should not have been stricken from the testimony.

(Syllabus by the Court.)

Appeal from district court, Fifth district; E. V. Higgins, Judge.

Action by C. D. White against V. H. Pease and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

S. McDowall, for appellants. Barlow Ferguson and Pressley Denny, for respondent.

MINER, J. Plaintiff brought this action to recover \$880, the value of 88,000 pounds of wheat, oats, and barley, alleged to have been unlawfully converted by the defendants on September 18, 1895. Defendant Pease answered, and denied the allegations of the complaint. Defendants Brigham and Kuss answered, and alleged that one William Kessler and F. P. Kessler were the owners of the property in question at the time it was alleged to have been converted; that an ex-

ecution in favor of defendant Pease against said William and F. P. Kessler was duly issued out of the Third district court, September 16, 1893, and placed in the hands of said Brigham and Kuss, as United States marshals, for service; that only 62,283 pounds of said grain was taken from the possession of William and F. P. Kessler thereon; that the same was sold as their property by virtue of said writ; and that said grain was sold for the sum of \$335.94. Judgment was entered for the plaintiff in the sum of \$880 damages. The defendants moved for a new trial, which motion was overruled, and this appeal is taken from the judgment and from the order overruling defendants' motion for a new trial.

Respondent moves to dismiss the appeal from the order overruling defendants' motion for a new trial on the ground that no appeal lies from an order overruling a motion for a new trial, because the order is not a final judgment. In the case of *North Point Consolidated Irr. Co. v. Utah & Salt Lake Canal Co.*, decided by this court at the last term, and reported in 46 Pac. 824, 14 Utah, 155, it was held that an appeal from an order made pendente lite, granting a temporary injunction, was not an appeal from a final judgment from which an appeal would lie, under section 9, art. 8, of the constitution. In *Eastman v. Gurrey*, reported in 46 Pac. 828, 14 Utah, 169, this court held that the constitution had taken away the right of appeal from an order vacating and setting aside a judgment, and that such an order was not a final judgment, from which an appeal would lie. We are also of opinion that an order refusing to grant a new trial comes within the rule laid down in the above cases, and that such an order is not a final judgment from which an appeal will lie to this court, under section 9, art. 8, of the constitution. The judgment in this case was final. The proceeding on motion for a new trial had reference to the regularity of the judgment. The order refusing a new trial was an order confirming its finality. We are of the opinion that any errors committed by the trial court in granting or refusing to grant a new trial, and any affidavits used on said motion, if properly identified, and embodied in a bill of exceptions, or otherwise properly preserved in the record, may be reviewed on appeal from the judgment. Comp. Laws Utah 1888, § 3032. The appeal from the order denying defendants' motion for a new trial is dismissed. See cases cited in above-mentioned opinions. Also *Young v. Shallenberger* (Ohio Sup.) 41 N. E. 519; *Holdsworth v. Tucker* (Mass.) 18 N. E. 430; *Laber v. Cooper*, 7 Wall. 565; *Smith v. Publishing Co.*, 5 C. C. A. 91, 55 Fed. 240; *Kearney v. Snodgrass* (Or.) 7 Pac. 309; *Roberts v. State*, 3 Tex. App. 47; *Zitzer v. Jones*, 48 Md. 116; *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8.

The plaintiff, who resided in Beaver, claimed the property by virtue of an alleged bill of

sale made to him by William H. and F. P. Kessler, September 15, 1896, at 4 o'clock p. m. That he took possession of the grain contained in three houses or bins on vendors' farm in Beaver Bottoms, some 45 miles from Beaver, and retained possession thereof until about 9 o'clock in the forenoon of September 18th, when he returned to Beaver for the purpose of obtaining teams to draw the grain away, he having received permission to use the bins until he could draw the grain away. On arriving at Beaver, he was informed by the marshal that the grain had been levied upon by virtue of the execution referred to. The levy was made shortly after plaintiff left for Beaver, and the officer was informed, at the time of the levy, by Kessler, that the plaintiff owned the grain. No one was left in possession of the grain at the time of the levy, unless it was Kessler, who resided on the ranch, which was located in a remote locality. The appellants contend that this transfer was void under section 2837, Comp. Laws Utah 1888, for the reason that no continued change of possession or delivery, within a reasonable time, took place, and allege error in the refusal of the court to grant a nonsuit. Section 2837, Comp. Laws Utah 1888, reads as follows: "Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods or chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or assignor, or subsequent purchasers in good faith." The grain in question was located in a remote locality, away from transportation. It was bulky and inconvenient to carry away without considerable time and preparation. The grain was in bins or granaries, of which the plaintiff had the possession. After plaintiff obtained the bill of sale and possession, he started to procure means to carry it away. Before the officer levied he was notified of the sale to plaintiff. Under the statute there must be a delivery within a reasonable time, and such delivery must be followed by an actual and continued change of possession. A reasonable time should be allowed in which to make the delivery. What was a reasonable time, under all the circumstances of the case, and whether the transaction was fraudulent or not, was a question for the jury to consider under the facts shown. *Everett v. Taylor*, 47 Pac. 75, 14 Utah, 242; *Farr v. Swigart*, 44 Pac. 711, 13 Utah, 150; *Dubois v. Spinks* (Cal.) 46 Pac. 95; *Hill v. Hobart*, 16 Me. 164; *Thomp. Trials*, § 2014.

Mr. Webb, a witness for plaintiff, was allowed to state on direct examination, under objection from the defendants, that he was at Kessler's place on the day of the sale to see about getting a school. Mr. Reed was with him. Reed said to Kessler that he want-

ed to sell him some fish. Kessler replied that he could not buy the fish. Reed said he would take grain in payment. Kessler replied that he had no grain; that he had just sold it to White,—turned it over for a debt. This conversation does not appear to have taken place at the time of the sale, or during the negotiations for the sale, but, as appears from it, the grain had previously been sold to White. It was therefore no part of the *res gestæ*, and it was error to admit it, even though White was present.

Mr. Proutt, a witness for the defendants, who purchased oats at the execution sale, was asked what price he paid for such oats. The question was objected to, and ruled out. It is well settled that the price the property brought at execution sale is admissible, as having some tendency to prove value. We think it was error to exclude this testimony, as well as other testimony of like character that was offered by the defendants. *Hutchinson v. Poyer*, 78 Mich. 337, 44 N. W. 327; *Baker v. Seavey* (Mass.) 40 N. E. 863; *Brigham v. Evans*, 113 Mass. 538; *Croak v. Owens*, 121 Mass. 28; *Campbell v. Woodworth*, 20 N. Y. 499; *Smith v. Mitchell*, 12 Mich. 180; *Davis v. Zimmerman*, 40 Mich. 24; *Dyer v. Rosenthal*, 45 Mich. 588, 8 N. W. 560.

Defendants offered in evidence the judgment roll, with the execution and return of the marshal attached, showing the sale of the goods in question, and what they sold for. Plaintiff's counsel moved to strike out all that part of the return which referred to the price the grain sold for at the execution sale as immaterial and irrelevant. The court sustained the objection, and the return was stricken out. We think this was error. While this evidence may not be conclusive as to value, yet it is *prima facie* evidence of value, and should not have been stricken out. *Herm. Ex'ns*, § 241, p. 288; *Worthington v. Hanna*, 23 Mich. 530; *Walrath v. Campbell*, 28 Mich. 111. There are many other errors assigned, but we do not think they merit further consideration. For the reasons given the judgment is reversed, with costs, and a new trial granted.

ZANE, C. J., and HART, District Judge, concur.

(15 Utah 818)

MONTAGUE v. MCCARROLL.

(Supreme Court of Utah. June 18, 1897.)

ASSIGNMENT OF SOLDIER'S SCRIP BEFORE ENTRY—
HOMESTEAD ACT—POWER OF ATTORNEY COUPLED
WITH AN INTEREST—REVOCATION.

Plaintiff's grantor received an irrevocable power of attorney for the consideration of five dollars, paid him to enter land on soldier's scrip, under section 2306, Rev. St. U. S., and he was irrevocably vested with power to grant, bargain, sell, release, and convey the same to a purchaser, and deliver a deed of conveyance thereof. The maker of the power of attorney forever re-

nounced all right in and to revoke any of said powers, or to appoint any other person to execute or revoke the power, and forever renounced all right on his part to do what the attorney was authorized to do, and released to the attorney all claims to any proceeds of the land when sold, ratifying all acts of the attorney in conveying and retaining the proceeds of the land when sold. Before the conveyance of the land to plaintiff, this power of attorney was revoked, and the land sold to defendant's grantor. Held, that the plaintiff's grantor had a right to convey the land under the power of attorney, that the power of attorney was given for a valuable consideration, coupled with an interest, and was irrevocable.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by John J. Montague against George McCarroll. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to quiet title to 20 acres of land, which plaintiff claimed to own. Defendant denied the allegations of the complaint, alleged that he was in possession, and entitled to the possession, of the land through his grantor and his predecessors in interest, and that they had been in open, notorious, adverse possession thereof since 1875. Defendant also filed his cross complaint, claiming the fee in the land, and claimed title thereto through Hankammer, the patentee, etc. It appears that on October 12, 1875, Adolph Hankammer and wife made and delivered to Joseph C. Hemingray the following power of attorney: "Know all men by these presents, that Adolph Hankammer and Mina Hankammer, his wife, of the county of Waubesa, in the state of Kansas, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Joseph C. Hemingray, of the county of Salt Lake, territory of Utah, our true and lawful attorney for us, and in our name, place, and stead, to enter into and upon, and take possession of, any and all pieces and parcels of land, or the timber or materials thereon, in the territory of Utah, and in any state or territory of the United States, which we now own, or which we may hereafter become seised of, or in which we now or hereafter be in any way interested, under the homestead act of June 8, 1872, or the amendment thereto of March 3, 1873, granting additional land to soldiers and sailors who served in the war of the late Rebellion, being the following described land situated in the county of Salt Lake, and territory of Utah, to wit: N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$, section 22, township 1 south, of range 1 east, Salt Lake meridian, county of Salt Lake, and territory of Utah; and that we further authorize and empower our said attorney, Joseph C. Hemingray, to grant, bargain, sell, lease, convey, and confirm said land, or any part thereof, or the right to sever or remove timber and other materials whatsoever therefrom, to such person or persons, and for such prices, as to our said attorney shall seem meet and proper, and thereupon to execute, acknowledge, and deliver, in our name and in our

behalf, any deeds, leases, contracts, or other instruments, sealed or unsealed, and with or without covenants and warranty, as to him shall seem meet to carry out the foregoing powers; with full power to our said attorney to appoint a substitute or substitutes to perform any of the acts which our said attorney is by this instrument authorized to perform, hereby giving and granting to our said attorney and his substitutes full power to do and perform everything proper and convenient in carrying out and executing said powers as fully as we could do if personally present and acting on the premises. And in consideration of five dollars to us in hand paid by our said attorney at the enrolling hereof, the receipt whereof we do hereby acknowledge, we do further appoint and ordain that our said attorney is hereby irrevocably vested with the powers above granted, and we do further forever renounce all right to revoke any of said powers, or to appoint any person other than our said attorney to execute the same, and forever renounce all rights on our parts personally to do any of the acts which our said attorney is hereby authorized to perform, and do hereby release unto our said attorney all our claims to any of the proceeds of any sale, lease, or contract relative to said land or timber, or material thereon. And we do hereby revoke all power of attorney heretofore made, authorizing any person to do any act relative to any part of said lands, hereby ratifying and confirming whatever Joseph C. Hemingray, our attorney in fact, or any substitute appointed by him, may do in the premises by virtue thereof. In witness whereof, we have hereunto set our hands and seals, this 12th day of October A. D. 1875." Said power of attorney was recorded April 27, 1877, in Book B, page 303. On the 3d day of November, 1876, the United States issued its patent to the locus to Adolph Hankammer. The patent is in regular form, and is issued on homestead certificate No. 498. On the 23d of April, 1891, the plaintiff received a quitclaim deed for the locus from Adolph Hankammer and Mina Hankammer, his wife, through Joseph C. Hemingray, attorney in fact, acting under and through the above power of attorney. The defendant offered in evidence a deed to the same property, dated November 1, 1890, from Adolph Hankammer and Mina Hankammer, his wife, to John J. Ryan. This deed was recorded November 22, 1890. It contains the following clause: "We revoke the power of attorney held by Joseph C. Hemingray, recorded in Book B, page 303." Ryan conveyed the property to defendant. On the 26th day of November, 1890, Adolph Hankammer revoked the power of attorney given to Joseph C. Hemingray. This revocation was recorded December 2, 1890. It was stipulated by counsel that there had never been any occupation and actual possession of the property in dispute by either party to the suit or their predecessors in interest. No taxes were attempted to be assessed against the property until 1887. The defendant claims that the power

of attorney was revocable, and had been revoked by Hankammer.

Frank Pierce, for appellant. S. H. Lewis and J. A. Williams, for respondent.

MINER, J. (after stating the facts). The question presented is whether the power of attorney could be and was revoked by Hankammer. In *Montague v. McCarroll*, 10 Utah, 22, 36 Pac. 50, this court held that the right given by section 2306, Rev. St. U. S., to a soldier who had theretofore entered under the homestead laws less than 160 acres of land, to enter enough more to make up 160 acres, is assignable before entry, there being no restriction in the homestead law. In *Knight v. Leary*, 54 Wis. 459, 11 N. W. 600, it is held that a conveyance before patent, under a power similar to that in question in this case, of land entered under section 2306, was sufficient to convey the title, and was valid against the assignor, his heirs and assigns. In *Barnes v. Poirier*, 12 C. C. A. 9, 64 Fed. 14, the court sustained the same doctrine, holding a power of attorney made by a soldier similar to the one in this case was an assignment of his right before entry, and that there was nothing in the statute prohibiting such assignment. In *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963, the supreme court held to the same doctrine, quoting with approval the decision of Judge Sanborn in the case of *Barnes v. Poirier*, 12 C. C. A. 9, 64 Fed. 14, in which Judge Sanborn said: "The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift, in the nature of compensation for past services. It vested a property right in the donee. The presumption is that congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The assignment before entry of the right to this additional land, granted by section 2306, Rev. St., contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns."

Adolph Hankammer, owning the right to enter land under section 2306, Rev. St., made an irrevocable power of attorney to Hemingray to enter upon and take possession of the land in question, and in consideration of five dollars, paid by the attorney, he was irrevocably vested with power to grant, bargain, sell, lease, convey, and confirm the same to the purchaser, and deliver a deed of conveyance thereof. Hankammer forever renounced all right in, and to revoke, any of said powers, or to appoint any other person to execute the same, and forever renounced all right on his part to do what the attorney was authorized to do, and released to the attorney all claims to any of the proceeds of

sale, and ratified the acts of the attorney as absolute, both in conveying and retaining the proceeds of the sale of the land. This power of attorney not only carried with it an assignment of the interest of Hankammer in the land to Hemingray, but vested in him the legal right to convey the title. It was a power coupled with an interest. It was valid as against Hankammer, his heirs, assigns, and grantees. The proceeds of the sale of the land were vested in the attorney, and renounced by the principal. In consideration of five dollars, paid to Hankammer by Hemingray, Hankammer expressly renounced not only the proceeds of the sale of the land, but all power and authority over the property, expressly confirming what should be done by the attorney, and made the act irrevocable. This power was irrevocably vested in the attorney until exercised. The power was exercised when the conveyance was made to the plaintiff. By that act and deed all right, title, and interest in the property was vested in Montague. The conveyance by Hankammer to the defendant's predecessor in interest, as well as the attempted revocation of the power of attorney to Hemingray, were inoperative and ineffectual either to pass the title or revoke the power. Hankammer had parted with his interest before he executed the deed to Ryan, through whom the defendant obtained title, and he had no power to revoke the authority embraced in the power of attorney.

While a power of attorney, by its terms, may be expressly declared to be irrevocable, yet if the agent has no interest in its execution, and there is no valid consideration for it, it is treated as a mere nude pact, and is deemed in law to be revocable, upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it. But, where the power is coupled with an interest, or where it is given for a valuable consideration, unless there is an express stipulation that it shall be revocable, it is from its character, in contemplation of law, irrevocable, whether terms expressly making it so are expressed in it or not. In this case the power became a part of the contract, coupled with a valid consideration. It therefore became irrevocable, and the attempted revocation, as well as the deeds to those through whom defendant derived his title, are wholly insufficient to vest any title in the defendant. *Mechem, Ag. §§ 205, 206; Story, Ag. § 477; Hunt v. Rousmanier's Adm'rs, 8 Wheat. 173; Barnes v. Poirier, 12 C. C. A. 9, 64 Fed. 14; Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963.*

The court below held correctly that the legal title to the property was vested in the plaintiff. This conclusion being reached, it is unnecessary to discuss any other errors.

The judgment of the district court is affirmed, with costs.

BARTCH and HILES, JJ., concur.

(15 Utah 136)

STATE v. McCOY et al.

(Supreme Court of Utah. June 9, 1897.)

ABORTION—PHOTOGRAPHS—EXPERT TESTIMONY—SCOPE OF RE-EXAMINATION OF A WITNESS—INSTRUCTIONS.

1. A photograph, taken two years before the death of the person photographed, but identified by the parents as an accurate photograph of their daughter just before her death, may be shown to a witness who saw the deceased under peculiar circumstances just before her death, for the purpose of identification.

2. It is competent for a doctor giving expert testimony to give as his opinion, from an examination of the body after death, and from his previous knowledge of the deceased, that it was not necessary to produce an abortion in order to save the life of the deceased.

3. When new subject-matter is called up for the first time on cross-examination, by defendant's attorney, for the purpose of discrediting a witness, the prosecution are entitled to go into the matter upon a re-examination of the witness.

4. Instructions to a jury must be considered together, and an omission to state fully the law in one part of the instructions, where the omission is fully and accurately supplied in the instructions which follow, which were favorable to defendant, does not constitute reversible error, unless from the whole charge it is reasonable to believe the jury were misled.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

William McCoy was convicted of a crime, and he appeals. Affirmed.

Moyle, Zane & Costigan, for appellant. A. C. Bishop, Atty. Gen., and Benner X. Smith, for the State.

MINER, J. The defendant, impleaded with others, was indicted and convicted of having, on the 19th day of February, 1896, at Salt Lake City, Utah, procured an abortion on one Evelyn Bonnett. Evelyn Bonnett died from the effects of the abortion a short time after it was committed. The deceased resided at Provo at the time, and came to Salt Lake City, where, as the prosecution claimed, she was operated upon by defendant. The mother and sister of the deceased were called as witnesses by the prosecution, and identified a photograph of the deceased, taken about two years prior to her death, as a good photograph of the deceased, and that it was as natural a representation of the deceased as it could be; that the deceased looked like the picture ten days before her death,—the time she left Provo. The photograph was offered in evidence for the purpose of identifying the deceased. The defendant objected to the introduction of the photograph as immaterial and incompetent. Dr. Collins was called, and gave a minute description of a woman seen in the defendant's office on the day in question, describing her face, features, height, age, and dress, and stated that he would recognize her again. He testified that she came down from defendant's office, and seemed in pain, and that he heard scream-

ing in the office just before she came downstairs following the defendant. The photograph was then shown to witness, under the objection that it was immaterial, irrelevant, and incompetent, and that the picture was taken too long a period prior to the time the witness saw her. The objection was overruled. The witness identified the photograph as resembling the woman he saw at the defendant's office. Other evidence was introduced tending to show that the deceased was at the defendant's office at the time in question, and that the defendant produced a miscarriage upon her.

We are of the opinion that the photograph was properly introduced in evidence. The witness saw a young woman in defendant's office at the time in question, under the peculiar circumstances stated. He did not know her name, but noticed her so critically that he would know her again if he should see her. He was able to give a minute description of the woman he saw, but such description, however minute, could not carry to the minds of the jury so perfect a representation of the woman as an accurate photograph would present. The photograph, when shown to be a correct likeness of the deceased, served the purpose of locating her at defendant's office, and as identifying her with more accuracy than any description from the witness could do, and thus aid the jury in coming to a more correct conclusion than they otherwise could. In the case of *Dederichs v. Railroad Co.*, 46 Pac. 656, 14 Utah, 137, this court held that the law was well established that photographic scenes are admissible in evidence as appropriate aids to the court and jury in applying the evidence, whether it relates to persons, things, or places, provided such photographs are shown to be correct. In the case of *People v. Durrant* (Cal.) 48 Pac. 83,—a case where the question at issue was very similar to the one here presented,—a photograph of the deceased, taken three years before the date of the testimony, was offered in evidence, and the court held the photograph admissible on the grounds decided by this court in the above-mentioned case.

Dr. Allen, a physician, was called by the prosecution, and gave testimony tending to show that he resided in Provo, and knew the deceased. Had met her frequently, and saw her five weeks prior to her death. At this time she appeared to be in good health. That he made a post mortem examination, and gave it as his opinion, from a careful examination of the body, that a miscarriage had been produced upon the deceased by artificial means, stating in full the reasons for his opinion. He gave it as his opinion, from an examination of the body, and his previous knowledge of the deceased, that it was not necessary to produce an abortion in order to save the life of the deceased. The last testimony was objected to as incompetent on the ground that the witness' knowledge of

the deceased was not sufficient for him to give an answer intelligently. We are of the opinion that the testimony was proper. The reasons for the opinion were given with great detail. The witness was an expert, and the weight of his testimony was for the jury to consider.

Defendant's counsel, on cross-examination of F. J. Collins, a witness for the people, drew out for the first time the fact that Mrs. Stansfield died from the effects of an operation, what the operation was for, who assisted in it, and whether the witness produced an abortion upon her, and attended her in her last sickness. On redirect examination by the prosecuting attorney the witness stated that he had a conversation with Dr. McCoy about this operation on Mrs. Stansfield, whereupon witness was requested to state the conversation. The witness replied: "I asked him if he performed the operation. He said, 'Well, by God, if I did, she needed it.'" The question was objected to, and an exception taken. This subject was new matter, called out for the first time on cross-examination for the evident purpose of discrediting the witness. The subject having been opened by the defense, the prosecution were entitled to go into the matter upon a re-examination of the witness.

An exception was taken to the charge of the court because it ignores the fact that it was necessary to prove that a miscarriage (not the use of an instrument) was not necessary to save the life of the deceased. Upon this subject the court instructed the jury as follows: "To constitute the offense charged in the information, it must appear from the evidence given before you, to your satisfaction beyond a reasonable doubt: First, that the woman Evelyn Bonnett was with child; second, that some instrument was used upon her with a design to procure a miscarriage of the woman; that the use of such instrument upon her was not necessary to save her life. If, in this case, you believe from the evidence given before you, beyond a reasonable doubt, that the woman Evelyn Bonnett was pregnant, and that the defendant William McCoy, on or about the 18th day of February, A. D. 1896, at the county of Salt Lake, state of Utah, either provided or supplied the woman with any instrument to be used by her upon herself, or that he himself used an instrument upon her, with the intent thereby to procure the miscarriage of the woman, and that a miscarriage was thereby in fact produced, and that the producing of such miscarriage was not necessary to save her life, you should find him guilty as charged in the information." That part of the charge referred to was not critically accurate. But the court charged the jury in that connection: "That if the defendant used an instrument upon her with intent thereby to procure the miscarriage of the woman, and that a miscarriage was in fact thereby produced, and that the pro

ducing of the miscarriage was not necessary to save her life, you should find the defendant guilty as charged." The same proposition was fairly contained in the other part of the instructions given by the court. The instruction that, in order to convict, the jury must find that the use of the instrument upon her was not necessary to save her life, is not strictly in contradiction to the proper instruction that the producing of such miscarriage was not necessary to save her life, under the proof that the instrument was used for the purpose of producing a miscarriage. The giving of the first instruction does not necessarily contradict the latter. The giving of both instructions threw an additional and unnecessary burden upon the prosecution, and rendered the instructions more favorable to the defendant than they otherwise should have been. The jury could not have been misled by the instructions when taken together. Instructions must be considered together. An omission to fully state the law in one part of the instructions, where the omission is fully and accurately supplied in the instructions which follow, does not constitute reversible error, unless when from the whole charge it is reasonably apparent the jury were misled. *State v. Maloy*, 44 Iowa, 104; *Railway Co. v. Ingraham*, 77 Ill. 309; *People v. Cleveland* (Mich.) 65 N. W. 216; *Martin v. Hill*, 3 Utah, 157, 2 Pac. 62; *Hamer v. Bank*, 9 Utah, 215, 33 Pac. 941.

On motion for a new trial several affidavits were filed, tending to show that a rubber catheter and metallic sound were found in the room of the deceased, Evelyn Bonnett, by her landlord, on the 18th day of February, 1896, about the time the abortion was alleged to have been committed, and that witness had not communicated the fact of finding such instruments, except as to the finding of the catheter, until after the trial. Another witness sold to Silms Duggins, the co-defendant, a speculum, in 1895, several months before the occurrence complained of. The motion for a new trial was overruled, and an exception taken. Under the facts of this case we cannot discover any good reason for disturbing the order of the trial court in refusing a new trial. The facts alleged are in part remote, and, in the light of the facts shown, could scarcely have affected the verdict, if proven. The finding of the catheter was known at the time of the trial, and, if important, should have been shown. The purchase of the speculum in 1895, by Duggins, several months before the operation, and probably before the pregnancy of the deceased, would not tend to show that it was purchased for the purpose suggested. Upon the whole record we find no reversible error. The judgment of the district court is affirmed.

ZANE, C. J., and HART, District Judge, concur.

ROMAN CATHOLIC CONGREGATION OF THE CHURCH OF THE ANNUNCIATION v. O'LEARY.

(Supreme Court of Colorado. June 22, 1897.)

RELIGIOUS SOCIETIES—AUTHORITY OF PRIEST.

A church and school belonging to a religious corporation were for eight months entirely in charge of the priest, who collected and disbursed all funds, the trustees holding no meeting, and taking no part in the management. The priest borrowed money to build an addition to the school. The trustees knew that the addition was being built, and that the corporation was without funds, and retained the building so erected. *Held*, that the corporation was liable for the borrowed money.

Appeal from district court, Chaffee county.

Action by Julia O'Leary against the Roman Catholic Congregation of the Church of the Annunciation. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee, in her amended complaint, alleges that the defendant is a religious corporation organized and existing under the laws of the state of Colorado; that between the 1st day of July and the 1st day of November, 1892, the plaintiff advanced to the defendant the sum of \$3,000 at the special instance and request of the defendant; and that the money was laid out and expended for the use and benefit of the defendant. The amended answer upon which the case was tried contains a general denial, and also a special defense, based upon an alleged arbitration and settlement of the matters here in controversy; but, as this defense is abandoned in this court, it need not be further considered. The trial was, by consent, had to the court, and resulted in findings in favor of the plaintiff upon all the issues. It was specially found that: "Plaintiff, prior to 25th day of October, 1892, advanced to pastor of defendant congregation, for benefit of church, \$2,691.50, which was received, accepted, and retained by the church. That defendant received and accepted from plaintiff, prior to October 25, 1892, the sum of \$2,691.50, which was appropriated to its use. That plaintiff is entitled to recover \$2,691.50, with interest at 8 per cent. per annum from October 25, 1892. All testimony tending to show that Bishop Matz ordered the building of addition to parochial school in question by Rev. C. F. O'Leary, disregarded by court, being held insufficient to render defendant liable." Upon these findings a judgment was rendered for the plaintiff. The defendant brings the case here by appeal.

A. T. Gunnell and John A. Ewing, for appellant. Talbot, Denison & Wadley, for appellee.

HAYT, C. J. (after stating the facts). The evidence shows that the defendant corporation was at the time a religious institution, having the control and management of a church and also a parochial school in the city of Leadville, in this state; that upon

February 22, 1892, Rev. Father C. F. O'Leary took charge of the affairs of the church and school under an appointment from the proper church authority, and continued in control until about the 28th day of October, 1892, when he was stricken with paralysis, and relieved from his charge. It is further shown from the evidence that during these dates Father O'Leary had entire charge of the church and school; that he was intrusted with the collection of the necessary funds to maintain both institutions, and with the disbursement of the same; that he employed and discharged teachers at will; and that everything in and about the management of the church and school was under his direction and control. The record discloses that during this time there was in existence a board of trustees of the defendant corporation, the members of which board resided in Leadville, but during the entire time of Father O'Leary's charge this board did not hold a single meeting, and, so far as the evidence shows, did not attempt in any way to manage or control the business of the corporation, or interfere with Father O'Leary's management of the church or school, or to in any manner advise or assist him with reference thereto. To all intents and purposes, the priest had absolute and unconditional control of the entire business of both institutions. Soon after Father O'Leary took charge of this work the number of scholars enrolled at the school exceeded 600, and the school building was found too small to accommodate such a large number, and it was deemed necessary to build a large addition to the building. The priest testifies that in building this addition he had the sanction of the bishop, and that it was built at his request. The revenues of the church were at the time barely sufficient to pay the running expenses of the church and school, so that the cost of the addition to the school building had to be provided for from other sources. It appears that Father O'Leary raised by personal solicitation about \$2,000 of the amount necessary to build the addition, and, this being insufficient, he borrowed from his sister, Julia O'Leary, the plaintiff in this case, the sum of \$3,000 to complete the work. He gave to his sister a writing, of which the following is a copy: "Leadville, Colo., July 5, 1892. Received of Julia O'Leary three thousand dollars, with interest at the rate of 8 per cent. per annum. C. F. O'Leary, Pastor Annunciation Church, Leadville, Colo. \$3,000.00. Due July 5, 1893." Father O'Leary swears that it was his intention at the time this money was borrowed to hold a fair and festival after the building was completed for the purpose of raising funds to discharge this indebtedness; but, owing to his sudden and unexpected sickness, he was prevented from carrying out such intention, and that no fair or festival was held. It is claimed by the appellant that there is no sufficient proof that the money advanced by Miss O'Leary was ever used in building

an addition to the school building, but we regard this claim as untenable upon this record. It affirmatively appears that the money loaned by Miss O'Leary was deposited in the American National Bank of Leadville, and that it was paid out by checks drawn by Father O'Leary in settlement of debts contracted in the construction of the building. The plaintiff was able to produce, and did introduce at the trial, checks showing such payments aggregating the sum of \$2,691.50,—the amount allowed her by the district judge. It is claimed that this money was borrowed without authority of the trustees, and that there is no evidence that the bishop ever authorized the making of such a loan, and that, for this reason, the proof is not sufficient to uphold the judgment of the court below. A sufficient answer to this contention, we think, is found in the fact that during the eight months that Father O'Leary had charge of the Catholic church and school at Leadville he had the sole management of the business in connection therewith. The directors were presumably residents of the city of Leadville, and attendants upon the church, which adjoined the school building. The city was small, and it is highly improbable that the attention of the trustees was not attracted to this building time and time again as its construction progressed, and, as the corporation was without funds, and dependent upon meager revenues to pay the daily running expenses of the church and school, they had no right to assume that the building was being constructed free from debt. They permitted Father O'Leary to hold himself out to the world as having absolute control of the affairs of the church and school; they permitted him to raise funds and expend the same as in his judgment seemed proper; and after the building was constructed it was then too late for the church authorities to repudiate the indebtedness, while accepting the benefits derived from the expenditure of this money. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248; *Insurance Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771; *Manville v. Mining Co.*, 17 Fed. 425; *Troup's Case*, 29 Beav. 353; *Railroad Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Mor. Priv. Corp.* §§ 715, 716, and cases cited; 4 *Thomp. Corp.* § 5258, and cases cited.

Appellant calls attention to the following from *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 531: "Nor is it material that the money was expended in the mine, or that the expenditure was advantageous to the company, unless it is shown that the company had knowledge of the loan and of the expenditure." When the case came up again, as it did upon a second appeal, the opinion of the court was written by the same judge, and in the later opinion he corrected the error in the above statement, and announced the law correctly. See *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248.

In that case the money was borrowed by the superintendent for the company, but there was little or no evidence that it was used in the development of the mine, or in the prosecution of work for the company. See dissenting opinion of Mr. Justice Belford, Id., 2 Colo. 266. The case of *Mann v. Farnum*, 17 Colo. 427, 30 Pac. 332, is also relied upon, but the case is not at all analogous to the facts in the case at bar. In that case Farnum contracted with Quimby to deposit upon lots owned by Farnum the dirt to be taken from a certain excavation to be made in lots owned by the Denver Club. After this contract was made, Farnum went abroad, and was absent for some time. During his absence, he left no agent in charge of this business. Quimby placed the dirt from the excavation upon the lots in question in accordance with his contract, and afterwards raised the lots still higher by putting dirt taken from other places upon them. This was done without the knowledge or consent, express or implied, of Farnum, and the court held that his liability was limited to the amount of dirt contracted for. But the court in that case expressly recognizes the doctrine that, when a person performs work or furnishes material beneficial to the property of another, a promise to pay therefor by the owner may sometimes be implied from the circumstances, and that this will result where the facts are such as equitably estop the owner from denying his liability. In the district court the effort to defeat the present action was based largely upon the claim that the money was not used for corporate purposes, but plaintiff was able to establish to the satisfaction of that court, upon what we consider sufficient evidence, that the money was actually used to make a necessary improvement upon defendant's property; and it would certainly be a miscarriage of justice if plaintiff should be held remediless. Upon principle and authority, we think the judgment of the court below is right, and it is accordingly affirmed.

CRAVENS et al. v. LEE et al.

(Supreme Court of Colorado. June 22, 1897.)

APPEAL—JURISDICTION OF SUPREME COURT—FREEHOLD INVOLVED.

An action to determine the priority of liens on land does not involve a freehold, so as to give the supreme court appellate jurisdiction thereof.

Error to court of appeals.

Action by Ellsha B. Cravens against Harry H. Lee and others. A decree establishing the priority of certain liens was reversed on error by defendants Lee and certain others (48 Pac. 159), and other defendants bring error. Dismissed.

A. M. Stevenson, A. P. Rittenhouse, and Joseph W. Taylor, for plaintiffs in error. Thomas, Bryant & Lee, for defendants in error.

PER CURIAM. Ellsha B. Cravens was the owner of certain real estate at Glenwood Springs. He transferred it to Clinton Reed by a deed absolute in form, but in fact the conveyance was in trust, and a written declaration of trust was executed by Reed. After this transfer, and as a result of a compromise of certain business transactions between Joseph W. Taylor and Joseph Reynolds, then deceased, Taylor executed his promissory note for \$15,500, payable to Charles S. Thomas, as the representative of the estate of said Reynolds; and at the direction of Taylor, who assumed to represent Cravens, and to have become vested with the power from him to control Reed in the execution of the trust, Reed, in obedience to such direction, and supposing he was acting in conformity with his duty as trustee, executed a trust deed of this property to Harry H. Lee, as trustee, to secure the payment of said note. Acting upon the same authority, Reed subsequently gave a trust deed upon the same property to John H. Fessler, as trustee, to secure the payment of a note made by Taylor to H. R. Kamm, which note was discounted by the First National Bank of Glenwood Springs. The note to Thomas having become due and not paid, Lee, upon the request of Thomas, advertised the property for sale under the terms of the trust deed. Cravens thereupon brought this action in the district court of Arapahoe county, asking for an injunction to restrain the sale, and, upon final hearing, that the said trust deed be canceled and set aside, and that the property be sold to satisfy the trust under which Reed held the land, and, after such application of the proceeds of sale, what was left, if anything, should be given to him. Cross complaints were set up by some of the defendants, and petitions of intervention were filed, whose object was to establish liens against the real estate included in these trust deeds. Upon final hearing the court dismissed the action as to the plaintiff, Cravens, and made a decree establishing the relative rank of the liens claimed against this land by Lee and Fessler under their respective trust deeds, and by the various other defendants and interveners, whereby Lee's lien was held to be junior to all the others. From this decree the defendants Harry H. Lee, C. S. Thomas, and Mary S. Reynolds, took the case, by writ of error, to the court of appeals; the defendants in error being the other defendants and the interveners in the original action, whose liens were adjudged superior to that of said plaintiffs in error. In the court of appeals the decree of the district court was reversed (48 Pac. 159); the court, in substance, holding the lien of the plaintiffs in error there to be the first and paramount lien on the land, and remanding the case to the district court to proceed in conformity with the opinion. Thereupon the defendants in error in the court of appeals brought the case here upon writ of error.

The defendants in error here (Lee, Thomas,

and Reynolds, plaintiffs in error in the court of appeals) now move to dismiss the writ of error upon the ground that this court has not jurisdiction to entertain it. Strictly speaking, no money judgment was rendered; but if there was, in any sense, a money judgment, no one of the separate judgments held to be liens amounts to \$2,500, and upon that ground the jurisdiction of this court does not attach. *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674. Indeed, unless there is a freehold involved, we are without jurisdiction. It would seem, from a bare statement of the case, that a freehold is not involved. The controversy between the parties before this court is merely one over the priority of their respective liens upon real property. The decree of the district court, which was reviewed by the court of appeals, established the rank of these liens. It does not take a freehold from one, or give it to any of the other parties to the litigation. If these liens are paid within the time designated by the decree, there will be no sale of the property. If not so paid, the property will be sold to satisfy these liens, and the title transferred, if at all, only to the purchaser at the sale. Nor is a freehold involved if Cravens were still in the case. Had he succeeded in the litigation, and a judgment gone for him, it is apparent that the title would not necessarily have been reconveyed to him; for, according to his own contention, he had only an equitable interest in the property, contingent upon the legal claims against him and Taylor being paid, and, if the proof shows anything, it shows that the amount of these claims was much larger than any possible value attaching to the land. Under the established rule of this court, laid down in many cases, and at this term again enunciated in the case of *Paddock v. Staley*, 49 Pac. 281, there is no freehold involved, nor is there present any other element that gives this court jurisdiction of the writ of error. The temporary writ of injunction heretofore issued is vacated, and the writ of error is accordingly dismissed. Writ of error dismissed.

(9 Colo. A. 497)

MULLEN et al. v. WESTERN UNION BEEF CO.

(Court of Appeals of Colorado. June 14, 1897.)

SECRETARY OF AGRICULTURE—AUTHORITY—CATTLE—REGULATIONS—CO-OPERATION BY STATE.

1. Act Cong. May 29, 1884, § 8, which was subsequently made to apply to the secretary of agriculture, made it the duty of the commissioner of agriculture to prepare such regulations as he might deem proper for the speedy and effectual suppression of diseases among cattle, and to certify same to the executive of each state, and invite co-operation in the execution of the act, authorizing him, on the acceptance of his plans by any state wherein any disease was declared to exist, or on the acceptance by him of plans adopted for the same purpose by any such state, to expend so much of the money appropriated by the act as might be necessary to prevent the spread of diseases from one state into another. *Held*, that such regulations are ineffect-

ive in any state which does not co-operate with the secretary in their enforcement.

2. Act Cong. May 29, 1884, § 6, prohibits the delivery for transportation, or the transportation, by any person, of any live stock with knowledge that they are infected with a communicable disease, with the qualification that Texas fever shall not be considered such a disease as to cattle transported by rail to market for slaughter. Section 7, afterwards made to apply to the secretary of agriculture, made it the duty of the commissioner of agriculture to notify transportation officials of the existence of a contagion, and declares a violation of section 6 to be a misdemeanor. *Held*, that under section 7 the secretary has no power to make regulations on compliance with which cattle may be removed from any state in which contagion exists to other parts of the United States.

3. After cattle become domiciled in a state, their management therein is regulated by the state laws, and not by Act Cong. May 29, 1884, establishing the bureau of animal industry, unless the state has determined to co-operate with the secretary of agriculture in the execution of said act.

Error to district court, Arapahoe county.

Action by J. K. Mullen and Charles D. McPhee, co-partners, against the Western Union Beef Company, to recover damages for the loss of cattle. Defendant had judgment, and plaintiffs bring error. Affirmed.

William C. Kingsley and Victor A. Elliott, for plaintiffs in error. Thomas, Bryant & Lee, for defendant in error.

THOMSON, P. J. This action was brought by the plaintiffs in error against the defendant in error to recover damages for loss of stock occasioned by the communication from cattle of the defendant to cattle of the plaintiffs of the disease known as splenetic or Texas fever. The defendant had judgment, and the plaintiffs have brought the case here by writ of error. The complaint charges that about the 15th day of June, 1891, the defendant negligently, wrongfully, and unlawfully shipped from Kimble county, Tex., a large number of Texas cattle infected with Texas fever; and wrongfully, negligently, and unlawfully unloaded them, and turned them loose in the vicinity of a herd of the plaintiffs' cattle, in Logan county, Colo., and permitted them to run at large upon the range occupied by the plaintiffs' cattle, and to come in contact and become mingled with the plaintiffs' cattle, in violation of the quarantine rules, regulations, and orders of the United States department of agriculture, and in violation of the quarantine rules, regulations, and orders of the state of Colorado, by reason whereof the plaintiffs' cattle, which had been sound and healthy, became infected with Texas fever, and large numbers of them died. A demurrer to the complaint was overruled, and the defendant filed an answer, which was, in so far as we care to consider it, a denial of the averments of the complaint. The cause of action, as alleged in the complaint, was the loss of cattle of the plaintiffs, occasioned by the communication to them of Texas fever by cattle of the defendant imported into Colorado, and suffered to run at large, in violation of the quarantine rules and regulations of the depart-

ment of agriculture, and in violation of the quarantine rules and regulations of the state of Colorado. The negligence complained of was alleged to consist in these violations. The case was tried below and is argued here upon the theory that if the loss of the plaintiffs' cattle was in consequence of disease communicated by the cattle of the defendant, its liability depends upon its acts with reference to rules and regulations which it was legally bound to observe, so that no question of negligence generally, in the shipment and management of the cattle, is presented by the record. We may dismiss the question of violation by the defendant of the quarantine rules and regulations of the state of Colorado by saying that upon sufficient evidence it was settled by the jury in the defendant's favor.

The plaintiffs introduced in evidence an order issued by Hon. J. M. Rusk, the secretary of agriculture, as follows: "Regulations Concerning Cattle Transportation. United States Department of Agriculture. Office of the Secretary. Washington, D. C., February 5th, 1891. To the Managers and Agents of Railroad and Transportation Companies of the United States, Stockmen, and Others: In accordance with section 7 of the act of congress approved May 29th, 1884, entitled 'An act for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and of the act of congress approved July 14th, 1890, making appropriation for the department of agriculture for the fiscal year ending June 30th, 1891, you are notified that a contagious and infectious disease known as splenic or Southern fever exists among cattle in the following described area of the United States: * * * From the 15th day of February to the 1st day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations." Here follows a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts, the purpose of which was apparently to prevent healthy cattle from coming in contact with the infection. The plaintiffs then produced the following further order of the secretary of agriculture: "United States Department of Agriculture. Office of the Secretary. Washington, D. C., April 23d, 1891. Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described may be moved from said area by rail into the states of Colorado, Wyoming, and Montana, for grazing purposes, in accordance with the regulations made by said states for the admission of Southern cattle thereto. Provided: (1) That cattle from said area shall go into said states only for slaughter or grazing, and shall on no account be ship-

ped from said states into any other state or territory of the United States before the 1st day of December, 1891. (2) That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the Eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact. (3) That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5th, 1891. (4) That the state authorities of the states of Colorado, Wyoming, and Montana agree to enforce these provisions." The territory described in both orders includes that from which the defendant's cattle were shipped, and it is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which are claimed to have been violated by the defendant. It may be conceded, for the purposes of the case, that rules or regulations made by the direction of a statute have the authority of the statute itself, and that their violation is, in effect, a violation of the statute; but, that such may be the case, they must be clearly within its terms. The effect to be given to the foregoing orders is dependent upon the provisions of the act referred to in the order of February 5th (23 Stat. 31). By section 2 the commissioner of agriculture was empowered to appoint agents, whose duty it should be, under his instructions, to examine and report upon the means to be adopted for the suppression and extirpation of pleuro-pneumonia, and to provide against the spread among animals of other dangerous, contagious, and infectious diseases. Section 3 made it his duty to prepare such rules and regulations as he might deem proper for the speedy and effectual suppression and extirpation of the diseases referred to, and to certify such rules and regulations to the executive authority of each state and territory, and invite such authority to co-operate in the execution and enforcement of the act, authorizing him, upon the acceptance by any state or territory wherein such disease should be declared to exist, of his plans and methods, or, upon the acceptance by him of plans or methods adopted for the same purpose by any such state or territory, to expend so much of the money appropriated by the act as might be necessary to prevent the spread of such diseases from one state or territory into another. Section 4 required him to make special investigation as to the existence of any of the diseases along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock were exported, and report the result of his investigation to the secretary of the treasury, who should, from time to time, establish such regulations

for the export and transportation of live stock as the result of the investigation might require. Section 5 authorized the secretary of the treasury, for the purpose of preventing exportation from the United States to foreign countries, of live stock affected with contagious diseases, to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary. Sections 6 and 7 are as follows:

"Sec. 6. That no railroad company within the United States, or the owners or masters of any steam, or sailing, or other vessel, or boat, shall receive for transportation or transport, from one state or territory to another, or from any state into the district of Columbia, or from the District into any state, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuropneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; provided, that the so-called splenic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

"Sec. 7. That it shall be the duty of the commissioner of agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company, doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of, or person having control over, such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

By subsequent legislation the department of agriculture was created, to be under the supervision and control of a secretary of agriculture, and the authority vested in the commissioner of agriculture, and the du-

ties which the law devolved upon him, were transferred to the secretary of agriculture. Whatever orders, therefore, the commissioner could have lawfully issued could be issued by the secretary as his successor. Now, the only authority of either to make rules and regulations of any kind in respect to cattle is found in the third section of the act; and that empowered him only to prepare rules and regulations for the suppression and extirpation of the diseases. And it seems evident to us, from the language of the section, that it was the intention of congress that in any measures taken by him looking to the suppression and extirpation of the diseases, he must act in conjunction with state or territorial authorities. Until there should be an agreement between him and them upon a method to be pursued, no part of the money appropriated by the act was available to him; so that if he should prepare rules and regulations, they would be ineffective, unless a state or territory interested should determine to co-operate with him in their enforcement. Until their acceptance by the domestic authorities, they would have no force in this state, and such acceptance was not shown. But, aside from all this, there was no evidence that any such rules or regulations as contemplated by section 3 were ever made. The order of February 5th was expressly based on section 7. It named section 7 as the sole authority for its issuance. That section made it the secretary's duty to notify railroad, steamboat, and transportation officials doing business in or through an infected locality of the existence of the contagion; but it gave him no further power. The order contained the required notification, and to that extent was in exact conformity with the provisions of the section; but it went further, and qualified the notification by a series of rules, upon compliance with which cattle might be removed from the territory in which the contagion existed to other parts of the United States. These rules find no support in section 7. That section simply directed the notice to be given, and made the knowing violation of the provisions of section 6 by certain enumerated classes of persons a misdemeanor. When the notice was given, the secretary's statutory duty was fully performed; and whatever else he assumed to do in that connection he had no warrant for, except the dictates of his own private judgment. Section 6 prohibits the delivery for transportation, or the transportation at all, by any person, of any live stock, with knowledge that they are infected with a communicable disease, with the qualification that Texas fever shall not be considered a communicable disease as to cattle transported by rail to market for slaughter. It is the violation of this provision which section 7 declares to be a misdemeanor. The restrictions upon the transportation of cattle are prescribed by the statute. It contains

all the regulations which congress, in its wisdom, regarded as necessary in connection with the movement of cattle from one state or territory to another. Certainly it was not in the power of the secretary to prohibit, even qualifiedly, anything which it permitted; or to permit, even upon condition, anything which it forbade.

Counsel agree that the order of April 23d was issued as a modification of that of February 5th, and upon its face it would seem that it was so intended. Upon that hypothesis its only authority was section 7, and what we have said in relation to the first order applies to it. But whether it was a modification, or an independent order, its first provision was in contravention of the statute. It assumed to permit the transportation of cattle from a district in which splenic fever had been declared to exist, to the state of Colorado for grazing. If the cattle came within the prohibition of section 6, they could be transported only for slaughter, and their transportation for any other purpose would be illegal. If they were not within its prohibition, then the parties moving them did only what they had the right under the law to do, independent of any rules or regulations, and no cause of action could arise out of their removal. The second provision undertakes to regulate the duties in relation to them of the persons by whom they might be removed, after their arrival in the state; and it is upon this provision that the plaintiffs' reliance is chiefly placed. After becoming domiciled within the state, their management would be regulated by its laws, and not by the act of congress. Any violation of the federal law in connection with the cattle would consist in their removal. The disposition of them afterwards was not within the scope of the statute. Section 3 was drawn with reference to the authority of the several states in matters pertaining to their domestic concerns. It distinctly recognized that authority, and so, we may say, did also the order of April 23d, in providing for the concurrence of the state authorities in the enforcement of the regulations it contained.

The rules promulgated by the secretary of agriculture may have been conceived in wisdom. They probably were, and, if they could be enforced, we see no reason to doubt that the results would be beneficial, but with the question of their wisdom or unwisdom we have nothing to do. They were outside of any authority conferred by the statute, and could, therefore, have no greater effect than, perhaps, as an expression of the opinion of the secretary. A disregard of their requirements would not, in itself, involve the violation of any law. It may be that the act of transporting the cattle was contrary to the terms of the statute, and that, if so, the plaintiffs were entitled to redress for the injuries sustained. But in a case based on a violation of the statute a number of ques-

tions would arise which this record does not present. The case at bar is not a case of that kind, and, as to it, such questions would be purely hypothetical.

The plaintiffs complain that the court erred in the admission and exclusion of evidence, and in its instructions given to the jury. We think there were some erroneous rulings in the course of the trial, but it would have been of no benefit to the plaintiffs if everything in the way of evidence which they offered had been received, and everything that they objected to had been excluded; so that the errors, if any, were harmless. We are not at liberty to review the instructions, because no proper objection was made to them when they were given; but it is not very material to the plaintiffs whether they were good, bad, or indifferent. In no view of the case as made were the plaintiffs entitled to a recovery. The judgment must be affirmed. Affirmed.

CHICAGO, B. & Q. R. CO. v. ROBERTS.
(Court of Appeals of Colorado. June 14, 1897.)
RAILROADS—INJURY TO STOCK ON TRACK—EVIDENCE—ADMISSIONS.

1. Plaintiff's black horse was alive December 18th, but was dead by the side of a railroad track, with marks of violence on him, December 20th. On the 19th, while running the train past where plaintiff's horse was found, an engine collided with a black horse. Held sufficient for the jury to conclude that plaintiff's horse was killed by the railroad company.

2. Where an engineer testifies that it would be impossible to stop a train within 600 feet, and a witness, in answer thereto, states that with air brakes the train could have been stopped, it will be presumed the witness meant the train could have been stopped within 600 feet.

3. The admission of incompetent hearsay evidence, which could produce neither good nor harm, is not reversible error.

4. A letter headed "Burlington and Missouri Railroad in Nebraska, C., B. & Q. R. Co., Owner," and signed "E. Hanson, Claim Agent," and received in reply to a letter written to a claim agent at the C., B. & Q. R. Co. in Colorado, is prima facie the act of the C., B. & Q. R. Co.

5. In an action for killing a horse, a letter of defendant stating that it would allow \$35 in settlement of the claim, which it considered was all plaintiff was entitled to, is admissible, as it is not a proposition to compromise, but is an acknowledgment of a liability.

Appeal from Weld county court.

Action by W. W. Roberts against the Chicago, Burlington & Quincy Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wolcott & Valle (William W. Field, of counsel), for appellant. James E. Garrigues, for appellee.

THOMSON, P. J. Action by the appellee against the appellant for killing a horse belonging to him. The suit was originally commenced before a justice of the peace, and went by appeal to the county court, where, upon trial, judgment was awarded to the plaintiff, from which the defendant appealed to this court.

It does not appear from the evidence first introduced by the plaintiff, unless as the result of far-fetched inference, that the plaintiff's horse was killed by the defendant. He testified that he saw the horse going to water on the 18th of December, 1893, and on the morning of the 20th of the same month he saw him dead by the side of a railroad track, partially buried, with his right shoulder badly bruised. This was the only proof that the plaintiff made on the subject of the killing of the horse, and we are inclined to think that a motion for a nonsuit, offered by the defendant when the plaintiff rested, should have been sustained. But the defendant, instead of abandoning the case at that point, produced the engineer in charge of a locomotive and train of cars which on the 19th day of December, 1893, passed the locality where the horse was supposed to be killed, who testified that his engine struck a horse at that place, and that the horse fell down when he was struck, but got up and limped away. The plaintiff's horse was black, and the engineer stated that the horse his engine struck was black. By the provisions of an act of the legislature approved April 8, 1893 (Sess. Laws 1893, p. 406), the killing or injuring of animals by a railroad company is *prima facie* evidence of the negligence of the company, and of its liability for the value of any animal so killed, unless it shows affirmatively, by proof, that the killing was not caused by its negligence, or unless it shows that its road was inclosed with a good and lawful fence. If, in the entire case, there was sufficient evidence to go to the jury of the killing of the plaintiff's horse by the defendant, then, *prima facie*, the defendant was liable; and we think the evidence was sufficient. First. It appeared that the plaintiff's horse was alive and well on the 18th of December, and was lying dead at the side of the track on the morning of the 20th, with marks of violence upon him, so that the injuries to the horse must have been received between the 18th and the morning of the 20th. Second. The engineer testified that, on the 19th, while running his locomotive and train past the place where the horse was found, his engine came into collision with a horse which answered the description of the plaintiff's horse. The testimony of the plaintiff and of the engineer, taken together, was, we think, sufficient to warrant the jury in finding that the horse struck by the engine was the plaintiff's horse, and that the horse died in consequence of injuries received from the engine. There was no pretense that the road was inclosed with any fence, but the defendant, to rebut the presumption of negligence arising from the fact of the killing, examined the engineer as to the attendant circumstances. He testified that the horse was about 100 yards ahead of the train when first discovered by him; that by reason of a curve in the track the horse could not have been visible sooner; that the horse was running away from the train, so that when he was struck he was about 600 feet from the point where he was first seen; that

the speed of the train was about 35 miles an hour; and that to stop it within that distance was an impossibility. But there was other evidence tending to show that by means of air brakes, with which the train was supplied, it could have been stopped in time to avoid the accident. It is true that the witness did not say, in words, that it could have been stopped within 600 feet. He said only that with the air brakes it could have been stopped. It is argued that, as he did not himself limit the distance, his testimony amounted only to a statement that the train might have been stopped within some indefinite section of space, and, therefore, derogated nothing from the testimony of the engineer, leaving it uncontradicted. But his testimony was in answer to that of the engineer. The latter had stated that the train could not have been stopped within 600 feet. Whether it could or not was a material question in the case, and the witness, in answering the engineer's statement, must have spoken with reference to the distance named by the engineer. What he said must be considered in connection with, and interpreted by, what the engineer said. The engineer said that the train could not have been stopped within 600 feet, and the effect of the witness' answer to the statement was that it could have been stopped within that distance. Naturally and logically such was the meaning of his language, and it must have been so understood by those who heard it. Neither the court nor the jury needed to be told that any train can be stopped in some distance with or without air brakes.

The court permitted the plaintiff, over the defendant's objection, to testify to some statements made by the engineer at the trial before the justice, and error is assigned upon the ruling. The evidence was, of course, incompetent. It was mere hearsay, and it was error to admit it. But all there was of it was that there was a passenger train on the road, going east, in the morning, called the "Flyer." How that testimony could help the plaintiff or hurt the defendant we confess ourselves unable to see. It was not even shown that that was the train which collided with the horse. So far as we can look down into the testimony, it was utterly unimportant, and could be productive of neither good nor harm. This error alone would not warrant us in reversing the judgment.

The plaintiff testified that he notified the defendant of the accident four or five days after it occurred, and wrote to its claim agent with reference to the matter. The letter which he wrote was not produced, and is not before us. He introduced the following as the reply which he received: "Burlington and Missouri Railroad in Nebraska, C. B. & Q. R. R. Co., Owner. Division Superintendent's Office. McCook, Neb., Nov. 23, 1893. W. W. Roberts, Hudson, Colorado—Dear Sir: Referring to your claim, C. S. 371, I have investigated the matter, and find that we have been paying from thirty dollars to thirty-five dollars for such horses as yours. I can allow you thirty-

five dollars in settlement of your claim, which, at the present price for horses, I think is all that you are entitled to. If this amount is satisfactory, on receipt of your acceptance a draft will be sent you, in care of our agent at Hudson. Yours, truly, E. Hanson, Claim Agent." Two objections were made to the introduction of this letter—First, that the letter head showed the letter to be that of an official of the Burlington & Missouri River Railroad in Nebraska, and therefore not written by the authority of the defendant; and, second, that it was incompetent and inadmissible. In argument its incompetence is said to consist of its being on its face a proposition of compromise,—an attempt on the part of the claim agent to buy his peace, irrespective of the justice of the claim made upon him.

1. The letter was received in answer to one addressed to the claim agent of the defendant company. The presumption from that fact is that the author of the letter represented the defendant. We certainly cannot presume that some stranger, surreptitiously or otherwise, got possession of the letter of the plaintiff, and answered it. On its face it indicates that the defendant was the owner of the Burlington & Missouri Railroad in Nebraska, and that it came from the division superintendent's office of the defendant. From its appearance and its contents, and the circumstances under which it was received, it would be accepted by any person accustomed to correspondence, and acquainted with the method by which business is transacted, as being a response of the defendant's authorized agent to the letter which was addressed to him. Whether Mr. Hanson was in fact the agent of the defendant was a matter peculiarly within its own knowledge. The surface appearances were that he was, and, if he was not, the defendant should have shown that he was not, as it could easily have done; certainly much more easily than the plaintiff could have proved that he was. The fact that it attempted no such proof, while perhaps not conclusive of anything, strengthens the presumption arising from the receipt, contents, and appearance of the letter. *Prima facie*, we think the letter was the act of the defendant, and admissible in evidence as such.

2. There is nothing on the face of the letter to indicate that it was intended as an offer of compromise. The defendant did not produce the letter of the plaintiff, and there was no evidence of its contents. We are therefore deprived of the light which it might have shed on the reply. This reply letter recites an investigation of the matter, and the price the company had been in the habit of paying for such horses. We cannot suppose that it was in the habit of paying out its money upon every claim for damages made against it, without reference to the question whether it was responsible for them or not, or that, whenever an animal was found dead in the vicinity of its track, it paid its owner something, without inquiry as to the way in which the animal

met its death. No such inference is to be drawn from the agent's letter. It does not purport to be an offer to pay a portion of a claim, on account of which the defendant denied liability, for the purpose of avoiding a lawsuit. The amount offered was the full value of the horse, as estimated by the defendant, and was based on the price of horses at that time. The letter amounted, in so far as it amounted to anything, to an acknowledgment of liability upon investigation made, coupled with an offer, based on that investigation, to pay what the defendant regarded as the full damages sustained. We do not think the second objection tenable.

Evidence having been submitted to the jury, even outside of the letter, upon which, in the exercise of their judgment, they might well find as they did, and the questions of the legitimacy and sufficiency of the evidence being the only ones before us, it is our opinion that the judgment should be affirmed. Affirmed.

RHODES et al. v. BOARD OF PUBLIC WORKS OF CITY OF DENVER.

(Court of Appeals of Colorado. June 28, 1897.)

MANDAMUS TO BOARD OF PUBLIC WORKS—PETITION—PUBLIC IMPROVEMENTS.

1. In mandamus to compel the board of public works to entertain a petition for paving, without which, by Sess. Laws 1893, p. 201, § 3, subd. 3, no paving can be done, it is not necessary to aver that the board had complied with subdivisions 1 and 2 of said section, providing that, before ordering any paving, the board shall adopt details and publish notice to the district property owners, etc.; since the duties described in subdivisions 1 and 2 are not to be performed until after such petition has been entertained.

2. A board of public works cannot reject a paving petition out of fear that it would establish a bad precedent.

3. A petition for Trinidad Lake asphalt as material for paving, though there be only one dealer in such asphalt, complies with Sess. Laws 1893, p. 201, § 3, subd. 3, providing that, in a petition for paving, the material shall be so described, either by standard or quality, as will admit a genuine competition between contractors, so there can be at least two bids by those not connected with each other.

Appeal from district court, Arapahoe county.

Mandamus by James E. Rhodes and others against the board of public works of the city of Denver. From an order sustaining a demurrer, one of the petitioners appeals. Reversed.

James H. Brown, for appellants. F. A. Williams and G. Q. Richmond, for appellee. Thomas, Bryant & Lee, amici curiæ.

THOMSON, P. J. On the 16th day of March, 1896, the following petition was presented to the board of public works of the city of Denver: "Petition for Paving on Pennsylvania Avenue. To the Honorable Board of Public Works and City Council of the City of Denver: The undersigned, your petitioners, owners of the frontage of lots and tracts of land described

opposite their respective names, hereby, in pursuance of the charter of the city of Denver, passed by the Ninth general assembly of the state of Colorado, respectfully petition your honorable bodies for the grading, paving, and curbing of Pennsylvania avenue, including intersections, from the north line of Eighth avenue to the south line of Twelfth avenue, in the city of Denver; the wearing surface of the pavement to be that known as 'Trinidad Lake Asphalt,' and equal in quality to that laid on California, Stout, Glenarm, and Nineteenth streets. We request that the wearing surface be one and one-half inches in thickness, laid upon a bituminous binder not less than one inch in thickness, and that a hydraulic cement concrete foundation four inches deep be required; that you require a five-year guaranty; order the work on the five installment plan; and we further request that, if the lowest reliable and responsible bidder shall bid exceeding two dollars and twenty-one cents per square yard for the above paving, that all bids be rejected. We further request that the distance between the curbs be established at not more than forty feet, nor less than thirty feet, leaving the balance for parking and sidewalk. And we will ever pray." This petition purported to be signed by the owners of a majority of the frontage on Pennsylvania avenue, between the north line of Eighth avenue and the south line of Twelfth avenue. Upon the presentation of the petition, the board of public works, at a meeting duly called and held, acted upon the petition, and made and entered the following order in respect thereto: "First. That the right of petition of the owners of a majority of the frontage to be assessed for any particular material for the wearing surface is not paramount to, but subject to, the charter provisions of the same clause requiring genuine competition between contractors, so that there can be at least two or more bids by individuals or companies in no manner connected with each other; and this petition is so specific as to render compliance with that part of the charter doubtful, in the mind of the board (although as to that matter this board has had no hearing or evidence), so that it does not feel warranted in putting the city to the expense of making preliminary surveys, and preparing specifications, which would necessitate a fruitless expenditure of the city's money in case it turned out that, in specifying said Trinidad Lake asphalt as a wearing surface, there could not be genuine competition between contractors by at least two or more bids, as required by the charter. Second. That, in the opinion of the board, it would be establishing a bad precedent to recognize a petition so specific as this one, since the board might hereafter be compelled to accept a petition for a wearing surface which would be a detriment, instead of an improvement, to the street. Therefore it is resolved, that while said petition is sufficient in all other respects, and the public necessity requires that said street should be paved, nevertheless, for said reasons, and no other, that, until this question be otherwise

determined by some binding judicial decision of the courts of this state, the petition be denied." Thereupon the appellant, one of the petitioners, for himself and on behalf of the others, instituted this proceeding, praying for a writ of mandamus commanding the board to accept and entertain the petition, and to proceed with the improvement of the portion of Pennsylvania avenue which it described, in manner and form, as by the charter of the city of Denver provided. The respondent demurred to the petition for a mandamus, on the ground that it did not state facts sufficient to constitute a cause of action against it, or to warrant the court in granting the relief prayed for. The demurrer was sustained, and judgment rendered in favor of the respondent, from which error is prosecuted to this court.

The argument has taken a wide range, but we do not deem it necessary for us to follow it in all its ramifications. Upon the record before us, we think that the determination of a few questions will dispose of the case in this court. The general authority of the board of public works in the matter of public improvements, in so far as any question concerning it is involved in this record, is conferred by section 35 of article 3 of the charter of the city of Denver, and is expressed as follows: "The board of public works shall have exclusive management and control of the construction, reconstruction and maintenance of all public and local improvements, including the grading, paving, curbing or otherwise improving of the streets, alleys and other public places, except parks, of the city." *Sess. Laws 1893, p. 167.*

The sections specifically defining their duties in relation to the improvement of streets, in so far as they affect any question before us, are as follows:

"Article VII. Public Improvements.

"Section 1. The city shall have power to contract for and make local improvements, and to assess the cost thereof wholly or in part upon the property specially benefited, as hereinafter provided. All contracts for public improvements shall be awarded by the mayor, upon the recommendation of the board of public works, and the improvements shall be constructed by and under the direction of said board, in accordance with specifications prescribed by said board. In all cases when the cost of local improvements is to be assessed wholly or in part upon the property benefited, the same shall be constructed by independent contract or contracts; but other public improvements may be constructed by day's labor under the direction of the board.

"Sec. 2. Whenever the board of public works shall by resolution, order any of the local improvements herein mentioned, the same shall be authorized by ordinance; which ordinance shall be in form recommended by the board of public works by endorsement thereon, and shall not be subject to amendment by the city council.

"Sec. 3. The board of public works may order the grading, curbing and paving, or otherwise improving, of the whole or any part or parts of any street or streets, alley or alleys or streets and alleys in the city of Denver, or any one or more of the said improvements. In case of grading only, or of grading and curbing only, the improvements may include the necessary cross walks; and the board may thereafter, under the conditions herein prescribed, do such further grading as may be necessary in paving or otherwise improving the same area: Provided, First. Before ordering the improvements mentioned in this section, or any of them, the board of public works shall adopt full details and specifications for the same, permitting and encouraging competition, determine the number of installments and time in which the cost shall be payable, the rate of interest on unpaid installments, and the district of lands to be assessed for the same, as in this act provided; and shall cause the engineer of said board to make a map of the district and an estimate of the total cost of said improvements, showing the approximate amounts that will be assessed upon each piece of real estate in the district; and no contracts shall be let for any amounts exceeding the estimates of the engineer. Second. The board shall by advertisement for twenty days in two daily newspapers of general circulation, published in the city of Denver, give notice to the owners of the real estate in the district, of the kind of improvements proposed, the number of installments and time in which the costs will be payable, the rate of interest on unpaid installments, the extent of the district to be assessed, the probable cost as shown by the estimates of the engineer, and the time, not less than thirty days after the first publication, when a resolution ordering the improvements will be considered by said board; that said map and estimates and all resolutions and proceedings of the board in the premises are on file, and can be seen and examined at the office of the board during business hours, at any time within said period of thirty days, by any person interested; and that all complaints and objections that may be made in writing concerning the proposed improvements, by the owners of any real estate to be assessed, will be heard and determined by the board before final action of the board thereon. Third. If owners of a majority of the frontage to be assessed, shall petition for paving, and for any particular materials for the wearing surface, then the improvements shall be ordered, and the material so designated shall be used; but no paving shall be ordered unless a petition for the same is first presented, subscribed by the owner of a majority of the frontage to be assessed for the same; and in every instance the material shall be so described in the specifications, either by standard or quality, as will admit of genuine competition between con-

tractors, so that there can be at least two or more bids by individuals or companies in no manner connected with each other."

Sess. Laws 1893, p. 201.

The order of procedure by the board in carrying into effect the foregoing provisions is the subject of some contention. The learned gentlemen who appear specially as advisers of the court insist that it is the duty of the board, in anticipation of petitions for paving, to comply with the requirements contained in the first and second subdivisions of section 3. In their view, until the paving districts have been created, the specifications adopted, the number of installments, and the time of their payment, fixed, the estimates made, and the notice given, petitions for paving are premature, and cannot be entertained. If this position is correct, as the petition for a mandamus does not allege the performance by the board of any of those requirements, the demurrer was properly sustained. But to our minds such a construction of section 3 is not only unwarranted by its language, but would be productive of inconsistent and illogical situations. In the matter of providing for improvements upon streets, the board of public works moves itself, or it is moved from the outside. All improvements, except paving, are initiated by the board. But in the matter of paving it is powerless until a legal petition for the purpose has been presented. The second subdivision of section 3 provides that the notice, by advertisement, of the several matters which the board are required by the next preceding subdivision to resolve upon and determine, shall specify the kind of improvement proposed. This language contemplates a proposal for the improvements, previous to any action by the board; and that the board must act upon a proposition either originating with itself, or submitted by others, seems to be a necessary conclusion from the nature of the duties which are devolved upon it. Whether the whole or a part of a street shall be improved, must be in some manner resolved upon beforehand. If it is proposed to improve part of a street, the part must be specified. In like manner, whether the design is to improve a whole street, or only a part, the nature of the improvement must be embraced in the proposition. Unless the location, extent, and kind of improvement are specified, compliance with the first subdivision would be impossible. It must be known whether the improvement is to be made upon the whole of a street, or a part, and, if a part, where the limits of the part are, before the district of lands to be assessed for the improvement can be defined; and the engineer must know both the boundaries of the improvement and their character before he can make an estimate of the cost of the work, or approximate the amount to be assessed upon each piece of abutting land. The improvement must therefore be initiated by a proposal of some kind from some source. Except in the matter of paving, it emanates from

the board itself; but, in the case of paving, it comes to the board from the outside. In the latter case the proposal comes in the form of a petition signed and presented by those upon whom the burden of the assessment for the work will fall; and the presentation of the petition is the very first step to be taken. It is an indispensable prerequisite condition to any action in the premises by the board. When it comes, and the board is thereby advised of the limits and location of the proposed improvement, it can determine the district of lands to be assessed for the work, and adopt the necessary specifications. The engineer, being informed of the work to be done, and the character of the materials to be used, is in possession of the data necessary to an estimate of the total and the distributive cost. It is evident to us that the duties required by the first and second subdivisions are simply preliminary to the order provided for by the third, and that they follow, and must, in the nature of things, follow, the presentation of the petition. As this mandamus is asked only to compel the board to entertain the petition for paving, the performance of duties which were dependent upon the acceptance of the petition, and which, as the petition was not accepted, were necessarily not performed, could not very well be averred in the petition for a mandamus. The objection by the amici curiæ that it did not contain those averments is without merit.

The point we have been considering is not made by counsel for the respondent. The objection which they urge and elaborate is the same one against which the board stumbled, and to that we shall now give our attention. Before proceeding to a consideration of this objection, a few observations on the nature of the remedy by mandamus seem necessary, as explanatory of what we may say concerning the duties of the board. Mandamus will not lie to control the exercise of discretionary powers with which public officers may be invested; and, if the denial of the petition for paving was the result of the exercise by the board of a judgment and discretion with which it was intrusted by law, the judgment of the district court is unassailable. High, Extr. Rem. § 42. The charter having confided to the board of public works the exclusive management and control of the construction and maintenance of all public improvements, necessarily, in determining upon the improvements, their location, extent, and character, it is clothed with some discretionary authority. What the limits of that authority are, wherein an exercise of its own judgment is contemplated, and wherein not, it is unnecessary for the purposes of this case to decide. But where any tribunal in which discretionary power is lodged has exercised its discretion so far as the exercise is necessary in a particular case, and has given its conclusions upon the facts before it, what remains to be done to make its conclusions effective is purely ministerial, and mandamus will lie to compel its performance

Williams v. Saunders, 5 Cold. 60; State v. Cox, 26 Minn. 214, 2 N. W. 494; Cortleyou v. Ten Eyck, 22 N. J. Law, 45; State v. Judge of Fourth District Court, 28 La. Ann. 451; Lloyd v. Brinck, 35 Tex. 1; Insurance Co. v. Wilson's Heirs, 8 Pet. 291.

Recurring to the proceedings of the board upon the paving petition, we find that it approved the petition throughout, except as to the manner in which it designated the material to be used; and the board's disapproval of that was grounded partly on a meaning which it assigned to the language of the third subdivision of section 3, concerning competition in bidding, and partly on a fear that an acceptance of the petition would be a precedent, upon which it might afterwards be compelled to accept a petition for a wearing surface which would be a detriment instead of an improvement. Its expressed judgment was that the petition was sufficient in all other respects, and also that public necessity required that the street should be paved. The only reason given for rejecting the petition is founded on an opinion the board had formed of the law applicable to the case, and an apprehension of some legal embarrassment which might follow its acceptance. The fear of establishing a bad precedent was groundless, because, being intrusted by the law with the interests of the public as to all matters within its cognizance, the board is fully authorized, and it would be its duty, to reject a petition proposing a wearing surface from which detriment would result to the public. Within whatever limits its discretion may be confined, it can be exercised only in relation to facts which concern the public interests or convenience or necessity. It has no discretion to place a wrong interpretation on the law; and, if a duty is otherwise obligatory upon it, it cannot shield itself, in a refusal to perform it, behind a legal opinion which it has erroneously formed. In Williams v. Saunders, supra, a county judge in Tennessee refused to admit a will to record which had been proved before the register of wills in the city and county of Philadelphia, Pa., admitted to record according to the forms of law in the state of Pennsylvania, and an official and duly-certified copy thereof presented to the county judge for record, on the ground that, according to his construction of the law of Tennessee relating to wills executed in other states, it was necessary to prove the will before him as an original will. The county judge's construction of the Tennessee law was held erroneous, and a writ of mandamus awarded, commanding him to admit the will to record, the court saying: "It follows, therefore, that, so far as the will in question purports to dispose of personal property, the probate court of the domicile of the testatrix had the exclusive jurisdiction to decide upon its validity or invalidity as a will of personal property; and, as such, it was not open for contest in the courts of Tennessee. The judg-

ment or decree of the 'register of wills,' being a tribunal of competent jurisdiction, and in the nature of a proceeding in rem, is necessarily conclusive and binding upon all persons interested in the property to be administered, until the same is reversed, annulled, or set aside by a proper proceeding in the judicial tribunals of the domicile of the testator. * * * The order, as set out in the pleadings, and the facts contained in the petition, and admitted in the answers, contain every essential fact necessary to authorize the county court to receive, file, and record the authenticated copy of the will presented, and to issue letters testamentary thereon. Assuming, therefore, that the county judge acted as a judicial tribunal, and having found all the facts necessary to a judgment or decree, so that the judgment or decree would be nothing but the conclusion of law upon the facts, the entering up of the proper judgment must be regarded as, in its nature, ministerial; and, in the absence of any other adequate specific remedy, a mandamus would be the proper method of redress."

The decision of this case, therefore, now turns upon the answer to be given to this question: "Was the paving material which the petitioners proposed designated in the petition in such manner that specifications based upon it would admit of genuine competition between contractors, so that there could be two or more bids by individuals or companies in no manner connected with each other?" The opinion of the board seems to have been, and the argument of counsel is, that the designation of Trinidad Lake asphalt was too specific. So far as the particularity with which the material was designated is concerned, leaving out of consideration a monopoly suggestion, which we shall notice hereafter, we disagree with both counsel and the board. In our opinion, for every purpose of genuine competition between bidders there is and can be no such thing as too great particularity in the description of the subject concerning which competition is invited. In order that bidders may really compete, they must have in mind precisely the same thing. It is agreed on all sides that there are several varieties of asphalt, differing in quality, cost, and fitness for paving purposes; and, if a contract for paving with asphalt is to be let, it is necessary to specify the particular kind of asphalt to be used, in order that, in bidding, each bidder shall be on an exact equality with every other bidder.

But in behalf of the board the argument goes beyond this. Its theory is that, if the paving material named in the petition was owned and controlled by a single person or company, there could be no competition, for the reason that others who might desire to compete for the contract could not do so, because the material would not be within their reach: and, accordingly, it is said that it must appear in the petition for a manda-

mus that the designated material could be the subject of competition, in the sense that different bidders would be able to obtain it. We think the presumption is that every article of commerce is within the reach of any person who desires it, and is able to pay for it; and, therefore, that an allegation that Trinidad Lake asphalt could be obtained by the bidder to whom the contract should be awarded was unnecessary. But even if it was the fact, as counsel intimate,—and we have nothing but their word on the subject,—that this asphalt was controlled by some man or combination of men, we are not prepared to say that therefore the persons interested may not lawfully petition for its use as paving material. We are referred to some cases in which it was held that material the right to which was a patented monopoly could not be the subject of competition, under a law requiring all work to be let by contract to the lowest bidder. We do not think that these decisions are directly applicable to the case in hand, for the reason that they are based on statutes which invested the authorities letting the contract with the sole power to designate the material. By the charter of Denver, the board of public works has no discretion in the selection of the material for paving. The right to say what material shall be used belongs exclusively to the owners of the frontage assessed, and the board is bound to use that material, unless it clearly appears that the material suggested is unfit for the purpose, and that, in the judgment of the board, its use would be detrimental to the interests of the public. If the material is rejected, as being improper, then the owners may select other material; but in no case has the board authority to determine upon the material, independently of the wishes of the owners. It is possible that every kind of asphalt out of which a pavement can be constructed is the subject of exclusive private ownership or control. So far as this record discloses, there is just as much authority for assuming this to be the case as there is for assuming that Trinidad Lake asphalt is so owned and controlled. If such should turn out to be the fact, then, following the argument of counsel to its logical and inevitable conclusion, no pavement of asphalt could be laid in the city of Denver at all. The same conditions are also possible with every other suitable paving material. If everything of the kind should be the subject of a single monopoly, the paving provisions of the charter would be entirely ineffective and useless. Whatever may have been decided in cases where the persons out of whose pockets the cost of the improvement must come have no voice in the selection of the material, an argument the necessary result of which, in certain possible, and not altogether improbable, conditions of fact, would be not only to destroy a right which the charter has explicitly conferred upon those persons, but to prevent the

streets from being paved at all, cannot be sound. But we apprehend that the difficulty which counsel have conjured up is more imaginary than real. If the whole of some certain kind of property which is in demand is owned by a single individual, it could be of no benefit to him to continue to hold it indefinitely. The presumption is that he desires to convert it into money, and that he will sell it to others. In a majority of instances the successful competitor for a contract is not himself the owner of the material necessary for the purposes of his contract, but must purchase it from the person or persons having it; and, if there is only one such person, it must be purchased from him. It would be contrary to experience to assume that, whether the material is in one ownership or several, it cannot be purchased. The fact that some particular material in common use is the subject of exclusive ownership furnishes in itself no sufficient reason why, with reference to that material, there could not be genuine competition between individuals or companies unconnected with each other.

The decisions cited by counsel for the respondent, and concerning which we have spoken, while, in our opinion, they are inapplicable, and criticism of them is therefore not called for, have not been acquiesced in elsewhere. In *Hobart v. City of Detroit*, 17 Mich. 245, the question which we have just been considering was exhaustively discussed by Chief Justice Cooley. In an able and carefully prepared opinion, which covers the whole ground embraced in counsel's argument, that eminent jurist held that the fact that some material necessary to the performance of a public contract was the subject of a monopoly did not, necessarily, have the effect of shutting out independent competition for the contract. A contract had been let to pave a street with the "Nicholson pavement." This pavement was a patented invention, and the right to lay it in Detroit was owned exclusively by a single firm. The charter of Detroit required that, after specifications of the work should be advertised, the contract should be awarded to the lowest responsible bidder. The argument was that, owing to the exclusive ownership of the right to lay the pavement, competition was impossible. But the court was of a different opinion, and upheld the contract. In *Paving Co. v. Hunt*, 100 Mo. 22, 13 S. W. 98, a contract for paving with material to which the plaintiff held the exclusive right was sustained, although the charter provided that the work should be let out by contract to the lowest responsible bidder. We have not referred to the last two decisions as decisive authority in this case, but simply to show how respectable courts have regarded a question upon which considerable argument has been expended here. We agree with those courts as far as their opinions have any

bearing upon the question under consideration.

By the provisions of the Denver charter, where the cost must be paid by the abutting owners, no paving can be ordered unless a petition for the purpose by them is first presented. The petition designates the particular material desired for the wearing surface, and, if the paving is done, that material must be used. This is the controlling feature of the charter provisions on the subject. The board cannot dictate the material. It is determined upon by the owners. If material unfit for paving purposes, or detrimental to the public interests, should be proposed, the board having in charge the interests of the public might reject the proposal; but, with the authority to pass upon the question whether the material proposed could properly be used for paving, its discretion ends. The subsequent steps it is required to take are simply means provided for carrying into effect the will of the petitioners. Its first duty, after receiving the petition, is to adopt details and specifications for the pavement, and in those specifications the particular material named in the petition must be so described by standard or quality as to admit of genuine competition between contractors. Whether an opportunity is afforded for such competition depends upon the language of the specifications, and not on that of the petition. While the specifications must describe the same material proposed in the petition, they need not do so in its exact phraseology, although there is no reason why they should not, if that is sufficiently expressive of standard or quality. The standard or quality may be well and generally understood by some particular name which has been given to the material, and in such case the simple name by which it is called would indicate its standard and quality better and more intelligibly than some elaborate analytic description. The petitioners asked for Trinidad Lake asphalt. It is not questioned that such asphalt is good paving material, and it seems to be conceded that in its constituents and quality it differs from every other variety of asphalt. The petitioners wanted that asphalt, and not another kind of asphalt. The charter gave them the right to it, and there was nowhere any authority to deny it to them. The board, in the specifications, could describe it by its name, as indicative of its standard and quality, or could set forth its standard or quality in some other way, provided that identical asphalt was described. All other preliminary duties having been performed, the resolution ordering the pavement would be adopted, and an ordinance authorizing the improvement prepared and submitted to the city council. Upon the passage of the ordinance, bids would be invited for the work, and each bid would be made with the understanding on the part of

the bidder that the wearing surface material to be furnished would be Trinidad Lake asphalt. "Trinidad Lake asphalt" suggests no greater difficulty than diligent and ingenious parties have found, and, without doubt, will continue to find, in the way of the prosecution of meritorious and entirely legal public enterprises. Upon the facts stated in the petition for a mandamus, the board should have entertained the paving petition, and it was error to sustain the demurrer. The judgment is reversed. Reversed.

ATCHISON, T. & S. F. R. CO. v. RICHARDS.
(Supreme Court of Kansas. June 5, 1897.)

NEW TRIAL—EXCESSIVE DAMAGES.

It is the duty of the trial court which finds that a verdict for damages for bodily injuries negligently inflicted is excessive in amount, and that such excess is not due to inadvertence or errors in calculation, but is excessive in view of the character and extent of the injuries sustained, and does not express the real opinion of the jury as to the allowance justly to be made, to set such verdict aside and award a new trial of the cause; and the error of its failure to do so cannot be cured by ordering a remission of a portion of the sum adjudged to be excessive.

(Syllabus by the Court.)

Error from district court, Shawnee county;
Z. T. Hazen, Judge.

Action by Almon Richards against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. **David Overmyer and E. D. McKeever,** for defendant in error.

DOSTER, C. J. This action is for the recovery of damages for bodily injuries sustained by defendant in error, a passenger on one of the trains of the plaintiff in error. A verdict was returned for \$5,000. The court, in passing upon a motion for a new trial, remarked and decided as follows: "That this man was badly hurt, no one denies, but he did not lose any limbs, and, although he was injured internally at the time, he has recovered from his injuries, and the judgment rendered by the jury was excessive. It was not the sentiment of the jury that he should have had as much as was allowed, but there were two men on the jury who were determined he should have \$5,000 or nothing. I know this to be so, for one of the jurors told me so soon after the verdict was rendered. The only real injury the man still sustains was to his foot, and then it took an expert physician to determine that he did not have the full use of his large toe. There is no question but that the steam heater on the car was dangerous. The only expert on steam appliances introduced said that any steam or hot-water heater that had no steam gauge is dangerous, and this Martin heater did not have a steam gauge. I will overrule the motion for a new trial, providing the plain-

tiff's attorney will agree to a reduction of the verdict to \$3,500, which, in my opinion, is about \$500 too much." In the face of this expressed opinion, finding in reality that the verdict, as returned, was excessive, and in the face of the fact that, as remitted by plaintiff, it was still excessive by at least \$500, it cannot be allowed to stand. It has repeatedly been held by this court that if a verdict for damages is, in the judgment of the trial court, excessive, and the result of inconsiderate judgment or unfairness of action, it is its duty to set it aside, and award a new trial, instead of ordering a remittitur of the amount deemed to be excessive. And where the record, as brought to this court, shows that in the judgment of the court below the sum awarded by the jury was in substantial excess of a just allowance, and awarded without due and careful consideration, a retrial of the cause will be ordered, notwithstanding the remission of the sum deemed to be unjust. *Railroad Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Railroad Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772; *Drumm v. Cessnun* (Kan. Sup.) 49 Pac. 78. The jury are as much the judges of the amount justly due as they are of any other question in the case, and the court should not substitute its own opinion for that of the jury in the determination of this, the principal fact to be tried in the case. It is not merely in cases where the excessive sum appears to have been returned through the influence of passion or prejudice that it becomes the duty of the trial court to interfere to prevent the imposition of an unjust amount upon the losing party. In the Case of *Ryan*, supra, litigants were reminded that: "It has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the cause could, within the rules prescribed, approve the same. When the judgment of the trial judge tells him the verdict is wrong, whether from mistake, or prejudice, or other cause, no duty is more imperative than that of setting it aside, and remanding the questions at issue to another jury. While the case is before the jury for their consideration, the jury are the exclusive judges of all questions of fact; but when the matter comes before the court upon a motion for a new trial it then becomes the duty of the trial judge to determine whether the verdict is erroneous." In this case an additional element of error is disclosed in the remarks of the court. The verdict was permitted to stand for a sum \$500 in excess of what the court adjudged to be a just allowance. If a judgment for an excessive sum could be abated to a reasonable amount by the trial court, and the wrong committed by the jury in that way redressed by the judge, it could only be done by ordering the abatement of the whole of the excess. It could not be done by ordering the remission of a portion only, leaving the verdict to stand for a sum in substantial excess of a just amount.

Former decisions of this court are cited as sustaining the power of a trial court to order the remission of a portion of the sum awarded by the verdict in personal injury cases, and to enter judgment for the remainder. An examination of such cases will disclose an element which is lacking in this case, and this case also discloses an element lacking in those. In the cases cited the excess seemed capable of measurement, at least capable of approximation by rules, and was not arbitrarily declared by the unguided judgment of the trial court. In the case of *Broquet v. Tripp*, 36 Kan. 700, 14 Pac. 227, the court ordered the remission of a portion of the verdict for damages for communicating disease to sheep, whereby some of them died and others were injured. Evidence of the value of the sheep lost, and of the deterioration in value of those injured, and of the cost of the care and attention which it became necessary to bestow upon them, furnished guides to the judgment of the court as well as the jury. The damages were capable of measurement by mathematical computation upon the basis of market values. This court, in the opinion, remarked: "In actions for damages of this kind, the excess in the verdict, above what the evidence might justify or satisfactorily establish, may, with the consent of the party in whose favor the verdict was given, be remitted, and judgment entered for the residue. The exercise of such power is sanctioned on the theory that the excess arises either from error of law, misapprehension of the facts, or error in computation by the jury, and that such error does not permeate the entire verdict, and therefore it is competent to correct it." The case of *Railroad Co. v. Ryan*, supra, was that of an excessive verdict for land damages, in which the trial court might have calculated from the evidence the amount of a just award, and ordered a remission of the excess; but, instead of doing so, it allowed the verdict to stand, although declaring that it did not meet its approval, and that it was in its judgment largely in excess of just compensation. Had the court ordered the entry of a remittitur in that case, and then overruled the motion for a new trial, as was done in the case of *Broquet v. Tripp*, supra, its action might have met the approval of this court. In the case of *Railway Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244, the court below filed a written opinion in passing upon the motion for a new trial, and, as remarked by this court in reviewing the case, intimated nothing in the way of passion or prejudice on the part of the jury. In that case the trial court, in determining the amount of the excess, took as a guide the decisions of this court in similar cases, in which verdicts were disapproved because excessive, and in which just allowances were suggested upon a review of the evidence and a comparison with like cases. In the case under consideration the court below distinctly declared that the

verdict was excessive, not because of any error in computation of damages, nor as compared with verdicts in similar cases, but excessive because the injuries sustained were not of such substantial and permanent character as to justify the award returned, and because the court did not believe the real sentiments of a majority of the jury favored the large allowance made. It is manifest that if the trial court was correct in its views of the character and extent of the injuries which defendant in error sustained, and correct in its belief that the verdict returned did not express the real sentiments of the jury as to a just allowance, the plaintiff in error did not have a fair trial.

We have examined the record, and find it does not support the claims of the defendant in error in his motion to dismiss, and it is unnecessary to examine the other claims of error raised by the railroad company. The judgment is reversed, and a new trial ordered. All the justices concurring.

CITY OF LIVINGSTON v. WOODS et al.
(Supreme Court of Montana. June 30, 1897.)

CITY TREASURER—LOSS OF FUNDS—LIABILITY.

Where a city treasurer, pursuant to Comp. St. 1887, § 351, requiring him to deposit the funds of the city, exercised prudence in the selection of a bank of good standing wherein to deposit the funds, and was free from negligence in permitting them to remain there, he was not liable for loss of the funds by the failure of the bank.

Appeal from district court, Park county; Frank Henry, Judge.

Action by the city of Livingston against Frank T. Woods and others to recover upon an official bond. From a judgment for plaintiff, defendants appeal. Reversed.

The defendant Frank T. Woods, at the time this action was commenced, and prior thereto, was the treasurer of the city of Livingston. The other defendants were sureties on his official bond. This action is on the official bond of Woods to collect the sum of \$756.50, which it is alleged in the complaint he failed, in violation of the terms and conditions of his bond, to pay over to his successor in office. The bond contains the following conditions: "Now, therefore, if the said Frank T. Woods shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of city treasurer required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue." The answer denies that the defendant Woods did not well, truly, and faithfully perform the duties of his office required of him by the laws in force at the time of his election, or those enacted subsequent to the execution of said bond. The defendants then allege that on the 1st day of May, 1893, when defendant Woods entered up-

on the duties of his office of city treasurer of the city of Livingston, the moneys belonging to the city of Livingston, in the hands of his predecessor, were on deposit in the Livingston National Bank, a bank doing business in the city of Livingston; that said bank had been used for more than a year prior thereto as the depository for the moneys in the hands of the city treasurer; that, upon his assuming the duties of the office of city treasurer, the said Woods continued to keep the moneys on deposit in said bank; that he was required by an ordinance of the city to deposit said moneys. Said ordinance reads as follows: "The city treasurer, acting as city collector, shall receive all moneys belonging to the city, and shall deposit all moneys in his own name as treasurer." The said ordinance further required the city treasurer to keep a correct account of all moneys belonging to the city, and that his books should be kept in such a manner as to correctly present the condition of the city finances, and be at all times subject to the inspection or examination of the mayor and council, or any member thereof. The defendants further allege that, subsequent to assuming the duties of said office, he, as city treasurer, filed with the city council of the city of Livingston his report, showing the amount of money which was deposited in the Livingston National Bank, which report was approved by the board of aldermen of the city for the months of June and July, 1893, and that at all times prior to the 7th day of July, 1893, the Livingston National Bank was considered by the business men and the people of the city of Livingston and vicinity thereof to be a responsible and solvent banking institution, and that he (the said Frank T. Woods) used all the precaution that was necessary or required of him by law in the selection of the Livingston National Bank as a depository for the city money; that on the 7th day of July, 1893, the said Livingston National Bank suspended operations, and became insolvent, and on the 20th day of July, 1893, passed into the hands of a receiver, and has ever since been in the hands of a receiver, in process of settlement; that, on the day the bank suspended, he had on deposit in said bank, in his name, as treasurer of the city, the sum of \$1,513; that thereafter he (the said Woods), as city treasurer, filed his claim with the receiver of said bank for the moneys on deposit in his name, as city treasurer, prior to the suspension thereof, which was duly allowed by the receiver of said bank; that since the allowance of said claim the receiver has paid to him, as city treasurer, the sum of \$756.50, leaving a balance due him, as said city treasurer, the sum of \$756.50, the amount sued for; and that there are not sufficient assets in the hands of the receiver to pay such balance. Defendants further alleged that the sum received by Woods, as city treasurer, had been paid over to his successor, and that he has assigned the claim against said bank for the balance due to his successor in office. The answer then alleges that the city of Livingston

had not prior to said 7th day of July, 1893, selected any depository of the said moneys of the city, except as hereinbefore set forth; that said loss of the funds of the city was occasioned without any fault, negligence, or fraud on the part of said defendant Woods; and that he faithfully discharged the duties of his office, as required of him by law; and that, by reason of the facts hereinbefore mentioned, the said plaintiff is, and ought to be, estopped from claiming that said defendant Woods did not use ordinary care and diligence in the selection of the Livingston National Bank as said depository. The plaintiff filed a general demurrer to the answer, which was sustained by the court. Defendants electing to stand upon their answer, a judgment was rendered for plaintiff for the amount sued for. The defendants appeal from the judgment.

Campbell & Stork and A. J. Shores, for appellants. Smith & Wilson, for appellee.

PEMBERTON, C. J. (after stating the facts). Sections 350, 351, and 352 of the Compiled Statutes of 1887 control as to the conditions of the city treasurer's bond, as well as define and limit his duties and powers in relation to the public funds. Section 350 provides: "The treasurer shall give bond to the city in its incorporate name, with sureties to be approved by council, * * * for the faithful performance of his duties as treasurer, and also when he vacates the office that he will deliver over to his successor all money, books, papers, property and all other things belonging to the city or town held by him as treasurer." Section 351 provides: "The city treasurer shall also be city collector. He shall receive all money belonging to the corporation, and shall deposit all money in his name as treasurer." Section 352 provides: "The treasurer is hereby expressly prohibited from using directly or indirectly the moneys or property of the corporation for his own private gain or profit, or that of any other person or persons." The contention of the appellants is "that, when the city treasurer deposited the money of the city in the bank in his name as city treasurer, he performed the duties of his office as directed by law, and fully complied with the conditions of his bond, and if he used ordinary care in selecting the bank in which to deposit the money, and the bank afterwards failed, the loss, if any, must be borne by the city."

The question here presented of the liability of an officer on his official bond for the loss of public moneys, and what, if any, facts will excuse the loss, is a grave and far-reaching one. We are not only mindful of the importance of this question, but we are confronted with the great difference and conflict of views and decisions upon the subject among the best authorities and highest courts in the land. Mechem, in his work on Public Officers, says that four theories, at least, of this question, have prevailed, and these four theories are given in sections 298, 299, 300, and 301 of his work. These sections read as follows: Sec-

tion 298: "One view is based upon the strict language of the bond. The officer having bound himself and his sureties, without reservation or qualification, by the express terms of his bond, that he will duly deliver and pay over the public funds which come into his hands, this obligation 'can only be met or discharged by making such delivery or payment,' and that, having bound himself by this solemn agreement to do this act, he must be 'held liable for his nonperformance, though it is rendered impossible by events over which he had no control.' If the parties had desired exemption in a given contingency, it should have been 'so nominated in the bond.'" Section 299: "A second view, somewhat analogous to the last, is based upon the requirements of the public policy. 'Public policy,' says McLean, J., 'requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if, indeed, any can be found, where any relief has been given in such cases by the interposition of congress. As every depositary receives the office with a full knowledge of its responsibilities, he cannot in case of loss complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.'" Section 300: "A third view is based upon the assumption that, by force of the statutes governing the subject, the officer becomes, in effect, the debtor of the public. His liability, therefore, becomes absolute, and, like other debtors, he is not relieved from liability because he is so unfortunate as to lose, though by unavoidable accident, the money with which he expected to make payment. In legal effect, he is not a mere bailee, but he loses his own money, and cannot therefore call upon the public to bear the loss. These views all lead obviously to the enforcement of an exceedingly strict liability." Section 301: "But another view, less stringent, and, in the opinion of the writer, more consonant with reason and justice, has also met with favor, although the cases which maintain it are few. By this view, the officer is regarded as standing in the position of a bailee for hire, and 'bound, virtute officii, to exercise good faith and reasonable skill and diligence in the discharge of his trust, or, in other words, to bring to its discharge that prudence, caution, and attention which care-

ful men usually exercise in the management of their own affairs,' but 'not responsible for any loss occurring without any fault on his part.' The statute may, of course, impose, or the officer may himself assume, a more onerous responsibility; but, in the contemplation of this theory, a greater liability does not result from the simple undertaking to faithfully discharge the duties of the office." The authorities in support of these respective theories are cited in the notes to the appropriate sections.

In 1844, the supreme court of the United States decided the case of *U. S. v. Prescott*, 3 How. 578. Prescott was a receiver of public moneys. The action was on his bond for failing to pay over public moneys received by him. "The defense pleaded was that the sum not paid over by the defendant, Prescott, and for which the action was brought, had been feloniously stolen, taken, and carried away from his possession by some person or persons unknown to him, and without any fault or negligence on his part; and he avers that he used ordinary care and diligence in keeping said money, and preventing it from being stolen." The court held that those facts constituted no defense, and further held that "the obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond." The court further held that such a defense was in violation of public policy. So that we may say *U. S. v. Prescott* was decided upon a strict construction of the terms of the bond, and upon questions of public policy. The decision therefore embraced the first two theories given by Mechem. *supra*.

The supreme court of the United States followed the rule or rules of law announced in *U. S. v. Prescott*, from 1844, when that case was decided, in *U. S. v. Morgan*, 11 How. 154, *U. S. v. Dashiell*, 4 Wall. 182, *U. S. v. Kechler*, 9 Wall. 83, and perhaps other cases, until 1872, when the case of *U. S. v. Thomas*, 15 Wall. 337, was decided. In this last-named case the supreme court evidently departed from the stringent rule announced in *U. S. v. Prescott*, that nothing but the payment of the money, when required, will discharge the bond. After examining and commenting on *U. S. v. Prescott*, *supra*, and the cases following it, the court, in *U. S. v. Thomas*, says: "It appears from them all (except, perhaps, the New York case) that the official bond is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract, by which they assume additional obligations with regard to the safe-keeping and payment of those moneys, and as an indication of the policy of the law with regard to the nature of their responsibility. But, as before remarked, the decisions themselves do not go the length of making them liable in cases of overruling necessity. On the

contrary, in the last reported case on the subject, that of *Bevans v. U. S.* (13 Wall. 56), Mr. Justice Strong, delivering the opinion of this court, says: 'It may be a grave question whether the forcible taking of money belonging to the United States, from the possession of one of her officers or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a state, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States.' These observations show that the particular question raised in this case has been reserved by the court after its most mature consideration of the subject. So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case, the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case. * * * The condition of an official bond is collateral to the obligation or penalty. It is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes." In *U. S. v. Thomas*, it may safely be said, we think, that the court decided that the public officer in such cases is a bailee of the public funds, and not a debtor to the public, and also that the bond is conditional, and that the officer is not compelled to pay it in any event, and under all circumstances, as held in *U. S. v. Prescott* and other cases. It is worthy of remark that, while Mr. Justice Miller dissented from the opinion in *U. S. v. Thomas*, he distinctly says he did not approve of the doctrine announced in *U. S. v. Prescott* and the cases which followed it. He says: "When the case of *U.*

S. v. Dashiell came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that, on sound principle, the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that prior to these decisions there was any principle of public policy recognized by the courts, or imposed by the law, which made a depositary of the public money liable for it when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping." And says, further: "If the opinion or judgment of the court were based upon a frank overruling of those cases, and an abandonment of the doctrines on which they rest, I should acquiesce."

A number of the courts of the country have held to the doctrine embraced in the third theory given by Mechem, as shown above, namely, that the officer in such cases is the debtor of the public, and therefore cannot be excused for loss of public funds for any reason. These authorities are cited in the notes to section 300, Mechem, *supra*. As our statute expressly prohibits the use of the public funds, directly or indirectly, by the city treasurer, we cannot subscribe to the doctrine that he is a debtor to the public. We think such a theory is illogical, and not supported by the best authorities. We think in such cases the officer is a bailee of the funds. To hold that the moneys received by him are his own, and that he may so treat them on the theory that he is only a debtor of the public, would, in our opinion, lead to a most vicious abuse of public trust, encourage malfeasance in office and misuse of the public funds.

This brings us to the consideration of the rule embraced in Mechem's fourth view, that the "officer is regarded as standing in the position of a bailee for hire, and 'bound, virtute officii, to exercise good faith and reasonable skill and diligence in the discharge of his trust, or, in other words, to bring to its discharge that prudence, caution, and attention which careful men usually exercise in the management of their own affairs,' but 'not responsible for any loss occurring without any fault on his part.'" This theory is approved by Mechem. It is, in our opinion, supported fully by *U. S. v. Thomas* and the dissenting opinion of Mr. Justice Miller in that case. *Cumberland Co. v. Pennell*, 69 Me. 357. In *State v. Copeland*, (Tenn. Sup.) 34 S. W. 427 (a case very similar to the one at bar), the court holds the officer not a debtor to the public, but a trustee, charged with duties and liabilities which are fixed and

measured by the law relating to his office, and not alone by the terms of his bond, the chief purpose of which is to add the security of bondsmen to his personal responsibility for the performance of the duties imposed on him by law. In the case just cited, the law did not require, like in the case at bar, that the officer should deposit the money in his own official name. But this he did do in a bank of good standing and reputation. The officer having acted with proper caution and prudence, being guilty of no negligence or bad faith in the selection of the bank of deposit, the court held that he was not liable for the loss of the funds by the failure of the bank. The same doctrine is announced in *Wilson v. People*. (Colo. Sup.) 34 Pac. 944, and in *McClure v. Board of Com'rs*, Id. 763. The three cases last cited involve the question of the liability of public officers for loss of public funds. They are recent, and collate and review the authorities on this important question. They hold that the officer, under the facts and circumstances disclosed, is not liable for the loss of public funds, and show the trend of recent adjudications to be towards the fourth theory of this subject, as given by Mechem in section 301 of his work on *Public Offices and Officers*. It is held that, when the law requires an officer to deposit public funds, a failure to do so is a breach of his bond. *Murfree, Off. Bonds*, § 327.

In the case at bar the law of the state and the ordinance of the city both required the officer to deposit the money. By the demurrer it is admitted that the officer deposited it in a bank of good standing and reputation, and that he exercised good business caution and prudence, and was without fault, negligence, or fraud in so doing. In accordance with the best reason and recent authorities on the subject, we are constrained to hold that the facts pleaded in the answer, and admitted by the demurrer, constituted a good and sufficient defense. With Mechem, we concede that the majority of the cases and decisions are the other way, but, like him, we think the view we have taken "more consonant with reason and justice." We believe, with the court in *U. S. v. Thomas*, that in such cases the officer is "a bailee resting under special obligations," and that the burden rests upon him to show beyond any reasonable controversy that he has used that prudence, caution, and careful attention which prudent men usually exercise in the management of important affairs, and that he has been free from all negligence and the slightest imputation of fraud in the discharge of his official trust. When held to such strict accountability, we are unable to see why a public officer should be held liable for a loss which he was unable to prevent when so discharging his duties, any more than any other bailee or trustee who suffers a loss under like circumstances.

This view of the case may be said to be in

conflict with *Commissioners v. Lineberger*, 3 Mont. 231. This case follows strictly *U. S. v. Prescott*. We doubt if the facts in the Montana case made it necessary to invoke the rule of the Prescott Case. But, however that may be, the case of *Commissioners v. Lineberger*, in so far as it conflicts with the views expressed in the case at bar, is overruled. The judgment appealed from is reversed, and the cause remanded, with direction to overrule the demurrer.

BUCK, J., concurs.

HUNT, J. I concur in a reversal of the case solely upon the ground that the statute required the deposit of the funds by the city treasurer in a bank, and if the treasurer exercised all reasonable prudence and caution in the selection of a bank wherein to deposit the funds, and was free from negligence in permitting the deposit to remain in the particular bank selected as a depository, he cannot be held liable for funds lost by reason of the failure of the depository bank.

STATE v. BERNHEIM.

(Supreme Court of Montana. May 17, 1897.)

CARRIERS—SALE OF TICKETS—LICENSED AGENTS—STATUTORY REGULATIONS—POLICE POWER—CONSTITUTIONALITY.

1. Laws 1893, p. 150 (Civ. Code, §§ 978-984), was a senate bill, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers." It limits to agents authorized by certificates from the carriers the right to sell tickets, the certificates to be posted for inspection by travelers, and requires each agent, within 10 days after his appointment, to exhibit his certificate to the secretary of state, and obtain a license as ticket seller, and pay to the secretary a fee of \$1. The act makes it unlawful for anyone to sell tickets without a license, provides a penalty for violations, provides for the redemption of unused tickets, and makes it unlawful for tickets to be sold at other than the regular rate. Held, that the act was a police regulation, and not a bill for raising revenue, within Const. art. 5, § 32, requiring such a bill to originate in the house of representatives.

2. The providing of penalties against violations of the act does not violate Const. art. 5, § 23, requiring the subject of every bill to be clearly expressed in its title.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

J. Bernheim was convicted of the unlawful sale of a railroad ticket, and appeals. Affirmed.

The defendant was informed against for having sold a railroad ticket in violation of the law. He was tried and convicted, and appeals from the judgment of conviction. The law under which the defendant was convicted is entitled "An act to regulate the sale and redemption of transportation tickets of common carriers." Sess. Laws 1893, p. 150; also, sections 978 to 984, inclusive, of the Civil Code of Montana. Section 1 of the original law provided that the owner of any railroad or

steamboat shall provide each agent who is authorized to sell tickets with a certificate setting forth the authority of such agent. If the owner should be a corporation, then such certificate must be under the corporate seal. It is the duty of the agent to keep the certificate conspicuously posted for the information of travelers. He must also, within 10 days thereafter, exhibit the same to the secretary of state, and, upon payment of a license fee of one dollar, the secretary of state issues to such agent a license under the seal of the state of Montana, which authorizes persons so receiving the same to engage in the business of selling tickets of the common carrier from whom he holds his appointment. This license is also required to be kept conspicuously posted. Section 2 makes it unlawful for any person who has not thus been appointed to sell tickets. Section 3 provides a penalty for the violation of the second section of this act. Section 4 makes it the duty of every agent so authorized to sell tickets to exhibit his authority to any officer of the law who may request him so to do. Section 5 provides for the redemption of the unused portion of any ticket, and prohibits the sale by any person of such ticket, or of the unused portion of such ticket, otherwise than by presentation for redemption under the terms of this act. A violation of the provisions of this act subjects the party offending to a specified penalty. Section 6 provides a penalty for the unreasonable refusal of a railroad company or other common carrier to redeem its tickets, as required by section 5. Section 7 makes it unlawful for any ticket-selling agent or common carrier to dispose of tickets at a greater or less price than the regular rate for the same.

Henry C. Smith and Thompson Campbell, for appellant. C. B. Nolan, Atty. Gen., for the State.

HUNT, J. (after stating the facts). The appellant assails the validity of the act of the legislature under which the defendant was convicted. He does not, however, ask the court to declare it in violation of article 3 of section 27 of the constitution of the state, and the fifth amendment of the constitution of the United States, which provide that "no person shall be deprived of life, liberty or property without due process of law," but relies entirely upon these two propositions: First. Because the bill was one for raising revenue for the state of Montana, and, it being conceded that it originated in the senate, he argues that it violates the provisions of article 5 of section 32 of the constitution of the state, which reads as follows: "All bills for raising revenue shall originate in the house of representatives, but the senate may propose amendments as in the case of other bills." Secondly. Because the constitutional provision (section 23 of article 5 of the constitution of the state) requiring the subject of every bill to be clearly expressed in its title was violated at

least to the extent of rendering the penalty clauses of the law void by the omission to include expressed sufficient references to those clauses of the bill which imposed a punishment for violation of the law.

The argument of counsel that the law under consideration is a revenue law is based upon the fact that a license fee of one dollar must be paid to the secretary of state for the license provided for in section 1 of the act. This fee must be paid by the agent of the railroad company, who is authorized to sell tickets to the secretary of state, who in turn issues the license to the person authorized to engage in the business of selling tickets of the common carrier, from whom he holds his appointment as agent. It is contended that, because this license may become a source of revenue to the state, the law providing for this revenue is a revenue law, within the meaning of the section of the constitution referred to. The first clause of section 32 of article 5 of the constitution of Montana, in its requirement that "all bills for raising revenue shall originate in the house of representatives," is identical with the language of section 7 of article 1 of the constitution of the United States, while the remaining clause, permitting amendments by the senate, is substantially similar to a like clause of the federal constitution. This exclusive right of the house of representatives to originate bills for raising revenue having been obviously borrowed from the federal constitution, into which, Judge Story says, it found its way originally from similar privileges exercised by the British house of commons, we naturally turn to the construction of similar words by the federal courts, in order to learn their views of what are properly "bills for raising revenue." In the case of *U. S. v. Mayo*, 26 Fed. Cas. 1231, decided in 1813, Judge Story, in discussing liability for penalties under the embargo acts, used this language: "It is argued that the present is a case arising under the revenue laws of the United States, and that in an enlarged sense these words embrace all laws where any fine or forfeiture accrues to the government. I have no difficulty in rejecting this construction, as it would draw within its grasp every crime to which a pecuniary fine or forfeiture attaches by law, of whatsoever character it might be; and I might add that not a single law inflicting a forfeiture would escape its comprehensive power. The true meaning of 'revenue laws' in this clause is such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws whose collateral and indirect operation might possibly conduce to the public or fiscal wealth are within the scope of the provision. The argument on this head therefore utterly fails." Story, years afterwards, in his treatise on the Constitution (section 880), again wrote as fol-

lows: "What bills are properly 'bills for raising revenue,' in the sense of the constitution, has been a matter of some discussion. A learned commentator supposes that every bill which indirectly or consequentially may raise revenue is, within the sense of the constitution, a revenue bill. He therefore thinks that the bills for establishing the post office and the mint and regulating the value of foreign coin belong to this class, and ought not to have originated, as in fact they did, in the senate. But the practical construction of the constitution has been against his opinion. And, indeed, the history of the origin of the power already suggested abundantly proves that it has been confined to 'bills to levy taxes' in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue in the sense of the constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coins, or authorized the discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in case of insolvency, although all of them might incidentally bring revenue into the treasury." This construction by Judge Story has been expressly approved by the supreme court in *U. S. v. Norton*, 91 U. S. 566. See, also, *The Nashville*, 4 Biss. 188, Fed. Cas. No. 10,023.

Tested by these rules, we are clearly of the belief that there is nothing in the context of the bill to justify the opinion that the motive of the legislature in passing it was to raise revenue for the state. The more general object of the law, as expressed by its provisions and title, was to regulate the sale of railroad and steamboat transportation, limiting the right of sale of tickets to those designated as agents by the carriers, to the end, doubtless, of preventing violation of agreements under which transportation companies often sell their tickets to original purchasers, and to prevent fraudulent practices upon the public as well, and to provide for the redemption of certain tickets or coupons by carriers.

We need not dwell upon that feature of appellant's argument that the license charge or fee for the transaction of the business of an agent is a tax, as the word "tax" is employed in section 1 of article 12 of the constitution, which provides that "the legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state," designed to raise money for public purposes. The statute not being for revenue purposes, we regard it as a police regulation, adopted by the legislature in the exercise of the police power, and certainly not in conflict with the constitutional provision which the appellant says it violates.

As said before in this opinion, the question whether or not the law itself violates the United States and state constitution by attempting to deprive a man of his "property" without due process of law is not presented for our consideration, and we have assumed throughout that, unless the points relied on by appellant are well taken, the law is valid, and must be upheld.

Nor is there merit in the point that the subject of the act is not clearly expressed in the title. The subject of the law is the regulation of the sale and redemption of tickets. As an incident of regulation, penalties are provided against violation of the law. The provisions for these penalties are part of the methods for the regulation,—means whereby the regulation may be effectuated. Experience amply demonstrates that to regulate a particular business by law, and put a statute regulating it into practical and effective operation, there must be punishments prescribed and imposed upon those who violate its commands. But such penalties need not be included in the title, for they are but "ends and means necessary or convenient for the accomplishment of the general object." *Cooley*, Const. Lim. p. 172; *Insurance Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *State v. Stunkle*, 41 Kan. 456, 21 Pac. 675; *Howell v. State*, 71 Ga. 224. The judgment is affirmed.

PEMBERTON, C. J., concurs. BUCK, J., disqualified.

(20 Mont. 51)

EDWARDS v. SPALDING et al.¹

(Supreme Court of Montana. June 14, 1897.)
ASSIGNMENT OF LEASE—STATUTE OF FRAUDS—CONSIDERATION—RELEASE OF ASSIGNOR.

1. A contract accepting the assignment of a lease made to a firm, and assuming the obligations thereof, is not within the statute of frauds, though the signature of the assignor is in the firm name, where it is executed by a member of the firm authorized by the other members, and where the assignees have taken possession of the demised premises and have paid rent.

2. The assignment of a lease is a sufficient consideration for the payment of rents.

3. The mere acceptance of rent from the assignee of a lease does not release the assignor.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action by Mary Edwards against W. S. Spalding and F. A. Canfield. From a judgment for plaintiff, defendant Spalding appeals. Affirmed.

This is an action to recover rent. It appears from the record and pleadings that on the 28th of January, 1892, the plaintiff entered into a contract with N. Dysinger, George H. Dysinger, and F. A. Canfield, one of the defendants herein, co-partners doing business under the firm name of the N. Dysinger Company, by which she leased to them certain premises situated in the city of Helena, and which are described in said contract; that under and in pursuance of

the provisions of said contract the said N. Dysinger Company went into possession of the premises, and remained in possession of the same until June 29, 1892, when said firm assigned its interest in said contract by its contract in writing indorsed thereon as follows: "Helena, Montana, June 29th, 1892. For value received the undersigned, the N. Dysinger Company, hereby sell and assign to W. S. Spalding and F. A. Canfield all of our right, title, and interest in and to the annexed lease. [Signed] The N. Dysinger Company." It further appears that at the time of this assignment, and as a part of such transaction, the defendants in this suit undertook by their contract in writing, indorsed on said lease and under said assignment, as follows: "We, W. S. Spalding and F. A. Canfield, hereby accept the foregoing assignment; and, for value received, we hereby assume all the obligations of said lease on the part of the lessees to be performed, and agree to carry them out. [Signed] W. S. Spalding. F. A. Canfield." This assignment was consented to, and said undertaking by the defendants accepted, by the plaintiff, by her written indorsement on said lease, and under the undertaking of the defendants, as follows: "In consideration of the foregoing, I hereby consent to the said assignment. [Signed] Mary Edwards." The defendants went into the possession of the premises, and occupied the same for some time, under the assignment to them by the N. Dysinger Company. This suit is brought to recover of the defendants the sum of \$913.30, claimed to be due as rent for said premises. Only the defendant Spalding answered. He admitted the execution of the lease by plaintiff to the individual members of the N. Dysinger Company, but denied that it was executed to them as a co-partnership; admitted the assignment as stated in the complaint by the N. Dysinger Company, and the entering into the contract executed and signed by Spalding and his co-defendant, assuming the obligation to pay and to perform the conditions of the lease as alleged in the complaint. Defendant denied that he remained in possession of the premises longer than until the 17th day of August, 1892, when he alleges he delivered possession of the premises to Joseph Gokey, Romeo Lavigne, and his co-defendant, F. A. Canfield. He further alleged that the rents were fully paid during the time he was in the possession of the premises. The defendant also denied the amount alleged to be due, or any sum due from him to the plaintiff. For separate defenses, defendant alleged: First. "That on or about the — day of August, 1894, the plaintiff, through her son and agent, Frank G. Edwards, without the knowledge or consent of the defendants or either of the lessees named in said lease, or of the parties to whom this defendant delivered the possession of said premises, obtained the key to said premises, and entered into possession thereof, evicted the occupants thereof, and stored merchandise in said premises, and has continued to occupy the basement of said premises as a storeroom." Second. "The defend-

ant alleges that the written contract by which he and his co-defendant, Canfield, assumed the obligations of the original lease, was and is null and void, for the reason that neither said contract nor the pretended assignment of said lease are subscribed by either George N. Dysinger or N. Dysinger, or their, or either of their, lawfully authorized or other agent, as prescribed by sections 219 and 220 of the fifth division of the Compiled Statutes of Montana." Third. "That on the 17th day of August, 1892, this defendant delivered the possession of the premises to Joseph Gokey, Romeo Lavigne, and his co-defendant, who entered into possession thereof with knowledge and consent of the plaintiff herein, and paid the rent thereof according to the terms of said lease for a period of several months after; that said plaintiff accepted said rent from said last-named parties, and never made any demand for rent for said premises upon this defendant until about the time of the commencement of this action; this defendant claiming that by reason thereof the plaintiff accepted said parties as her tenants, and thereby released this defendant from all obligations under said lease." Fourth. "This defendant alleges that there was no consideration for the contract by which he and his co-defendant assumed the obligations of the original lessees of said lease, and that the same is void for want of consideration." The plaintiff demurred to the second, third, and fourth separate defenses pleaded by defendant Spalding for the reason that they did not state facts sufficient to constitute a defense, and that the third separate defense, which attempts to plead a release by the plaintiff of the defendant, is ambiguous and uncertain, and that it does not state how plaintiff accepted the parties named in said special defense as her tenants, or that she did any other act except to receive the rent due on said premises from the parties occupying the same, or whether plaintiff released this defendant by instrument in writing or orally. The court sustained this demurrer, whereupon the plaintiff filed a replication denying the agency of Frank G. Edwards, and denying that he or anybody else ever in any manner evicted the defendant or any other person or persons from said premises. The case was tried to a jury, who returned a verdict for plaintiff in accordance with the prayer of the complaint, and upon which verdict a judgment was rendered against the defendant. The defendant appeals from the judgment and an order overruling a motion for a new trial.

McConnell, Gunn & McConnell, for appellant. T. J. Walsh, for respondent.

PEMBERTON, C. J. (after stating the facts). The only material question involved in this appeal is as to whether the court below erred in sustaining plaintiff's demurrer to the separate special defenses pleaded in defendants' answer. The second separate defense alleged that the assignment of the lease to defendants by the N. Dysinger Company

was void because not signed by the individual members of said firm. The third separate defense alleged that there was no consideration for the assignment, or the assumption of the obligations of the original lessees by defendants, and that the same is therefore void. As these two defenses involve the statute of frauds, we will treat them together. We think there can be no question as to the fact that the lease was made to the Dysingers and Canfield as members of the co-partnership known as the N. Dysinger Company. The lease so states. The evidence shows that the firm took possession of the premises, and used and occupied them for the benefit of the co-partnership until they assigned the lease to defendants. The lease was partnership property. The firm assigned it to the defendants. The appellant says he and his co-defendant went into the possession of the premises under the assignment by the firm, and that he paid all the rents due while he and his co-defendant held possession under that assignment. The lease being partnership property, the assignment thereof by one of the firm was valid, if done by authority of the other members of the firm, or ratified by them. *McGahan v. Bank*, 158 U. S. 219, 15 Sup. Ct. 347; 1 Devl. Deeds, §§ 110, 111; *Willson v. Hunter*, 14 Wis. 744. The evidence in this case shows that the lease was signed by N. Dysinger with G. Dysinger's consent. Canfield, the other partner, ratified it by accepting the assignment, and agreeing in writing to pay the rents. The appellant, having accepted the assignment of the lease in writing, and agreeing thereby to pay the rents, and having taken possession of the premises under the assignment by the N. Dysinger Company, and having paid the rents while in possession, placed himself in a position where he could have enforced a specific performance of the contract against the N. Dysinger Company, if that firm had refused to perform its contract; and, of course, the firm could have enforced the contract against him. Under such circumstances the contract is taken out of the statute of frauds, and the appellant is not in a position to resist a recovery upon the contention that the contract is void under that statute. *Scott v. Bush*, 26 Mich. 418; *Nelson v. Implement Co.*, 96 Ala. 515, 11 South. 695; *Abbott v. Draper*, 4 Denio, 51; *Wallace v. Scoggins (Or.)* 17 Am. St. Rep. 749, and notes (s. c. 21 Pac. 558); *Reed, St. Frauds*, §§ 281, 381. We are unable to find any support for the contention that there was no consideration to support the assignment of the Dysinger Company to appellant and his co-defendant, and their acceptance thereof in writing, and agreement to pay the rents of the premises. The assignment of the lease to them, which we hold to be valid and binding, was a sufficient consideration, in law and equity, for the payment of rents by them. In a written contract, a consideration is presumed. Section 2169, Civ. Code.

The fourth separate defense of appellant alleged, or attempted to allege, a release of defendant, by showing that plaintiff accepted rent of the parties to whom appellant assigned his interest in the lease. The evidence is not satisfactory that this allegation is true. It is the only allegation on which appellant bases his contention of release. The plaintiff in her testimony says that Canfield paid what rent was paid. Canfield is one of the parties that the Dysinger Company assigned the lease to, and to which assignment plaintiff assented. But, if it were undisputed that plaintiff accepted rent from the appellant's assigns, this alone would not show a release of appellant. There is no allegation in the special defense that plaintiff accepted appellant's assigns as her tenants. *Hunt v. Gardner*, 39 N. J. Law, 531.

We see no error in the action of the court in sustaining the demurrer to appellant's answer. The matters specially pleaded constituted no defense. There is no substantial evidence to support the defense that Frank Edwards, the son of plaintiff, was her agent in the matter, and that he evicted the assigns of the appellant from the leased premises. There is no merit in this defense. It seems that in this case the appellant, when he assigned his interest in the lease, neglected to protect himself against the default of his assigns. If the result is a hardship to him, it is attributable to his own negligence. That is all there is in the case. The judgment and order appealed from are affirmed.

HUNT and BUCK, JJ., concur.

WHITESIDE v. SCHOOL DIST. NO. 5 OF FLATHEAD COUNTY et al.

(Supreme Court of Montana. June 21, 1897.)

MECHANICS' LIENS — PROPERTY SUBJECT TO — SCHOOL HOUSES.

1. The mechanic's lien law having omitted to expressly give the right to a lien on such a building, a subcontractor has no lien for work done or materials furnished in the construction of a public school house.

2. Comp. St. 1887, div. 1, § 321, subd. 9, after providing that public property shall be exempt from execution, declares that "no article or species of property mentioned in this section shall be exempt from execution issued on a judgment recovered for its price." Held not to render a school house subject to sale to enforce the lien of a subcontractor for work done or materials furnished.

Appeal from district court, Flathead county; Charles W. Pomeroy, Judge.

Action by Fred Whiteside against school district No. 5 of Flathead county and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. N. Noffsinger and M. D. Baldwin, for appellant. C. B. Nolan, Atty. Gen., for respondents.

HUNT, J. Plaintiff brought this action to enforce a mechanic's lien against certain lots

of ground alleged to belong to the defendant school district No. 5, Flathead county, Mont., and the buildings and improvements thereon, for material and labor furnished and used in the erection of a school house. Plaintiff was a subcontractor, with a balance due him by the contractor. The question raised is whether such a lien can be enforced against a school house and lots held by school trustees for uses of a public school. Boisot, a late and careful writer on mechanics' liens, states the law as follows: "There can be no mechanic's lien on public property unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement, public property not being subject to forced sale. * * * Public school buildings are also exempt from mechanics' liens." 2 Jones, Liens, § 137, lays down the same rule that mechanic's lien laws do not, in the absence of express provisions, apply to public buildings, on grounds of public policy. Phillips on Mechanics' Liens, § 179, also writes that under an ordinary statute a lien cannot be acquired for work done or materials furnished towards the erection of a public school house, erected in accordance with public law, and that, where a remedy is provided by statute for the collection of judgments and debts created by public functionaries, a mechanic's lien against a public school house is impliedly prohibited, and cannot be enforced. The copious citations of cases in the notes of these several authors fully sustain the text laid down by each of them. Some of the more recent cases are *Hovey v. Town of East Providence*, 17 R. I. 81, 20 Atl. 205; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646; *Fatout v. Commissioners*, 102 Ind. 223, 1 N. E. 389; *Portland Lumbering & Manuf'g Co. v. School District No. 1*, 13 Or. 283, 10 Pac. 350; *Jordan v. Board of Education*, 39 Minn. 299, 39 N. W. 801. Most of the decisions base their reasoning upon the ground of public policy, and point out that it is easy to see what detriment might follow if lands and buildings held for public uses—as, for instance, common schools—could be sold to satisfy the debts or defaults of municipal corporations having the legal title. In the California case cited above the court invoked the general doctrine that "the state is not bound by general words in a statute which would operate to trench upon its sovereign rights injuriously affecting its capacity to perform its functions or establish a right of action against it," and the court applied the familiar rule of construction heretofore cited by holding that by the omission in the statute to mention public buildings it was manifest from the whole statute of that state that they were not included. We believe that under the statute of this state, construing it according to the rule laid down in the foregoing cases, it was not intended to give to a mechanic who is a subcontractor a lien for

work done or materials furnished in the construction of a public school house. The omission of the express right to a lien upon such a building and property shows that it was not intended to be included within the provisions of the law for reasons of public policy. It is evident that the legislature did not mean to disturb this almost universal rule of statutory construction. By section 321, div. 1, Comp. St. 1887, public buildings and lots are exempt. This includes public school houses and lots.

The appellant contends, however, that the very last clause of subdivision 9 of the exemption statute renders a school house subject to the levy of an execution. After providing that public property shall be exempt, the statute continues: "But no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon." But we think that the language quoted is entirely inapplicable to the case of a subcontractor who is seeking to foreclose a mechanic's lien. Not having the right to subject the property to the lien, it should not be subjected to a sale to enforce such lien. *State v. Tiedemann*, 69 Mo. 306. Whatever may be the rights of a direct judgment creditor of the school district, who has sold property to the trustees for public uses, it is certain that the statute does not mean to limit the previous general words of exemption by permitting a school house to be sold under an execution in favor of a subcontractor who has no special lien for a small part of its value, and perhaps to be forever lost to the school district before funds could be collected by a tax levy wherewith to pay the amount of the debt. The judgment is affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

MUTUAL BENEFIT LIFE INS. CO. v. WINNE et al.

(Supreme Court of Montana. June 14, 1897.)

FOREIGN CORPORATIONS—CONTRACTS—CURATIVE ACT—CONSTITUTIONAL LAW—STATUTES—AMENDMENT RETROSPECTIVE LEGISLATION.

1. Comp. St. 1887, c. 24, § 444, providing that, if any foreign corporation commence to do business in Montana without first filing certain statements and certificates, it shall forfeit to the people \$10 a day, and all acts and contracts made by it during the time it neglects to make such filing "shall be void and invalid as to such incorporation," renders a mortgage given it before such filing merely voidable.

2. A bill which subsequently becomes a law may be amended by a bill introduced before, but passed after, the first bill becomes a law.

3. Civ. Code 1895, § 1034, providing that any foreign corporation that has heretofore performed acts or made contracts in this state may, within 90 days from the time the act goes into effect, comply with the provisions hereof, and thereupon all its acts and contracts heretofore done and made shall be valid and enforceable, any statute heretofore enacted to the contrary notwithstanding, does not repeal the statute of

frauds as to such a corporation, or make legal any invasion by it of vested rights, or confirm ultra vires acts, but merely permits it, on filing statement and certificate, to enforce contracts which it has made without such filing, notwithstanding the statute declaring that its contracts made before such filing should be void and invalid as to it.

4. Const. art. 15, § 13, forbidding the enactment of a law for any corporation or individual, retrospective in its operation, does not inhibit a general retrospective act enabling foreign corporations on thereafter filing statement and certificate to enforce contracts made while the law provided that contracts made by such corporations before such filing should be void and invalid as to them.

5. Civ. Code, § 1034, making enforceable contracts of any foreign corporation made before it had filed statement and certificate, if it thereafter make such filing, does not impair the obligation of contracts, but merely confers a remedy.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action by the Mutual Benefit Life Insurance Company, a corporation, against Peter Winne and another. Judgment for plaintiff, and defendants appeal. Affirmed.

The plaintiff and respondent herein, a corporation organized and existing under the laws of New Jersey, brought this action on December 4, 1894, to recover judgment upon a note made by the defendant and appellant Peter Winne for \$45,000, and to foreclose a mortgage given as security therefor. Both note and mortgage bear date October 21, 1890. On August 22, 1892, Winne conveyed the premises to the defendant the Denver & Helena Building Company, which assumed and agreed to pay the principal of the note. It is alleged in plaintiff's complaint that on August 13, 1895, plaintiff, in order to comply with the laws of the state of Montana relative to foreign corporations, filed with the secretary of state and the county clerk of Lewis and Clarke county, Mont., a duly-authenticated copy of its charter, and also a statement, verified by the oaths of the president and the secretary of the plaintiff, and attested by a majority of the board of directors, showing its name, the location of its principal office and place of business without the state of Montana and within the state of Montana, the amount of its assets, etc. It is also averred that the plaintiff, on August 13, 1895, and at the time of the filing of the statement just last referred to, filed with the secretary of state of Montana and the county clerk of Lewis and Clarke county a certificate under its corporate seal and under the signatures of its president and secretary, certifying that said plaintiff has consented to be sued in the courts of Montana upon all causes of action arising against it in said state, and that service of summons might be made upon John B. Clayberg, Esq., and that service, when made upon him, should be valid service on the plaintiff; and stating that the principal place of business of plaintiff in Montana is at the city of Helena; and that the written consent of said Clayberg to act as agent was also filed at the same time. It is

next averred that plaintiff, prior to 1890, and before doing any business or making any contracts in Montana, and in the month of March, 1890, appointed an agent in Lewis and Clarke county, in said state, upon whom service of process could be made, and filed with the state auditor a written instrument containing all the facts and items, as required by section 583, div. 5, Comp. St. Mont.; that prior to 1890, and in March, 1890, a certificate of authority was issued to plaintiff that it had complied with all the requirements of chapter 29, div. 5, Comp. St. Mont., and that annually since prior to 1890 plaintiff has filed with the auditor of the state statements as required by chapter 29, div. 5, Laws 1887. Defendants answered, denying the incorporation of plaintiff and the filing of the copy of the charter with the auditor. They also denied that plaintiff had complied with section 583, div. 5, Comp. St., in any respect, or that it had appointed an agent or attorney upon whom process could be served before doing business in the state; denied that plaintiff complied with the provisions of chapter 29 aforesaid, or that the auditor was authorized to give any certificate that plaintiff had complied with said chapter 29; denied that plaintiff has a duly-appointed attorney upon whom process could be served; denied that plaintiff ever complied with any of the provisions of chapter 24, div. 5, Comp. St., and alleged that sections 1034 and 1035 of the Civil Code are a nullity, and that house bill No. 150, which included said sections, was not a bill to amend a law, but a bill to amend a bill, and of no effect. Defendants also set up that, if said bill became a law, it took effect March 19, 1895, and that plaintiff has been doing business in Montana since 1886, and never was entitled to receive a license to transact business. The case was heard by the district court without a jury. Plaintiff moved for judgment on the pleadings. The court decided that plaintiff was entitled to such a judgment, but ordered certain proofs to be taken, showing the transaction of plaintiff with the state and territory of Montana as shown by the records in the office of the state auditor, and defendants excepted to the ruling of the court in not allowing them to offer proofs under their answer. Judgment of foreclosure and sale was ordered for plaintiff. From this judgment, and an order overruling a motion for a new trial, defendants appeal.

B. P. Carpenter, A. K. Barbour, and J. W. Kinsley, for appellants. McConnell, Clayberg & Gunn, for respondent.

HUNT, J. (after stating the facts). Much of the brief of respondent's counsel is addressed to the point that a foreign life insurance company was not required to comply with the provisions of chapter 24, Comp. St. 1887. But we shall not examine in detail the several legislative provisions pertaining to foreign corporations under which they are entitled to do business within the state of Montana, to determine whether this position

of respondent is well taken, for we shall assume for the purposes of this case that the appellant is correct in his contention that this company was amenable to the provisions of chapter 24, Comp. St. Section 444 of that chapter provides that all foreign corporations doing business at the time of the enactment of that statute within Montana should, within a certain period of time, file in the office of the secretary of state and in the office of the county recorder of the county wherein they were respectively doing business certain statements and certificates required to be filed by section 442 of the same chapter. This latter section provided that foreign corporations, before doing any business of any kind, nature, or description within Montana, should file in the office of the secretary of the territory, and in the office of the county recorder, a duly-authenticated copy of its charter or certificate of incorporation, and also a statement, to be verified by the oaths of the president and secretary of such incorporation, and attested by a majority of its board of directors, showing the name of the incorporation, and various other matters of concern to the corporation, including a certificate certifying that the said corporation consented to be sued in the courts of Montana upon all causes of action arising against it in Montana, and that service of process might be made upon some person, a citizen of Montana, whose name and place of residence should be designated, and that process, when so served upon such agent, should be taken, deemed, and held to be as valid as if served upon the company in the state and territory under the laws of which it was organized. Section 444 then proceeded as follows: "If any such corporation shall fail for more than four months from the said publication hereof so to file said statements and certificates, or any or either thereof; or if any foreign incorporation shall hereafter attempt or commence to do business in this territory without having first filed said statements and certificates required by this chapter, it shall forfeit to the people of Montana the sum of ten dollars for every day it shall so neglect to file the same, and all acts and contracts made by such incorporation, or any agent or agents thereof, during the time it shall so fail and neglect to file said statements and certificates, shall be void and invalid as to such incorporation. It shall be the duty of the district attorney of the county in which the business of such corporation shall be located to sue for and recover in the name of the people of the territory the penalty above provided, and the same, when so recovered, shall be paid into the treasury of such county for the use of the common schools therein."

It is insisted by the appellant that the plaintiff had never complied with the provisions of chapter 24 at the time that the defendant Winne made and executed the \$45,000 note, to wit, October 21, 1890; and we shall proceed on the ground that no certified copy of

the charter of plaintiff was ever filed with the secretary of state before it made the loan to the defendant Winne, and that no statement verified by the oaths of the president and the secretary of the company had been filed before said loan was made, which showed the matters and facts specified and required by said chapter 24. We are, therefore, confronted with the necessity of deciding whether or not a foreign corporation which has failed and neglected to file the statements and certificates required to be filed can recover upon a promissory note made to such a corporation during the time it so failed and neglected to file said statements and certificates. This question ought to be settled. It has for a long time been a perplexing one to the profession, and we realize that on its solution may depend very valuable rights. In an effort to reach a correct judgment we have, therefore, given it our most earnest deliberation, sensible of the fact that learned courts have not taken the same view of statutes generally similar to ours, or applied like rules of construction. Let us carefully consider the language of the statute. After prescribing that the corporation which omits to file the statements required shall forfeit to the state \$10 a day for every day it shall so neglect to file the same, it adds the further clause by way of punishment that all acts and contracts made during the time it shall so fail to file such statements and certificates shall be void and invalid as to such incorporation. The object of the statute is primarily to compel a foreign corporation desiring to avail itself of the privilege of doing business within the state, to submit itself to the jurisdiction of the courts of the state. It is not the policy of the statute to prevent foreign corporations from doing business within the state. It merely imposes certain conditions in order to enable the citizens of the state to effectually protect their rights, and prescribes penalties if the corporation ignores the law. The statute does not make the contract absolutely void or a nullity, nor does it attempt to prohibit contracts between foreign corporations and persons within the state. It says, in effect, contracts with such corporations shall be void and invalid as to the corporation unless it has first complied with the law. What does this mean? We must not be misled into giving to the words "void" and "invalid" too broad a meaning, for, as has been well observed by a learned court, deductions founded on the broadest meaning of the word "void" would lead to greater errors than are found in the most erroneous cases, while those founded on its narrower and more usual meaning seldom err. *Pearsoll v. Chapin*, 44 Pa. St. 9. Therefore, before the court can say that a mortgage made by a citizen of this state to a foreign corporation which has failed to file its certificate and statements required to be filed before it can undertake to do any business within the state is void in the sense that it is an absolute nullity, it should be assured of the correct mean-

ing of the word; it should observe the use of the word in the context of the statute. A void contract is the same as none, although a voidable one may be so treated. *Gist v. Smith*, 78 Ky. 367. The two words "void" and "voidable," as often used in statutes, have been pronounced by Bishop (section 610 of his work on Contracts) to be variable, and most inexact. But a correct discrimination will lead us to a right conclusion. It cannot be held that the contract of Winne with the plaintiff corporation is without any legal effect, for it has some effect, but it is liable to be made void by him or a third person. For illustration: Winne could enforce an agreement for a loan with a foreign corporation that had not complied with the law, if service could be had upon it, if it had agreed to make one to him, and thus give full effect to such a contract which already had some effect even under the statute; or, if a loan had been made to him, Winne could give full effect to such a contract by paying the corporation, or not asking to have the contract held void. In both of these illustrations, however, there would be some legal effect to the contracts when entered into. They would, therefore, not be void contracts within the true definition of the word, even though in either supposed case Winne could make either contract void if he chose to do so. And so in this foreclosure proceeding, when Winne made the note and mortgage sued upon, and delivered them to the foreign corporation's agent, a contract was made with the corporation which was enforceable in the courts of this state, except for the statutory provisions by which Winne could ask to have it declared void and invalid; that is to say, the note was voidable, but might become void when the mortgagor chose to avoid it. Bishop, in his work on Contracts (section 611), says that in exact language "void" has but the one meaning, and that "a contract is 'void' when it is without any legal effect, 'voidable' when it has some effect, but is liable to be made void by one of the parties or a third person." Some of the cases refer to contracts as void which may be avoided by those interested, yet define the word as applying to contracts not absolutely, but relatively, void. *Kearney v. Vaughan*, 50 Mo. 284, was such a case. There the court said it was perhaps unfortunate that it was not supplied "with a term of more precision than the word 'void,' a word more often used to point out what may be avoided by those interested in doing so than to indicate an absolute nullity,—a proceeding or act to be disregarded on all occasions." And in *Pearson v. Chapin*, supra, which is a leading case, Chief Justice Lowrie took the same general ground that Bishop has taken, and wrote as follows: "The terms 'void' and 'voidable,' as used in our books, would therefore seem to stand for absolutely and relatively void. That is absolutely void which the law or nature of things forbids to be enforced at all, and that is relatively void which the law condemns as a wrong to individuals, and refuses to en-

force as against them. It is void because absolutely or relatively invalid, or not binding. The French juriconsults adopt this distinction of absolute and relative nullity." The discrimination between a deed which is an absolute nullity and one which is voidable only is very clearly made by Chief Justice Spencer in *Anderson v. Roberts*, 18 Johns. 516. In discussing the attitude of a fraudulent grantee under a statute declaring a deed to be utterly void, he said: "No deed can be pronounced, in a legal sense, utterly void which is valid as to some persons, but may be avoided at the election of others. A thing is void which is done against law at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done. Bacon classes under the head of acts which are absolutely void to all purposes the bond of a femme covert, an infant, and a person non compos mentis, after an office found and bonds given for the performance of illegal acts. He considers a fraudulent gift void as to some persons only, and says it is good as to the donor, and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees: (1) Void as if never done, to all purposes, so as all persons may take advantage thereof; (2) void to some purposes only; (3) so void by operation of law that he that will have the benefit of it, may make it good." This same rule and distinction between void and voidable acts was laid down in *Fletcher v. Stone*, 3 Pick. 250. The court there, in order to more accurately arrive at a meaning, drew a distinction between acts which are mala in se and those which are only mala prohibita, declaring the former absolutely void, and that no right or claim can be derived from such acts; but that acts which are only mala prohibita are either void or voidable according to the nature and effects of the act prohibited. Among other things, the court said: "If it concerns the public good, it is generally to be considered void; but if it is prohibited for the purpose of securing the private rights of the parties interested, it is only voidable. Where the public interest is not concerned, it is sufficient to allow the party who may be prejudiced by an unlawful sale or contract to avoid it. It is on this ground that a mortgage or assurance given on a usurious consideration has been held only voidable, notwithstanding the strong words of the statute." The supreme court of the United States, in *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, had occasion to consider a point analogous to this under investigation. It arose in an action

brought on a promissory note, the defense being usury. The Texas statute in force when the note was executed made all contracts in writing stipulating for a greater rate of interest than 12 per cent. "void and of no effect" for the rate of interest, etc. The argument advanced was that the contract was void as to the entire interest. But it was held that the words "void and of no effect" were used in the sense of "voidable" merely,—that is, capable of being avoided,—and that they did not mean that the transaction was an absolute nullity, as though it never had existed; not capable of giving rise to any rights or obligations under any circumstances. "All that can be meant by the term," Justice Matthews said, "according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom, Leg. Max." That great court also recognized the distinction between mala in se and mala prohibita, saying: "A distinction is made between acts which are mala in se, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are mala prohibita, which are void or voidable, according to the nature and effect of the act prohibited. Fletcher v. Stone, 3 Pick. 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration was only voidable, notwithstanding the strong words of the statute. Green v. Kemp, 13 Mass. 515. And in such cases the advance of the money, although the contract is illegal for usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed." The statute was looked upon as, in effect, enabling the party sued to resist a recovery against him of the interest which he had agreed to pay; the court saying that the statute was penal in its nature, "inflicting upon the lender a loss and forfeiture to that extent."

These decisions rest upon firm ground. They decide that if there is anything immoral in the contract itself, or even in some instances where it is expressly prohibited by statute, that there can be no legal remedy; but they do not decide that contracts founded on meritorious considerations, although made by a foreign corporation in contravention of the statutes, are nullities. And it appears to us from the tenor of the statute of Montana that the legislature meant, not to declare such a contract as we have before us absolutely void, but to concede the validity of such a contract unless the party who has the right to treat it as void renders it practically a nullity by invoking the provisions of the statute to prohibit its enforcement. This opinion is strengthened by observation of the forfeiture clause of \$10 a day for every day that the corporation neglects to file the necessary certificates. We do not

believe that it was intended to not only impose that severe penalty, but likewise to sanction defenses which permit its just debtors to take the money of a foreign corporation, and treat the contract of loan as if never made at all. The words of forfeiture to the state seem to negative the idea that the contract is to be so treated. And what we have said of the word "void" in the statute applies as well to the word "invalid." They are used interchangeably, and, though used together, no force is added to "void" by the use of "invalid." The conclusion we therefore reach is that the defendant in this case could plead the statute, and defeat the action upon his note and mortgage so long, at least, as plaintiff delayed complying with the statutes cited applicable to foreign corporations, unless a valid curative statute has been passed, or unless the plaintiff could successfully invoke the doctrine of estoppel against defendant, upon the principle that defendant, having borrowed the money of it as a foreign corporation, and having recognized its legal existence and status within the state to a degree to benefit himself, ought not to be heard to say that the corporation had not done those acts which it should have done before it could undertake the very act which it did do at his request, and for his great advantage. This point we shall not discuss, but it has not been overlooked in our consideration of this case, and we expressly reserve an opinion upon it.

Passing, then, the question of estoppel, we proceed to examine the acts of the legislature passed subsequent to chapter 24, heretofore referred to, to ascertain whether, under any such statutes, plaintiff has a remedy, and can recover. The Civil Code of 1895 was approved February 19th of that year. As printed, sections 1034, 1035, thereof provide as follows:

Section 1034: "Any foreign corporation that has heretofore engaged in business, performed acts or made contracts in this state, may, within ninety days from the date this act goes into effect comply with the provisions hereof, and thereupon all its acts and contracts done and made before this act goes into effect shall be valid and enforceable, any statute of this state heretofore enacted to the contrary notwithstanding."

Section 1035: "Foreign life insurance companies, not on the assessment plan, are hereby declared to be embraced within the provisions of this act."

It appears that the bill containing said sections 1034 and 1035 was introduced February 1, 1895, and a substitute for the original bill was introduced February 7, 1895. They were enacted as sections 1 and 2 of "An act to amend title XI of part IV, of the first division of the Civil Code of Montana, entitled 'Foreign Corporations.'" On March 5, 1895, the bill passed, and was approved by the governor on March 19, 1895, or one month after the date of the approval of the Civil Code. The contention of the appellant is that the bill containing said sections 1034

and 1035 was, under the facts stated, not a bill to amend a law, but simply a bill to amend a bill, and that it follows that, the bill being a bill to amend something not in existence, it was, therefore, nugatory and void. But we cannot agree with the learned counsel for the appellant upon this point. Section 19, art. 5, of the constitution provides that "no law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose." It is a matter of common knowledge that bills pending in a legislature are amended frequently in the course of their process of enactment, and we cannot believe that a statute amending a bill which subsequently has become a law is a violation of any constitutional provision. We are cited to section 12, art. 7, of the constitution, which provides that every bill passed shall, before it becomes a law, be presented to the governor. But there is nothing in this language which prevents the separate amending of a bill which subsequently becomes a law. Several of the authorities cited by the appellant are to the effect that an amendment to an act which has been repealed is nugatory; but that is a very different proposition from the one immediately before us, while no case cited conflicts with our opinion. Holding, therefore, that sections 1034 and 1035 are in force as amendments to the Civil Code, by section 5182, Pol. Code, they went into force and effect July 1, 1895.

It is next urged that, even if said sections are in force, they violate section 11, art. 15, of the constitution of the state, and are void. Section 11, art. 15, of the constitution, is as follows: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served. And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state, any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." Appellant, in urging that the statutes referred to allow a foreign corporation greater rights or privileges than those possessed by a like domestic corporation, assumed that it might be held that chapter 29, Comp. St., and sections 680-683, Civ. Code, applied to life insurance corporations. But as we have accepted the contention of appellant that chapter 24 is applicable to respondent, and not chapter 29, it is needless to dwell on this point. Besides, if chapter 29 embraces foreign life insurance companies, and they are not embraced within chapter 24, the contract is valid without relation to section 1034 at all, for the provisions of chapter 29 do not declare it invalid, but simply impose a penalty.

We are next brought to another important point made by appellant. He assails the constitutionality of said sections 1034 and 1035 on the ground that they violate section 13, art. 15, of the constitution, which is as follows: "The legislative assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." The argument is that, if section 1034 is valid, any unlawful act or contract of the plaintiff performed or entered into before August 13, 1895, is made lawful and valid; that the statute of frauds, as applied to plaintiff, is repealed, and that any crimes or invasion of vested rights are made legal, and ultra vires acts are confirmed. Again we are constrained to disagree with the argument of the appellant. Section 1034 validates and renders enforceable acts and contracts of foreign corporations done and made before the amendatory act went into effect, notwithstanding any statute theretofore enacted to the contrary. Section 1034 is properly found in title 11 of the Civil Code, which pertains to foreign corporations, requiring them to file copies of their charter and reports and other matters pertaining to the conditions imposed by the legislature upon such foreign corporations before they have the right to transact business within this state. It was the purpose of the statute just cited to effectuate and make valid and enforceable acts and contracts made by such foreign corporations where perchance they had done business without filing the statement and certificate required by previous statutes cited. To this purpose it will be limited, because its relation is solely to the act of which it is amendatory.

The point particularly pressed is that the statutes involved are retrospective in their operation, and for the benefit of corporations. But, in our opinion, section 1034 is not a retrospective law in the sense in which the term is used in the constitutional clause quoted. It is not an inhibition against general retrospective legislation enabling corporations which have made contracts without first observing certain legal formalities to enforce such contracts. It does not prevent the enactment of valid curative statutes. Under its terms no special retrospective laws can be passed for the benefit of a corporation, nor can any law be enacted making a contract or obligation where none had existed; but, if a contract has been entered into between a citizen of the state and a foreign corporation, and the citizen has been possessed of a legal right to avoid it because of a defect of proceeding on the part of the corporation, which right, in violation of good conscience, the citizen unjustly insists upon, it never was the design of the constitution to protect such a right by taking away from the legislature the power to pass a healing act which deprives the citizen of that right.

Whatever the policy of the state may be in relation to the enforcement of such contracts by the corporation, the constitution never prohibited laws which, according to Thompson on Corporations (section 7963), are calculated to prevent persons from repudiating the honest engagements into which they have entered," provided, of course, vested rights are not divested, or the obligations of contracts are not impaired. The legislature doubtless realized at the time of the passage of section 1034 that there had been many contracts entered into between citizens of the state and foreign corporations, where such corporations had omitted to take the necessary steps to authorize them to do business within the state. For the purpose, therefore, of validating such contracts, and of enabling them to be enforced, the statutes referred to were enacted. We scarcely think it necessary to reaffirm the familiar doctrine that, unless a vested right is interfered with, or unless the obligation of a contract is impaired, a legislature may pass a law retrospective in its operation, unless the constitution of the state inhibits such legislation. But we have already seen there is nothing in the constitution of Montana against such legislation as that under examination, and the simple inquiry is, therefore, do these statutes take away vested rights or impair contracts? Cooley, *Const. Lim.* p. 454, says: "But there are many cases in which, by existing laws, defenses based upon mere formalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defense if it possesses the power to do so. In regard to these cases, we think investigation of the authorities will show that a party has no vested right in a defense based upon an informality not affecting his substantial equities." And again, on page 457, he continues: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity of which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." In *Mortgage Co. v. Gross*, 93 Ill. 483, the effect of a curative statute, somewhat similar to section 1034, was discussed. The court decided that Lombard, who had borrowed the money, and who had attempted to make a valid contract of mortgage to secure its payment, was, if not legally, at least in justice and good conscience, bound, and that it was clear that the mortgage could be validated by a subsequent statute, so far as it pertained to him. In that case, too, the rights of third persons intervened, which it was claimed could not be affected by such legislation. We mention this phase of that case as bearing upon

the relation of the Denver & Helena Building Company to the respondent in this suit. The Illinois court followed the distinction laid down by Judge Cooley on pages 378 and 379 in his work on Constitutional Limitations, and restricted the operation of the rule to the parties to the original contract, and to such other persons as may have succeeded to their rights, with no greater equities. Here the Denver & Helena Building Company expressly assumed and agreed to pay the principal of the note to the plaintiff corporation, and bought with full knowledge of the mortgage. Under such circumstances the court must recognize the rights of the plaintiff corporation as best, and as entitled to the first protection which the law usually accords in such cases. This Illinois decision last referred to was affirmed by the supreme court of the United States, reported in 108 U. S. 477, 2 Sup. Ct. 940. Justice Harlan, in speaking of the statute of Illinois which forbade a foreign corporation from taking a mortgage upon real property in that state to secure a loan of money, decided that when the legislature removed such inhibition, as well by statute as by the public policy of the state, upon the execution of a contract of mortgage, it could not be said that such legislation, although retrospective in its operation, impaired the obligation of a contract. Continuing, he said: "It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in *Satterlee v. Matthewson*, 2 Pet. 380, and in substance in *Watson v. Mercer*, 8 Pet. 83, that "It is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract." The supreme court was again called upon to pass upon rights taken away by curative statutes in *Ewell v. Daggs*, heretofore cited, and treated a constitutional repeal of a usury law upon a contract previously made in the following language: "Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in force, and not realized by having passed into a complete transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere to the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him,

by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court."

To enumerate more cases where the principle that a retroactive law conferring a legal remedy divests no rights, where a right to recover on the contract sued on would have been possessed if there had been no legislative interdiction, would be useless. The reasoning of Judge Cooley has been so often applied that to quote the language of many more decisions would be but needless prolixity. The doctrine is well laid down in *Hess v. Werts*, 4 Serg. & R. 356; *Wade*, *Retro. Laws*, § 250; *Suth. St. Const.* § 483. This curative statute impaired no contract. It only set aside an impediment to a contract honestly made by defendant with the plaintiff. In thus removing the impediment it was to that extent retroactive. As said, if the act destroys a right previously attached, it is contrary to constitutional limitations; but we should not lose sight of the difference between a law which does divest a right, yet removes a disability. The statute under consideration well exemplifies this distinction. It works no wrong or injustice against Winne. His rights are not interfered with. The mortgage contract is not violated or disturbed to any extent whatsoever. The statute merely takes from the mortgage contract the taint which the policy of the law imposed, and gives to the plaintiff a right to recover on the contract,—a right which it would have possessed if there had been no legislative interposition. *Bleakney v. Bank*, 17 Serg. & R. 64. Indeed, upon the authority of our own decision in *State v. Dickerman*, 16 Mont. 278, 40 Pac. 698, section 1034 is not a violation of the constitution of the state, and, as appropriate to the question before us, we quote the following language of Chief Justice Pemberton: "We have already held that a liability existed on the part of the district to refund the money advanced by relator. This liability existed prior to the passage of the law under discussion. The law imposed no new liability or burden upon the district. The law was intended to give a remedy, if remedy were wanting for its enactment. We think the legislature had the power to enact the law, and that the law does not conflict with the constitution of the state." It appearing that respondent fled the papers and complied substantially with the law within 90 days after the Codes went into effect, its acts and contract had and made with appellant Winne before the Codes took effect are valid and enforceable, notwithstanding any statute which provided that a foreign corporation should file a statement and certificate before doing business, or the contract as to them should be void and invalid.

Several minor errors are assigned, but we find none of them are well taken. The judgment is affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

(24 Nev. 38)

LUTZ v. KINNEY. Sheriff. (No. 1,492.)

(Supreme Court of Nevada. July 21, 1897.)

CHATTEL MORTGAGES—POSSESSION BY MORTGAGOR—UNRESTRICTED DISPOSITION—VALIDITY.

1. St. 1869, p. 55, providing that no chattel mortgage, except of a growing crop, should be valid without a change of possession, was so amended by St. 1885, p. 53, that where the mortgage is recorded a change of possession is not necessary, provided the parties annex their affidavits, describing the debt, and stating that the mortgage is bona fide, and not made to hinder creditors. A mortgage expressly stipulating that the mortgagor should remain in "possession of the said goods and chattels, and in the full and free use and enjoyment of the same," was made by a retail merchant in failing circumstances. The mortgage was duly recorded, and had the statutory affidavits annexed. *Held*, that the mortgage was valid.

2. It could not be validated by showing an oral agreement requiring the mortgagor to apply to the debt the proceeds of sales "as he went along," as against creditors without notice of the agreement.

Appeal from district court, Ormsby county; O. E. Mack, Judge.

Action by Martin Lutz against William Kinney, sheriff of Ormsby county, to recover for mortgaged goods sold under execution. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Trenmor Coffin and Alex J. McGowan, for appellant. Alfred Chartz, for respondent.

MASSEY, J. On the 18th day of March, 1896, Archer Baker, who was at the time a retail grocer in failing circumstances, executed a mortgage on his stock of merchandise to the respondent to secure the payment of a loan of \$700, a part of which sum was used in the discharge of an existing mortgage upon the same goods. The debt secured by the respondent's mortgage was evidenced by a promissory note of the same date, payable on or before the 18th day of March, 1897. The mortgage expressly stipulated that until default in payment of the said sum the mortgagor, his executors, administrators, and assigns, should "remain and continue in the quiet and peaceable possession of the said goods and chattels, and in the full and free use and enjoyment of the same." The mortgage was duly recorded, and the statutory affidavit was annexed thereto. At the time of the execution of the note and mortgage an action was pending in favor of A. J. McGowan against said Baker, and on the 3d day of April, 1896, judgment was rendered therein against said Baker for the sum of \$405.24, with interest and costs. On the 6th day of April, 1896, writ of execution was issued therein, and delivered to the appellant, sheriff of Ormsby county, who levied upon the goods covered by respondent's mortgage, and sold the same to satisfy said writ. It appears that the said McGowan and sheriff had actual notice of respondent's mortgage before

levy and sale as aforesaid, and that the goods were sold without regard to said mortgage, and without payment thereof. It further appears that the mortgagor and mortgagee had a parol agreement, entered into at the time of the execution of the mortgage, whereby the mortgagor was to sell the goods in the course of business, and pay off the mortgage as he "went along," but it does not appear that the appellant had notice of this agreement. After the execution of the mortgage, and until the sheriff took possession of the property, Baker continued in possession thereof, and sold thereof about \$300 in value, no part of which sum was paid by said Baker to the respondent, but all of said sum was appropriated by him for his own use. The respondent testified that during this period he was sick. The value of the goods at the date of the mortgage was \$1,800, and at the date of the levy of the writ, on the 6th day of April, 1896, \$1,200. The judgment of the district court was in favor of the respondent, and from that judgment, and an order refusing a new trial, this appeal has been taken.

The important question herein presented for decision is the validity of the mortgage. Appellant contends that it is fraudulent and void as to the creditors of the mortgagor; that it is rendered so by the stipulation therein permitting the mortgagor to retain possession of the mortgaged property, authorizing him to sell the same, and appropriate the proceeds to his own use and benefit, and from the further fact that he did make such appropriation. This question is for the first time presented to the court since the amendment to the law relating to chattel mortgages was passed in 1885. Prior to the 2d day of March, 1885, no mortgage of personal property, except a growing crop, was valid against any other persons than the parties thereto, unless the possession of the mortgaged property was delivered to and retained by the mortgagee. St. Nev. 1869, p. 55. This court, in the case of *Wilson v. Hill*, 17 Nev. 407, 30 Pac. 1076, say that under the above-cited act, a failure to deliver and retain possession of the mortgaged property is conclusive evidence of fraud in law; that in such a case the courts will not stop to inquire whether there is actual fraud or not; that the law imputes fraud under such conditions, and the statute does not permit this conclusive proof to be overcome by evidence of an honest purpose. By an act of the legislature the above statute was so amended that a mortgage upon all kinds of personal property was made valid against all persons without the possession of the mortgaged property being delivered to and retained by the mortgagee by attaching the certain affidavit of the parties thereto, and duly recording the same. St. Nev. 1885, p. 53. The statute was again amended, but the amendments in no manner affect the above provisions. St. Nev. 1887, p. 66. The amended acts of 1885 and 1887, above cited, changed

the rule announced in *Wilson v. Hill*, supra, and since then the fact that the mortgagor retains and continues in possession of the property, and is so permitted by the express stipulation of the mortgage, does not render the mortgage void per se, where the conditions of the statute have been complied with. Counsel for respondent contends that the amendments above cited have so changed that rule that under section 72 of the same act the question of fraud is one of fact, and not of law; in other words, that the courts have no right to declare a mortgage void per se when the same has annexed thereto the affidavit required, and has been duly recorded. A large number of cases have been cited for and against this contention by respective counsel, but in no one of the cases cited has been found a mortgage with like stipulation as is contained in the mortgage herein. A number of decisions by the supreme court of Indiana under statutes similar to ours are relied on by the respondent to support his contention, but it will be noticed that in all the cases cited it appeared that the mortgage contained either an express stipulation that the mortgagor should retain the possession of the property, sell the same, and apply the proceeds *ar. s. n.*; from such sale to the discharge of the mortgage debt, or, in the absence of such stipulation in the mortgage, such agreement was shown *aliunde*. *Fletcher v. Martin*, 126 Ind. 57, 25 N. E. 886, and cases therein cited; *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 303; *Bank v. Brown*, 112 Ind. 474, 14 N. E. 358. That court, in the case of *New v. Sailors*, 114 Ind. 412, 16 N. E. 611, discussing the same question for which respondent contends, say that: "The question of fraudulent intent is a question of fact, and not of law. Therefore, until the contrary appears, it will be presumed that a mortgagor who is permitted to retain possession of and sell the mortgaged chattels does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not. * * * If, however, it affirmatively appears that there was no agreement to account, and the mortgagor is permitted, either by an express or implied agreement with the mortgagee, to continue in possession, with the right to sell the property, and appropriate the proceeds to his own use, the transaction will be regarded as a fraud upon creditors, and void." *Southard v. Benner*, 72 N. Y. 424. Notwithstanding the decisions of the supreme court of Indiana in many respects support this contention of respondent, yet that court concedes that cases may arise wherein a mortgage should be declared void on its face, without regard to extrinsic facts. *Lockwood v. Harding*, 79 Ind. 133. The decision of that court in the case of *Davenport v. Foulke*, 68 Ind. 382, furnishes the example of the rule laid down in *Lockwood v. Harding*, supra, and is a case analogous to the case at bar. The

court there holds that where it is provided in a chattel mortgage that the mortgagor shall retain possession of the mortgaged property, and use and enjoy the same until default be made in the payment of the mortgage debt, where it is apparent from the nature of the property that the only reasonable use the mortgagor can make of it will be to expose it for sale and sell it, thus impliedly authorizing him to apply the proceeds to his own use, such mortgage is void. *Davenport v. Foulke*, 68 Ind. 382; *Mobley v. Letts*, 61 Ind. 11; *Voorhis v. Langsdorf*, 31 Mo. 451; *Paxton v. Smith* (Neb.) 59 N. W. 690; *Roberts v. Johnson* (Colo. App.) 39 Pac. 596; *Herm. Chat. Mortg.* § 101; *Jones, Chat. Mortg.* § 420.

Applying the rule laid down in *Davenport v. Foulke*, supra, to the case at bar, we must hold the mortgage made by Baker to the respondent void. It expressly stipulated that Baker, his executors, administrators, and assigns, should remain and continue in the quiet and peaceable possession of the property, and in the free and full use and enjoyment of the same, until default. This language is broad, clear, and explicit. Considered with the nature and character of the goods mortgaged, it confers upon the mortgagor the right to sell the property and appropriate the proceeds to his own use and benefit. It was authority to sell the mortgaged goods divested of all the rights of both the mortgagor and mortgagee, without being required to satisfy the mortgage debt from the proceeds thereof, the exercise of which authority was a fraud upon creditors, and of no benefit to the mortgagor. Baker remained openly in possession, and continued to sell the property after the execution and recordation of the mortgage, and in less than one month had disposed of one-sixth in value thereof, and had appropriated the proceeds to his own use. True it is that both Baker and the respondent testified, over the objection of appellant, that they had a parol agreement, whereby Baker was to sell the property, in the course of business, and pay off the debt as "he went along." This agreement, at best, is very uncertain in terms, and conflicts with the express agreement of the mortgage. It is not made to appear that the appellant ever had notice of this parol agreement, before levy and sale under the writ. It does appear that he had actual notice of the mortgage and its contents. In the language of Mr. Justice Davis in *Robinson v. Elliott*, 22 Wall. 523: "The creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity." This mortgage was a cover and shield to the property of one in failing circumstances, protecting it from creditors, and, under its terms, was no indemnity to the mortgagee.

Baker was given a year in which to sell the property, and apply the proceeds to his own use, while the creditors and respondent were compelled to stand helplessly by. For these reasons the judgment of the lower court must be reversed. We do not deem it necessary to pass upon the other questions presented by the record.

BELKNAP, C. J., and BONNIFIELD, J., concur.

ROLLINS v. WOODMAN et al. (S. F. 467.)
(Supreme Court of California. July 3, 1897.)

TAX DEED—SUFFICIENCY—RECITALS.

1. A tax deed reciting that in the publication of the delinquent list was given "such a condensed description of the property that it might easily be known" is not obnoxious to the objection that the list thus published "did not contain a copy of the assessment against this property, and contained only a condensed description of such property, and not the description contained in the original assessment," as the same condensed description may have been contained in the original assessment, and transcribed thence into the delinquent list, and published as first entered, or such condensation may have consisted only in the use of common abbreviations.

2. The fact that the date recited in the tax deed as the time, specified in the certificate, when the purchaser would be entitled to a deed, came on a Sunday, did not affect the validity of such deed, as such date merely indicated the time when the purchaser's right to a deed would become fixed.

3. Where it is stated in a tax deed that the least quantity of the land described was offered at the sale; that plaintiff was the person who was willing to take the least quantity thereof, and pay the taxes and costs; and that such least quantity was the whole of the land,—it cannot be claimed that such deed recites that the collector offered the whole of the property for sale before offering any smaller part.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by William Rollins against James F. Woodman and others. From a judgment for defendants, plaintiff appeals. Reversed.

Wm. & Geo. Levinson, for appellant. Freeman & Bates, for respondents.

BRITT, C. Action to quiet title to a parcel of land in the city and county of San Francisco. At the trial the only evidence offered by plaintiff was a deed following upon a sale of the premises in dispute made by the tax collector of said city and county, on April 4, 1884, for the taxes of the fiscal year then current, at which sale plaintiff was the purchaser. The court sustained certain objections to the competency of this deed, and rendered judgment for defendants.

The statute in force in 1884 provided that in the delinquent tax list must be set down "all matters and things contained in the assessment book, and relating to delinquent persons or property," and that the tax collector "must publish the delinquent list,

which must contain the names of the persons and a description of the property delinquent," and publish with such list a notice that the real property on which delinquent taxes are a lien will be sold at public auction. Pol. Code, §§ 3760, 3764, 3765. Plaintiff's deed recited that in the publication so required was given in this instance "such a condensed description of the property that it might easily be known." Upon such recital it was objected and is now argued that the delinquent list thus published "did not contain a copy of the assessment against this property, and contained only a condensed description of such property, and not the description contained in the original assessment." The language of the instrument is not fairly susceptible of this construction. It may well have been that the same condensed description was contained in the original assessment, and transcribed thence into the delinquent list, and published by the collector literally as first entered; or the condensation in the delinquent list, if it first occurred there, may have consisted only in the use of common abbreviations, which we think is permissible if thereby the property "may easily be known." See *Stout v. Mastin*, 139 U. S. 154, 11 Sup. Ct. 519.

By section 3776, Pol. Code, the certificate issued by the collector to the purchaser at a tax sale is required to specify the time when the purchaser will be entitled to a deed. This time, as the law stood in 1884, was upon the expiration of 12 months from the date of sale, if no redemption was made meanwhile (Pol. Code, §§ 3780, 3785); and the deed here recited that the date specified in the certificate issued to plaintiff was April 5, 1885, which was a Sunday, and it is argued that this was a fatal defect, because, it is said, the issuance of a deed could not be compelled on that day. But, obviously, the statute (Pol. Code, § 3776) has reference to the time when the right of the purchaser to a deed shall become fixed, not to the means of obtaining the instrument from the proper officer. If a cause of action accrues to a person on a holiday, we suppose he may be said to be entitled to it as a right of property, although no court may then be open to his suit for its enforcement.

It is further claimed that the deed recites that the collector offered the whole of the property for sale before offering any smaller part, and so offended the provision of section 3773, Pol. Code, requiring the sale of the least quantity which any person will take, and pay the taxes. It is stated in the deed that the least quantity of the land described was offered at the sale; that the plaintiff was the person who was willing to take the least quantity thereof, and pay the taxes and costs; and that such least quantity was the whole of the land. This satisfied the statute. *Doland v. Mooney*, 79 Cal. 137, 21 Pac. 430; *Hewes v. McLellan*, 80 Cal. 303, 22 Pac. 287.

It was error to sustain the objections made to the deed, and the judgment should be reversed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

(117 Cal. 505)

In re SMITH'S ESTATE. (S. F. 622.)¹
(Supreme Court of California. July 8, 1897.)

APPEALABLE ORDER—PARTY AGGRIEVED.

1. An order reciting that an administrator has sufficient funds in his hands for the payment of a certain claim, which had been previously adjudged a preferred claim, and directing the payment thereof "forthwith," is appealable, under Code Civ. Proc. § 963, subd. 3, though no appeal had been taken from such prior order.

2. Under Code Civ. Proc. §§ 1646, 1647, a valid order for the payment, by an administrator, of the claim of a particular creditor, though previously adjudged a preferred claim, can be made only on the settlement of the account of such administrator, after notice given as prescribed by section 1633; and therefore such administrator has the right, as the "party aggrieved," to appeal from such order when prematurely made.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Claim of Walter S. Thorne against the estate of William F. Smith, deceased. From an order directing the payment thereof "forthwith," Jeremiah Lynch, the administrator of said estate, appeals. Reversed.

Henry N. Clement and Lloyd & Wood, for appellant. Andrew Thorne, for respondent.

McFARLAND, J. This is an appeal by Jeremiah Lynch, as general administrator with the will annexed of the estate of William F. Smith, deceased, from an order of the superior court made April 24, 1896, directing him to pay a certain claim of Walter S. Thorne for \$1,414.60, which he alleges to be a preferred claim, under subdivision 4 of section 1643 of the Code of Civil Procedure, because a judgment rendered against the decedent in his lifetime. It appears from the transcript that there had been previously a proceeding instituted for the purpose of determining whether Thorne's claim was a preferred claim, and, if so, whether a certain claim of Mrs. Endora V. Smith was also a preferred claim upon a similar judgment; and that on December 24, 1895, an order had been made adjudicating that Thorne's claim was a preferred claim, and that Mrs. Smith's was not, and that Thorne's claim be paid in due course of administration. From that order there has been no appeal. The order of April 24, 1896, which is appealed from, recites that the administrator has in his hands \$1,954.42, and directs that the claim of Thorne be paid by the administrator "forthwith." The estate is insolvent.

¹ Rehearing denied.

Respondent Thorne moves to dismiss the appeal upon two grounds: First, that the second order of April 24th is not appealable, and that the appeal should have been from the first order of December 24, 1895; and, second, that the administrator is not a party aggrieved, and therefore has no right of appeal from the order.

1. The order, being for the payment of a debt or claim, is expressly made appealable by subdivision 3 of section 963 of the Code of Civil Procedure. Whether or not the order of December 24, 1895, could or should have been appealed from, is a question not before us.

2. If, upon the settlement of the account of the administrator, when all the creditors had been brought before the court by statutory notice, there had been a marshaling of the assets, and the court had made an order or decree specifying the amount to be paid each creditor, it might be argued then with great force that the administrator had no right of appeal if the only question was between two creditors, as to whether both had preferred claims. In such a case the defeated creditor, or any creditor feeling aggrieved, would be the party interested, and, being before the court, would be in a position to himself assert his rights. But that state of facts does not appear here. In this case there had been no settlement of the accounts of the appellant administrator, and the time for the order or decree above referred to had not arrived. There had simply been a settlement of a former administratrix with the present administrator. One of the points made by the appellant in the bill of exceptions is "that the said order was prematurely made, * * * the amount of the distributable estate not yet having been ascertained." Section 1646 of the Code of Civil Procedure provides: "The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and expenses of the last sickness and the allowance made to the family. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or legacy until, as prescribed in this article, the payment has been ordered by the court." Section 1647 provides: "Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator the court must specify in the decree the sum to be paid to each creditor." And section 1633 provides: "When any account is rendered for settlement, the court, or a judge thereof, must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court or a judge thereof may order such further notice to be given as may be proper."

It is apparent, therefore, that, at least in the case of an insolvent estate, a valid order for the payment of the claim of a particular creditor, whether or not his claim be a preferred claim, cannot be made except upon the settlement of an account of the administrator after notice given as prescribed by the Code; otherwise, the other creditors would not be bound by the order, and, if the administrator should obey it, he would do so at his peril. The appellant, therefore, was directly interested in the order appealed from, and has the right to appeal from it, within the principle stated in the opinion of Henshaw, J., in *Re Welch's Estate*, 106 Cal. 428, 39 Pac. 805. The motion to dismiss the appeal is denied.

The action of the court in directing the payment of the claim of Thorne was, for the reasons above given, premature and invalid. The order of April 24, 1896, appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

(117 Cal. 431)

COLUSA COUNTY v. GLENN COUNTY.
(Sac. 240.)

(Supreme Court of California. July 1, 1897.)

ACTION BETWEEN COUNTIES — MONEY HAD AND RECEIVED.

1. Under the County Government Act, § 4 (Pol. Code, § 4003), declaring that counties have power "to sue and be sued," a county may maintain an action against another county which is indebted to it, whether on an express or on an implied contract, as for money had and received.

2. When defendant county was formed out of a portion of the plaintiff county there remained on the assessment roll of the plaintiff county certain unpaid taxes which had been assessed by the state board of equalization on a certain railway then in the plaintiff county, which taxes were paid into the state treasury after such organization of the defendant county, and a portion thereof was thereafter paid to the defendant county. The act creating the defendant county made no provision for an apportionment of the public property, or of the debts or credits of the plaintiff county, between it and the new county. *Held*, that the defendant county, having received the money in question without any right, is liable, in an action for money had and received, on its implied promise to pay the same to the plaintiff county, which was entitled thereto.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by Colusa county against Glenn county. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Ernest Weynant and Johnson & Johnson, for appellant. George D. Dudley, K. E. Kelly, and John T. Harrington, for respondent.

HAYNES, C. The county of Colusa brought this action against the county of Glenn to recover the sum of \$1,622.72. The defendant demurred to the complaint, the demurrer was sustained, and the plaintiff having declined to amend judgment thereon was rendered against the plaintiff, and this appeal is from said judgment.

The complaint alleges: That the county of Glenn was formed out of a portion of the territory of Colusa county under an act of the legislature approved March 11, 1891. That in the years 1885, 1886, and 1887 the state board of equalization assessed the Northern Railway Company upon 62.81 miles of its railway then in the county of Colusa. That the auditor of Colusa county entered the assessment made by the board of equalization upon the assessment roll of said county in each of said years. That the amount of the taxes so assessed and due to the plaintiff for each of said years was as follows: For 1885 \$4,050, for 1886 \$3,969.60, and for 1887 \$3,728.40; and that the whole of said sums were due, owing, and unpaid from said railway company to the plaintiff at the time the defendant county was organized. That in the year 1894 said railway company paid into the state treasury, on account of the sums so due the plaintiff, the sum of \$3,526.74, and thereafter, in the month of December, 1894, \$1,622.72 of said sum was paid to the county of Glenn, but that said money so paid to the defendant was and now is the property of the plaintiff. That at the time of said payment the defendant had notice and knowledge of all said facts, but has neglected and refused to pay the plaintiff said sum of \$1,622.72, or any part of it. The complaint also alleges the due presentation of the claim to the board of supervisors of the defendant county, and the rejection of said claim. A second count or cause of action for money had and received is also pleaded. The demurrer was general and special. The demurrer appears to have been sustained upon the ground that an action for money had and received will not lie against a county.

Section 4 of the county government act declares that counties have power "to sue and be sued." This is a general authority, and any restriction upon that power must be determined from the nature or character of the action brought, and by the further requirement that all claims against a county must be first presented to the board of supervisors for allowance, and that no action can be maintained without such presentation. In *Price v. Sacramento Co.*, 6 Cal. 235, it was said: "The right to sue is not limited to torts, malfeasance, etc., but is given in every case of account." In *County of Los Angeles v. City of Los Angeles*, 65 Cal. 476, 4 Pac. 453, it was held that the county of Los Angeles may maintain an action against the city of Los Angeles to recover the amount of fines and forfeitures imposed and collected by the justices of the peace of the city, whether imposed for a violation of the laws of the state or of the ordinances of the city, and which had been paid into the city treasury. In *People v. Chapman*, 61 Cal. 262, 267, it was said: "Where money has been drawn from the treasury without authority of law, it is recoverable back. Money thus obtained does not become the property of the receiver, and

it is unconscientious for him to retain it." The court below, in its opinion (which we find printed in appellant's brief), quotes from *Whittaker v. County of Tuolumne*, 96 Cal. 101, 30 Pac. 1016, as follows: "The state and its political subdivisions cannot be sued except as authorized by statute, and general language creating new remedies or prescribing procedure has never been held to authorize such actions." This proposition is not questioned. That action was brought under section 1050, Code Civ. Proc., which provides that "an action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation, and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety." In that case an ordinance of the county imposed a license tax upon persons engaged in the business of raising, grazing, herding, and pasturing sheep. Plaintiff contended that the ordinance was void, and the defendant's claim against him for the license tax unfounded, and asked for a judgment so declaring. He had not paid the license tax, nor presented any claim against the county, and said section of the Code obviously did not authorize such action. If he had paid the license tax under protest, and presented his claim to the board of supervisors, and upon its rejection had brought suit to recover back the money, a different case would have been presented. The court also cited *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646. That was a case where a mechanic's lien was sought to be enforced against a public building, and it was held that the state is not bound by the general words of a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. The distinction between that case and this is obvious. As was there said: "The constitution has itself provided, as the only means which the state has for the payment of its debts, the exercise of the sovereign power of taxation, and for each political subdivision the rule is the same." If a mechanic's lien could be enforced against a public building, it would necessarily involve a sale of public property under execution or an order of the court, and this cannot be done. If one county be indebted to another, whether upon an express contract or upon an implied contract, as for money had and received, we are not able to see why such an action should not be maintained. If such power does not exist under the statute authorizing counties to sue and be sued, it must result that no county could enforce a just demand against another without a special act of the legislature permitting it.

The county having power to bring such action, the question is, do the facts alleged in the complaint show that the plaintiff is en-

titled to the money sued for? At the time these taxes were levied, the entire portion of the railroad so assessed was within the county of Colusa, and said taxes were due and payable to it, and at the time of the creation of the new county remained unpaid, and were assets belonging to Colusa county. The act creating the county of Glenn did not provide for any apportionment of the public property, or of the debts or credits of Colusa county between it and the new county, and in such case the whole thereof belonged to Colusa county. *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316; *Tulare Co. v. Kings Co.* (Sac. 221; filed May 28, 1897) 49 Pac. 8, where this question is fully considered. The fact that these taxes were not paid until after the creation of the new county gave it no right to any portion of the taxes paid by the railroad company. The legislature not having provided for a division of the assets of the old county, the new county could not have enforced against Colusa county a claim to any portion of the taxes paid by the railroad company if the whole had been received by the old county, and, that being true, the defendant, the new county, has no right to retain the portion of said tax which has come into its possession. In the case of *Kings Co. v. Johnson*, 104 Cal. 201, 37 Pac. 871, it was said: "The lien of the taxes for the year 1892 had already attached, and, unless the legislature saw fit to provide otherwise, such taxes due upon property situated in that portion of the former county of Tulare which was set off to the new county was collectible by the tax collector of Tulare." There can be no question, therefore, that the county of Colusa had the right to collect from the railroad company the taxes which were levied upon that portion of the road which, before the creation of the new county, was within its limits; and Glenn county, having received a portion thereof, cannot legally retain it. In *Argenti v. City of San Francisco*, 16 Cal. 258, it was held that if the city obtained the money by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial; and that in these cases the city does not make any promise, but the law implies one. See, also, *Grogan v. San Francisco*, 18 Cal. 590. The county of Glenn, having received the money in question without any right, and not being entitled thereto, is liable in an action for money had and received upon its implied promise to pay the same to the county of Colusa, which was entitled thereto. Respondent cites us, however, to the case of *Orange Co. v. Los Angeles Co.*, 114 Cal. 390, 46 Pac. 173. That was an action to recover from the defendant the sum of \$1,903.70, alleged to be the plaintiff's proportion of \$19,032.43, received from the state of California as repayment of money expended by Los Angeles county in providing for the support of aged persons in indigent

circumstances between June 30, 1883, and March 11, 1889,—a period prior to the organization of Orange county. The act creating Orange county provided for a division of the county assets between the old and new counties upon a basis therein stated, the same to be determined by commissioners. The commissioners reported, finding an amount due from Orange county to Los Angeles county at the date fixed by the act creating the new county, and this amount was afterwards paid by Orange county. At the time the commissioners made their report, neither party to said action knew of the existence of this claim against the state in favor of the county of Los Angeles, and it was, therefore, not taken into consideration by the commissioners, and the question arising in that case was whether the plaintiff could resort to the courts, and maintain an action to recover its proportion of the overlooked claim, as money had and received to its use. It was there held, as in other cases above cited, in the language quoted from *Sedgwick Co. v. Bunker*, 16 Kan. 498, that "where a county is divided the rule for the division and apportionment of the debts and property between such county and detached territory belongs exclusively to the legislature, and not to the courts; and, when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere." The court further said: "The act prescribed the limits of each county's rights, and the methods by which they were to be ascertained. In performing their duties the commissioners doubtless intended to make the division as required, and, if they failed to do so, the failure arose through mistake. The mistake was one, however, which, in our opinion, can be corrected by legislative action only, and not by the courts. The courts are without authority to adjust matters of this character between counties." The question here presented, however, does not involve the question of a division of property or credits, nor of the power of the courts to interfere or correct the mistakes or oversights of commissioners appointed by authority of the legislature to make such division. The money in question belongs to the county of Colusa, and there can be no question as to its right to recover it.

As to the demurrer upon the ground of ambiguity and uncertainty, counsel for respondent contends that, "in the absence of a clearer statement of facts in the complaint, it must be inferred that the state board of equalization, under the act of March 23, 1893 (St. 1893, p. 290), reassessed and reapportioned the assessment of the Northern Railway for the said years of 1885, 1886, and 1887, and as at that time the county of Glenn was a duly-organized county of the state, the taxes so reassessed were apportioned to the counties of Glenn and Colusa according to the number of miles in the respective counties." I do not think such an inference can be properly drawn from the complaint. The inference that there

was a reassessment does not appear from its language, unless from the averment that no part of the taxes were paid until the year 1894, and were then paid to the state treasurer, since section 3669, Pol. Code, requires each corporation, person, or association assessed by the state board of equalization to pay to the state treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board; and hence it appears that, whether the railroad company paid upon the original assessment or upon a reassessment, the payment would be to the state treasurer, and by him to the county. Whether there was such reassessment, and whether, if there was, it would affect the right of the plaintiff to recover in this action, are questions that are not so presented as to require decision. If there was a reassessment, and if that fact relieves the defendant from liability, it is open to the defendant to plead it. The judgment appealed from should be reversed, with directions to the court below to overrule the demurrer.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to overrule the demurrer.

(117 Cal. 491)

EHRMAN et al. v. ROSENTHAL et al. (S. F. 511.)¹

(Supreme Court of California. July 8, 1897.)

TRIPARTITE CONTRACT—RESCISSION—MONEY HAD AND RECEIVED—INDEMNITY.

1. One R. purchased goods of plaintiffs and defendants severally, under an agreement to transfer to defendants a certain note, which defendants agreed to discount, and to pay to plaintiffs one-half of the proceeds thereof, on R.'s account, crediting the other one-half thereof on their own bill. R. performed the agreement on his part; but defendants having failed to pay plaintiffs, or to return the note, R. authorized defendants to balance his account with the proceeds of the note, and pay the overplus, a small amount, to plaintiffs, whereupon plaintiffs sued defendants for the remainder of the sum which they had agreed to pay on R.'s account. In the meantime, R., becoming embarrassed, compounded with his creditors, including plaintiffs, at a discount. *Held*, that such agreement was a tripartite contract, which could not be rescinded, nor its terms modified, by R. or defendants, or both, to the detriment of plaintiffs, without their express consent.

2. Defendants' objection that an action in form for money had and received cannot be maintained on such facts is not tenable, as plaintiffs were justified under the facts in claiming that defendants were holding such moneys to their use.

3. Nor can it be insisted that defendants should be treated as guarantors of R.'s indebtedness to the extent of the sum involved, and that, as R. was released under the composition agreement, they are likewise released; for, if guarantors, they have been indemnified by their principal, and under Civ. Code, § 2824, are liable to plain-

tiffs to the extent of the indemnity, notwithstanding that plaintiffs, without their consent, may have modified the contract or released the principal.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Ehrman & Co. against Rosenthal, Feder & Co. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Mastick & Mastick, for appellants. Naphthaly, Friedenrich & Ackerman, for respondents.

HENSHAW, J. This action is in form for money had and received. Judgment passed for plaintiffs, and from that judgment, and from the order denying a new trial, defendants appeal. The facts, concerning which there is little or no dispute, are as follows: Plaintiffs were partners, engaged in the wholesale grocery business in the city and county of San Francisco. Defendants were partners, engaged in the wholesale boot and shoe business in the same place. In the month of August, 1883, one J. Rosenstein, a merchant engaged in business in Idaho, came to San Francisco to purchase a stock of merchandise. He held the promissory note of one Dodge for \$2,000. This note, by its terms, was payable in October, 1884. Upon his visit to San Francisco, Rosenstein did not have the note in his personal custody, but had left it in Idaho. Rosenstein called upon the defendants, and engaged with them for the purchase of a bill of goods. At the same time, Rosenstein designed to purchase goods of plaintiffs. It was proposed that Rosenstein should buy goods of plaintiffs and defendants, and deliver to defendants the Dodge note. Defendants agreed with Rosenstein to receive the Dodge note, discount it immediately, and pay \$1,000 to the plaintiffs, and apply the remaining moneys due from their purchase of the note upon the bill of goods which Rosenstein proposed to purchase. Rosenstein reported this proposed agreement to plaintiffs. They sent an agent to defendants to ascertain whether the transaction was to be as represented. Their agent made inquiry of the defendants, stating that, upon the strength of this proposed agreement, Rosenstein had applied to them for the purchase of a bill of goods. Defendants reported to plaintiffs' agent that the transaction was to be as represented. This was reported to plaintiffs, and thereupon they sold to Rosenstein on credit a bill of goods exceeding in amount the \$1,000. This sale was made upon the assurance of the representations of defendants to plaintiffs' agent. Rosenstein returned to his home. In due course, the goods of plaintiffs and defendants were forwarded to him, and he in turn mailed the note to defendants, with a letter of instructions requesting them to pay plaintiffs the \$1,000 according to the agreement. Rosenstein, however, had indorsed the note without recourse. Immediately upon its receipt, defendants notified Rosenstein that they refused to discount it, or to pay the plain-

¹ Rehearing denied.

tiffs the \$1,000, because of the limited indorsement, and about the same time communicated with plaintiffs, explaining to them that they had refused to discount the note for the reason explained, but suggested that they were willing to hold the note for the joint account of themselves and plaintiffs. Plaintiffs refused this offer, stating that they were going to get their money from Mr. Rosenstein. Thereupon Rosenstein, in writing, authorized defendants to erase the words "without recourse," and if they wished, and it was desired, to write his name as a general indorser upon the back of the note. This the defendants refused to do, writing to Rosenstein to that effect, and requesting further suggestions. Rosenstein then, in reply, wrote to defendants, requesting them to return him the note. Defendants in the meantime had banked the note with the London & San Francisco Bank, as collateral upon their own paper, and had drawn thereupon the sum of \$1,000. To Rosenstein's proposal they replied that he could have his note back upon the payment to them of the \$1,000. To this Rosenstein replied, complaining that they had violated their agreement, and again demanding the return of the note. Finally, on April 24, 1884, Rosenstein again wrote to defendants, complaining anew of their violated agreement. As he could neither obtain the note nor any credit upon account of it to plaintiffs, seemingly as a last resort he asked the defendants to apply the proceeds of the note in extinguishment of his account with them, and turn over the remaining moneys, amounting to \$77.90, to plaintiffs. This defendants did, crediting the account of Rosenstein with the entire principal and interest of the note. Upon receipt of the \$77.90, plaintiffs made demand upon defendants for the payment of the remainder of the \$1,000, which was refused. Rosenstein at the time of this demand was indebted to plaintiffs for the goods purchased under the agreement, in excess of the amount demanded. Later in the year 1884, Rosenstein became embarrassed in business, and was unable to pay his debts. His San Francisco creditors, including the plaintiffs, assigned their demands for collection, and a composition agreement was made with Rosenstein by his creditors, including plaintiffs, under which plaintiffs accepted 35 cents on the dollar for their claim against Rosenstein, and released him from the payment of the remainder. This action was begun before the date when the composition agreement with Rosenstein was entered into. The Dodge note was paid to defendants upon maturity. Under this state of facts, the court held that defendants became liable to plaintiffs in the sum of \$1,000, and that the amount unpaid thereof, to wit, the sum of \$922.10, was subject to a credit of 35 cents on the dollar paid thereon by Rosenstein, and awarded judgment in favor of plaintiffs for the sum of \$599.37, with interest.

The agreement between these parties was not a contract between Rosenstein and defendants for the benefit of plaintiffs, but

was in fact a tripartite agreement, under which plaintiffs sold goods to Rosenstein upon his agreement to forward the note to defendants, and defendants' agreement to discount it, and pay them \$1,000 of the proceeds for Rosenstein's account. The agreement of defendants as principals was as distinctively an agreement with plaintiffs to do this thing as it was an agreement with Rosenstein. In sending the note to defendants with the limited indorsement, it may be conceded that Rosenstein did not fulfill his agreement, and that defendants were entitled to receive the note bearing his general indorsement. This we say may be conceded, though the contract was entirely silent upon the matter. But, in so sending the note, Rosenstein did not violate his agreement. He merely failed fully to perform it. But there was abundant time and opportunity and means at hand for a complete performance, and he did completely perform his agreement when, in writing, he authorized defendants to cancel the limitation, and to put him in the position of a general indorser upon the instrument. At and after that date, defendants' duty to discount the note and pay the proper share of the proceeds to plaintiffs was in full existence. It cannot be successfully contended that the later transactions between Rosenstein and defendants amounted to a new and executed contract, which relieved them from their duty to plaintiffs. Rosenstein, it is true, after repeated and fruitless efforts to compel defendants to pay the moneys to plaintiffs, and after his failure also to obtain a return of the note, did write to them, and propose that they extinguish his account by applying thereto, so far as was necessary, the proceeds of the note, and, after so doing, to pay over the trifling sum which remained to plaintiffs. This proposition defendants promptly accepted. There seemed to be no hesitation upon their part at that time in discounting the note for their own benefit. But, as plaintiffs were a party to this contract, and as the consideration prompting them to sell the goods to Rosenstein was the express promise of defendants to discount the note, and pay over to them this money, it was not in the power of Rosenstein or defendants, or of both, to rescind the contract, or modify its terms, to the detriment of plaintiffs, without their express consent.

Appellants' contention that the action, in form money had and received, cannot be maintained upon these facts, is not tenable. At the time when, under the agreement, it became the duty of defendants to purchase the note, and pay over of the proceeds \$1,000 to plaintiffs, plaintiffs were justified in treating defendants as having in their possession moneys had and received by defendants for their own use. The action, it is true, lies only as to money or as to some specific article of property agreed to be treated as money; but plaintiffs were justified, under the facts, in claiming that defendants were hold-

ing the \$1,000 to their own use. *Kreutz v. Livingston*, 15 Cal. 344; *Logan v. Talbot*, 59 Cal. 662. And certainly, when defendants in fact discounted the note, and applied the moneys to their own account, it is plain that they held \$1,000 of plaintiffs' moneys which should have been paid over to them.

It is next insisted that defendants should be treated as guarantors of Rosenstein's indebtedness to the extent of the \$1,000, and that Rosenstein, the principal, having been released under the composition agreement, defendants themselves are likewise released. Civ. Code, § 2819. But, if defendants be treated as guarantors, then they are guarantors who have been indemnified by their principal, for the Dodge note was not only received and discounted by them, but was in fact paid at maturity. Section 2824, Civ. Code, declares that a guarantor who has been indemnified by the principal is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the consent of the guarantor, may have modified the contract or released the principal. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(117 Cal. 447)

CALIFORNIA CANNERIES CO. v. SCATENA et al. (S. F. 540.)

(Supreme Court of California. July 1, 1897.)

CONTRACT OF SALE—EVIDENCE—STATUTE OF FRAUDS.

1. In an action for damages for the breach of a contract of sale, the testimony of a witness for the plaintiff company was that, a short time before August 4th, he, on behalf of plaintiff, made a verbal purchase of peaches from one of the defendants, acting for his firm, and that on August 4th such member wrote the following instrument, which defendant signed: "Aug. 4th, '94. Scott's Ranch. One dollar in hand paid, I sell [plaintiff] one hundred and fifty tons of choice canning peaches. Varieties: Fosters, Mary's Choice, and Salways,—at \$20 per ton, delivered." The signature was, for want of room, written across the face of the document. It appeared that such signature was intended to be, and was, the signature of the firm. *Held*, that there was sufficient evidence of the sale alleged.

2. Such signature was a sufficient compliance with the statute of frauds, as it was immaterial to what part of the instrument it was attached, where the party to be charged had deliberately attached such signature to it with intent to accept and be bound by it.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the California Canneries Company against Lorenzo Scatena and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Estee & Miller and J. H. Miller, for appellants. Reinstein & Eisner, for respondent.

McFARLAND, J. Appeals by defendants from the judgment and order denying a new

trial. In the complaint it is averred, substantially, that "on or about the 4th day of August, 1894," plaintiff purchased of the defendants, Lorenzo Scatena and A. P. Gianini, co-partners doing business under the firm name of L. Scatena & Co., and said defendants under said firm name sold to plaintiff 150 tons of peaches, of certain named varieties, for the price of \$20 per ton delivered to plaintiff; that defendants refused to deliver the peaches, or any of them, although demanded, etc.; and that plaintiff was damaged by said refusal in the sum of \$1,500. The answer was a denial of the substantial averments of the complaint. The court found all the issues, except the amount of damages, in favor of plaintiffs, found the damages to be \$750, and gave judgment for the last-named sum. The two main propositions made by appellants for a reversal are (1) that there was no sufficient evidence to show a sale as averred in the complaint; and (2) that there was no sufficient memorandum in writing to take it out of the statute of frauds.

1. There was sufficient evidence of the sale. The testimony of Henry Jacobs is to the point that a short time before August 4th he, on behalf of respondent, made a verbal purchase of the peaches from the defendant Lorenzo Scatena, acting for the firm, and then wanted the transaction reduced to writing, but Scatena said it was not necessary. On August 4th Jacobs asked Scatena to give him a writing showing the sale. They were then on the Jackson street wharf in San Francisco, and Jacobs wanted Scatena to go to his store to have the writing made; but the latter said he had not time, and, handing Jacobs a piece of paper, told him to write it quick. Thereupon Jacobs wrote the instrument introduced by respondent, marked "Exhibit 1," and Scatena signed it. It was written on a rough box or desk used by teamsters to sign their receipts. A photographic copy of the document is in the record, and the body of it is as follows: "Aug. 4th, '94. Scott's Ranch. One dollar in hand paid, I sell California Canneries Company, San José, one hundred and fifty tons of choice canning peaches. Varieties: Fosters, Mary's Choice, and Salways,—at \$20 per ton, delivered." After having been written by Jacobs, it was signed by said Scatena. The writing took up the entire side of the paper, leaving no room for a signature, and Scatena wrote the signature across the face of the document. The signature was either "L. Scatena," or "L. Scatena & Co.,"; some of the testimony being that "& Co." was written at the time, but had become partly or wholly obliterated. But there is no doubt that, according to the great preponderance of the evidence, he thus wrote either "L. Scatena" or "L. Scatena & Co." He was seen writing it, not only by said Jacobs, but by other witnesses. And the transaction was with the firm of L. Scatena & Co., for which he was acting and for which

he had the right to act; and the signature was intended to be, and was in law, the signature of the firm. The foregoing evidence was clearly sufficient to warrant the court in finding that there was a sale as averred in the complaint.

2. The signature, as above stated, was a sufficient compliance with the statute of frauds. The weight of authority and the dictates of reason and justice are to the point that when, after the body of a memorandum has been fully written, a party to be charged deliberately attaches his signature to it, with intent to accept and be bound by it, then the statute has been complied with, no matter to what part of the instrument the signature be attached. The words "signed" and "transcribed," although of different derivations, and although their literal meanings have a shade or two of difference, are substantially, both in common and in law language, the same, except where, in a statute, or in connection with a context, some peculiar or additional meaning to either of the words is indicated. In the opinion of this court in *Re Walker's Estate*, 110 Cal. 387, 42 Pac. 815, the subject is discussed, and the result of the English authorities is thus stated: "To subscribe" is to attest or give consent, or evidence knowledge, by underwriting usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial, since a still more general meaning of the word 'subscribe' is to attest by writing, in which definition the locality is wholly disregarded." See, also, 1 *Reed, St. Frauds*, § 885. In *New York* it was held that the signature must be at the end of the memorandum, but that conclusion was reached mainly upon consideration of the fact that there the word "signed" was first used in the statute, and afterwards changed to "subscribed." No such change has been made here, but, on the other hand, in our statute of wills it is provided that a will "must be subscribed at the end thereof by the testator," etc., thus indicating a legislative construction of the word "subscribed" as not necessarily meaning "at the end." Moreover, we agree with counsel for respondents that in the case at bar, under the circumstances described, the signature was substantially at the end of the memorandum, and thus "subscribed," within the meaning of the extreme authorities on the subject. *Coon v. Rigden*, 4 Colo. 282. There is nothing in the point that the defendant Giannini was not bound by the memorandum. The act of Scatena was the act of the co-partnership. Neither is there anything in the point that there was no sale because appellants did not own or have any interest in the peaches at the time the sale was made. There was no evidence of that fact, and there is certainly no presumption in favor of a seller that he did not own what he sold. The two pencil marks which are partly through and partly over the first two lines of the memorandum are sufficiently explained as not intended as erasures.

The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(117 Cal. 509)

In re STILL'S ESTATE. (S. F. 650.)

(Supreme Court of California. July 8, 1897.)

HOMESTEAD—RIGHTS OF MINOR CHILD—COMMUNITY PROPERTY.

1. Under Code Civ. Proc. § 1465, providing that on administration "the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of * * * the minor children," the right of a minor child to such homestead is independent of, and not abridged by, the general debts of the estate, or the claims of the administratrix.

2. An application for such homestead may be made at any time before the administration of the estate has been closed, under Code Civ. Proc. § 1465, which provides that it may be made "upon the return of the inventory, or at any subsequent time during the administration."

3. Civ. Code, § 1402, provides that "upon the death of the husband one-half of the community property goes to the surviving wife. * * * In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and the charges and expenses of administration." Pending the administration of decedent's estate, a minor child sought to have certain premises set apart as a homestead. *Held*, that the widow had no title, as tenant in common or otherwise, in such premises, though community property, which, during the administration of the estate, was not subject to such probate homestead.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Samuel W. Still, a minor child of Alden P. Still, deceased, petitions for a homestead. From an order setting apart certain premises as such homestead, William Webb, administrator of the estate of Grace U. Webb, deceased, appeals. Affirmed.

W. H. Linforth, for appellant. W. E. White, for respondent. Black & Harrison, for Mrs. Still.

SEARIS, C. This is an appeal from an order of the probate court in and for the city and county of San Francisco, setting apart to Samuel W. Still, the infant son of Alden P. Still and Grace U. Still, his wife, as a homestead, a lot of land, with the dwelling house thereon situated, on Twenty-Fourth street, city and county of San Francisco, of the value of say \$2,000. It appears from the bill of exceptions that Alden P. Still died intestate at the city and county of San Francisco, June 30, 1885, leaving, him surviving, Grace U. Still, his widow, and three minor children, viz. John P. Still, then of the age of 12 years; Lottie L. Still, of the age of 9 years; and Samuel W. Still, then of the age of 8 years,—all of whom are of legal age except Samuel W. Still. The widow, Grace U. Still, was appointed administratrix of the estate, which was appraised at \$2,100. The residence of the family, which is the property

herein set aside as a homestead, was appraised at \$1,500. The widow and her children continued to reside in the family home. In March, 1886, the administratrix applied for and obtained an order for the sale of all the real property of the estate. Certain other real property was sold for \$600, but the home place was not sold. In January, 1886, the administratrix procured an order from the court for a family allowance of \$100 per month to commence June 30, 1886, none of which, so far as appears, has been paid, and it is claimed there is now due on account thereof the sum of say \$11,000. The administratrix also paid costs of administration, taxes, insurance, etc., amounting to about \$826, and it was claimed there was due her as commissions the further sum of \$145. Her total receipts were \$592. Grace U. Still, the administratrix, intermarried with William Webb, the appellant herein, June 15, 1888. After this marriage, appellant herein and his wife and her children lived in the home aforesaid, rent free, until February 8, 1895, when the said Grace U. Webb (formerly Grace U. Still), administratrix, died intestate. Appellant herein was duly appointed administrator of her estate. Said Grace U. Still never rendered any account of her administration of the estate of said Alden P. Still, deceased. The homestead property herein was the community property of said Alden P. Still and Grace, his wife, upon which they resided and had their home at the date of the death of said Alden P. Still. No homestead was ever selected, declared, or recorded by Still or his wife during their lives, and none has been selected since until as herein stated. The applicant, Samuel W. Still, in whose favor the homestead was set apart, was at the date of the order of the age of 19 years and over. The points made by appellant in favor of reversal are: (1) That, as a family allowance was made by the court to Grace U. Still, the widow, which was never paid, and as such widow supported the infant children, and that to allow a homestead would result in withdrawing the whole estate from administration, the court had no power to set apart the homestead. (2) The premises set apart constituted the only means for the payment of expenses of administration, etc., incurred by the widow as administratrix, to which she was entitled before the court could rightfully set apart the homestead. (3) The application for a homestead came too late. (4) The premises sought to be made a homestead, being community property, subject only to the payment of expenses of administration, the family allowance, and debts of the intestate, the widow, Grace U. Still, became vested with an undivided one-half of said premises subject to such debts, expenses, and charges; and as a tenant in common with the children her one-half interest in the estate could not be divested by making it a homestead.

First, then, as to the effect of the family

allowance upon the right of the court to set aside the homestead. The Code of Civil Procedure (section 1464) provides that when a person dies leaving a widow or minor children, the widow or children, until letters are granted, and the inventory is returned, are entitled to a reasonable provision for their support, to be allowed by the superior court, or a judge thereof. Section 1466 of the same Code provides that, if the amount thus set apart by the preceding sections be insufficient for the support of the widow and children or either, the court, or a judge thereof, must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters, etc. The following section makes such allowance a preferred charge against the estate, except as against funeral charges and expenses of administration. The provision in section 1466, that "if the amount set apart be insufficient," etc., evidently refers to not only the allowance provided by section 1464, but also by section 1465, which provides that: "Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; * * * if none has been selected, * * * the court must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or, if there be no surviving husband or wife, then for the use of the minor children, * * * out of the common property," etc. The legislative will, as expressed in the several sections of the Code, is: (1) Provision for the maintenance of the family, if such there be, "until letters are granted, and the inventory is returned." (2) Upon the return of the inventory, or at any time thereafter during the administration, the court "may" (and this phrase has been held to mean "must,"—*In re Ballentine's Estate*, 45 Cal. 696), on its own motion or on petition, set apart for the use of the family all the property exempt from execution, and the homestead, if one has been selected and recorded. If no homestead has been selected and recorded, etc., the court must select, designate, set apart, and cause to be recorded a homestead for the surviving husband or wife and the minor children; and, if there be no husband or wife, then for the use of the minor children. (3) If the amount thus set apart be insufficient for the support of the family, then, and then only, the court is required to make such reasonable allowance out of the estate as shall be necessary. Evi-

dently, as we think, it was not the legislative intent to make the subsequent allowance which might become necessary a charge or lien upon the exempt or homestead property which the court is required to set apart to the family. This should, in regular order, be set apart at once upon the coming in of the inventory showing its existence; but, if not then done, it may be done at any subsequent time during administration. When thus set apart, it is properly withdrawn from administration, and the administrator has no further concern with it. A family allowance subsequently allowed cannot impair the right of the surviving husband or wife and children thereto. A family allowance made before exempt property and the homestead are set apart, by parity of reasoning, is made subject to the right of the designated beneficiaries to have a homestead, and the exempt property set apart for their benefit. The widow and minor children did not lose their right to a homestead when, as administratrix, she procured an order of sale of the property, which was never sold under such order. In *re Smith's Estate*, 51 Cal. 563; In *re Lahiff's Estate*, 86 Cal. 151, 24 Pac. 850. When the widow, Grace U. Still, who was administratrix in 1888, intermarried with William Webb, she lost her right to have a homestead carved out of the property of the estate of her deceased husband (In *re Boland's Estate*, 43 Cal. 640); and when all the minors except Samuel W. Still reached their majority without an application for a homestead having been made for or on their behalf, their rights were similarly lost. But neither the widow nor the other children could individually or collectively waive the right of Samuel W. Still during his infancy to a homestead. *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667. Indeed, it has been held that the court has no discretion to deny the right of the widow or minor children to a homestead out of the estate. In *re Davis*, 69 Cal. 458, 10 Pac. 671; In *re Ballentine's Estate*, 45 Cal. 696. When, on or about June 15, 1888, Grace U. Still, the widow, intermarried with William Webb, the family allowance of \$100 per month, made January 29, 1886, to take effect June 30, 1886, out of the estate of her deceased husband, Alden P. Still, terminated without order of the court, as far as she individually was concerned. No doubt the court could have continued the allowance if necessary for the benefit of the children, but when she ceased to be the widow of Still she could not claim as a perquisite for herself, or for her new husband, a family allowance from the estate of her former spouse. In *re Hamilton's Estate*, 66 Cal. 576, 6 Pac. 493. We need not, however, scan the allowance, as from our point of view the right of the infant applicant to a homestead out of the estate is independent of, and not abridged by, the general debts of the estate, or the claims of the administratrix, however just. This may tend to show our statute defective, and not conducive to

equitable results, but we must take it as the legislature has left it.

Second. For like reasons we deem appellant's second point untenable.

Third. The application for a homestead did not come too late. It may be made "upon the return of the inventory, or at any subsequent time during the administration." The administration of the estate is not yet closed, but is being conducted by John H. Still, as administrator, and successor to Grace U. Still.

Fourth. The remaining point made by appellant is that the premises sought to be made a homestead, being community property of the marriage of the decedent and Grace U. Still, on the death of decedent one-half thereof vested in Grace U. Still, subject only to the payment of his debts, the family allowance, and the charges and expenses of administration, and her half thereof was not subject to administration. It is true that a homestead cannot be created out of land held by the applicant as a tenant in common with others. *Rosenthal v. Bank*, 110 Cal. 198, 42 Pac. 640. But was the land so held here? "Upon the death of the husband one-half of the community property goes to the surviving wife. * * * In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and the charges and expenses of administration." Civ. Code, § 1402. In *Re Moore's Estate*, 57 Cal. 437, it was said: "The objects of administration are: (1) To support the family for a period; (2) to set apart a homestead to the family; (3) to pay the expenses of administration; (4) to pay the debts of the deceased; (5) to distribute the balance of the estate to those who take it by law." In *Phelan v. Smith*, 100 Cal. 166, 34 Pac. 669, it was said: "The right to have a probate homestead carved out of the estate is in the nature of a charge upon the estate, from which the widow, under her right of succession, could no more discharge [it] than she could free the estate from its liability for the debts of her deceased husband." The homestead is, in a proper case, a charge upon the estate of the deceased, created by the law, and is one of the burdens upon the community property subject to which the surviving wife takes her interest therein, equally with the other limitations prescribed by the Civil Code. If this position is correct, the widow had no title as tenant in common or otherwise in the premises which, during the administration of the estate, was not subject to the probate homestead. We recommend that the order appealed from be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(117 Cal. 451)

KLAUBER et al. v. HIGGINS et al. (No. 19,395.)

(Supreme Court of California. July 2, 1897.)

STATE LANDS—VOID PATENT—VESTED RIGHTS—RESERVATION—TOWNS—DEFECTIVE APPLICATIONS—MISDESCRIPTION—ACTION.

1. Where a sale of land by officers of the land department of the state is unauthorized because the particular tract named in the patent has been by legislative act absolutely reserved from disposal, the patent is void, and may be assailed from any quarter.

2. Applicants for the purchase of state lands acquire no vested rights till the applications have been approved, or payments have been made.

3. Act March 28, 1868 (St. 1867-68, p. 507), providing for the management and sale of state lands, was so amended by Act April 4, 1870, that section 70 provides that all the swamp and tide lands within two miles of "any town or village are hereby excluded from the provisions of this act." *Held* that, within the amendment, the term "town" includes cities.

4. Act March 27, 1872, § 1 (St. 1871-72, p. 622), provided that "all applications heretofore made for the purchase of lands belonging to this state under the provisions of any act authorizing the sale of state lands shall be good and valid," notwithstanding misdescriptions of the character of the land. Section 2 provides that patents issued on applications described in section 1 shall be deemed to convey the legal title, "by whatever style such land may be designated." *Held*, that the act validated defective applications for lands subject to sale, and did not apply to lands that were reserved from sale under the general law.

5. A person in possession of lands at the commencement of the action may contest the right of another claiming under a void patent.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Abraham Klauber and others against T. J. Higgins and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiffs appeal. *Affirmed*.

S. M. White, H. M. Willis, and Aitken & Smith, for appellants. Luce & McDonald, C. H. Pippey, D. L. Witherington, Hunsacker, Britt & Goodrich, George J. Lovey, Trippet & Neale, and Works, Gibson & Titus, for respondents.

McFARLAND, J. This action was brought by Abraham Klauber and 18 other plaintiffs against T. J. Higgins and a very large number of other defendants, including the city of San Diego and the board of harbor commissioners for the Bay of San Diego. In the complaint it is averred that the plaintiffs now are, and for a long time hitherto have been, "the owners seised in fee and lawfully entitled to the possession" of certain lands specifically described as lands embraced by eight different state tide-land surveys adjoining each other. The lands thus described lie between low and high tide in the Bay of San Diego, adjoining lands embraced in the territory over which extends the municipal government of the city of San Diego. It is averred "that the defendants above named, while the plaintiffs were so seised and possessed of said lands and premises, and entitled to possession thereof, did, to wit, on the — day of —, 1890, without right

or title, enter into and upon the same, and unlawfully took possession thereof, and still unlawfully withhold possession of the same from these plaintiffs, and said defendants claim an estate or interest in the above-described property adverse to the title of said plaintiffs." It is further averred, as to each and all of the defendants, that their claim is without any right, and that they have no title or interest in said lands, or any part thereof, or any right to the possession of the same. The prayer is that it be decreed "that the defendants have not, nor has either of them, any estate or interest whatever in or to said lands or premises, and that the title of the said plaintiffs thereto is good and valid, and that plaintiffs have a writ for the possession of the premises aforesaid against the defendants herein," and that defendants be debarred, etc., from setting up any claim to said premises. The defendants, with the exception of a few who disclaimed, answered, denying that plaintiffs, or either of them, had any right, title, or interest in or to said premises, and setting up title or right of possession in themselves. The court found that none of the plaintiffs were seised of said lands, or entitled to possession thereof, and that the defendants did not at any time enter upon the same without right or title, or unlawfully take possession thereof, or that they unlawfully withhold the same from plaintiffs; and judgment was entered accordingly for defendants. From this judgment, and from an order denying a motion for a new trial, plaintiffs appeal.

The premises in controversy are tide lands over which the waters of the Bay of San Diego ebb and flow, and the appellants claim title thereto upon applications for their purchase under a general law of the state approved March 28, 1868 (St. 1867-68, p. 507), entitled "An act to provide for the management and sale of the lands belonging to the state," which act, commencing at section 22 thereof, provides for the sale of "the swamp and overflowed salt marsh and tide lands belonging to the state," and upon patents afterwards issued upon said applications. A large part of the arguments of counsel on both sides is directed to the question whether or not the legislature of the state had any power at all to provide for the sale of and to convey title to lands of the character involved in this action; but, under the views which we take of the case, it is not necessary to consider that question, because, in our opinion, the particular lands here involved were reserved from the operation of said act of March 28, 1868. If the only question involved here was as to the character of the lands in question, it would no doubt be true, under former decisions, that the officers of the land department of the state, by receiving the applications and issuing patents thereon, had determined that the character of the lands was such as described in the act, and that their determination of that question could not be collaterally impeached. See *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, and the cases there

cited. That is to say, "If a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character,—such as swamp or mineral,—then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised." But if there be no law for the sale of certain lands, no matter what their character be, then a sale of such lands by the officers of the land department of the government is without authority and void. As we said in *Gale v. Best*: "Of course, if the patent be void upon its face, or if, looking beyond the patent for a law upon which it is based, it is found that there is no law which authorizes such a patent under any state of facts, or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent will be worthless, and assailable from any quarter. For instance, if a certain section or a certain township described by legal subdivisions should be expressly and unconditionally reserved by congress from disposal under any other statute, a patent for any part of such tract would be void." See *Steel v. Refining Co.*, 106 U. S. 452-453, 1 Sup. Ct. 389. This principle, applied in numerous decisions of the supreme court of the United States to the public lands of the general government, is equally applicable to lands of the state. If, therefore, the land in contest in the case at bar was reserved from sale by the said act of the legislature under which appellants claim, the officers of the government had no right to sell the same, and any attempt on their part to do so was void. And we think that said land was clearly so reserved. The applications under which appellants claim were not approved until November, 1871, and no payments were made by the applicants prior to that time. They, therefore, had made no contract with the state, and had no vested rights until that time. But before that time, to wit, on April 4, 1870, the legislature amended section 70 of said act so as to read as follows: "All the swamp and overflowed, salt marsh and tide lands within one mile of the state prison at San Quentin, within five miles of the city and county of San Francisco, within five miles of the corporate limits of the city of Oakland, and within two miles of any town or village, are hereby excluded from the provisions of this act." Appellants contend that this provision does not apply in the present instance, because San Diego is a city, and therefore not a town or village; but this position is not tenable. In the first place, it is doubtful whether, at the time the applications were approved, San Diego was in any sense a city. It seems to have been incorporated as the city of San Diego by an act passed March 27, 1850, entitled "An act to incorporate the city of San Diego" (St. 1850, p. 121), but that act was repealed by an act approved

January 30, 1852, entitled an act "to repeal the charter of the city of San Diego, and create a board of trustees," and by that act a board of trustees was created and given certain rights and powers, among which was the power to pay off the debts of the city whose charter was repealed, and there is nothing said in the repealing act about any "city"; and afterwards, by an act approved April 16, 1852, entitled an act "for the relief of the indigent sick," it is provided that "the trustees of the town of San Diego" are given certain powers, which act must have gone upon the theory that there was no longer any city of San Diego, but that the same was a town. In other acts of the legislature it was called a city, so that it was recognized by the state both as a "town" and a "city." But, upon general principles, the word "town," as used in said section 70 of the amendatory act of 1868, clearly includes a city. The word "town" is used to designate either a place where there are a number of adjacent occupied dwellings, or as a municipal corporation organized under various statutes of different states, but in either sense it includes a city, unless used in some connection which shows that a different meaning was intended; and it would be absurd to say that the legislature intended to withhold the sale of tide land in front of a place where a considerable number of persons had settled in such a way as to constitute what we mean in common parlance by a "village" or "town," only in the event that the place was not called a city, or had not been organized under a statute providing for the organization of a municipal corporation to be called a city. Certainly, the clear purpose of the legislature would include such a place, however named, or however municipally incorporated.

This view is amply supported by authority. Blackstone says: "The word 'town' or 'vill' is, indeed, by the alteration of times and language, now become a general term, comprehending under it the various species of cities, boroughs, and common towns. A city is a town incorporated." 1 Bl. Comm. p. 114. Burrill defines "town" as follows: "A collection of houses in one neighborhood; a general term, comprehending under it the several species of cities, boroughs, and towns." In *Board v. McGuerrin*, 6 Daly, 349, the question was whether a certain act touching the suppression of intemperance, etc., which referred in terms only to overseers of a "town," applied to the city of New York, and it was held that it did. The court said: "It does not follow that, because this amendment designates overseers of the town where the penalty was incurred, that cities were not intended to be included. 'Every borough or city,' says Tomlins, 'is a town.' The greater necessarily includes the less, for a city begins as a village, extends into a town, and afterwards becomes a city by incorporation or otherwise; for there are cities that were never incorporated." The court, after referring to Blackstone, says fur-

ther: "In common parlance the word is frequently applied to cities, as 'leaving town,' 'come into town,' 'out of town,' etc. We have in this state the political divisions of towns, cities, and incorporated villages, and that that particular political division is what is meant by the word 'town' may, in a given case, be apparent from the purpose of the statute. But that is not the case here. This was an amendment of a section of a statute applying to the whole state." In New Jersey the constitution of the state was amended so as to provide that the legislature should not pass private, local, or special laws "regulating the internal affairs of towns and counties"; and in *State v. Parsons*, 40 N. J. Law, 1, it was contended that cities were not embraced in the expression "towns and counties" in said amendment. But the court held otherwise, and, among other things, said: "The contention is that the word 'towns' does not embrace 'cities.' But this argument is founded on the false basis of looking only at the letter of the law, and turning away from the spirit. It is true that if the letter of the law were absolutely unambiguous and definite, and were susceptible of but a single meaning, the clause would have to be read in such sense, no matter to what futility it might lead. But this is not the case. The word 'town' has no such fixed signification as this; for, though, in its narrower sense, it denotes something other than a city, in its broader scope it comprehends such a municipality. Mr. Tomlyn, in his *Law Dictionary*, under the title 'Town,' says: 'Under the name of the town or village, boroughs, and, it is said, cities, are contained, for every borough or city is a town.' Lord Coke, in 1 Inst. 116, showing the capaciousness of the term, has this language: 'And it appeareth by Littleton that a town is the genus and a borough is the species.' Bouvler's definition of the word 'city' is 'a town incorporated by that name.'" Afterwards, having reference to certain other matters, the court further said: "But this uncertainty obtains only so long as we yield our minds to the rigor of verbal definitions; for when once we emancipate ourselves from such bondage, and look at the purpose of the law, all doubts are at an end. When we find that the adoption of the narrow signification of the term used will lead to positive absurdity, and that the reception of the word in its wider import is attended with the establishment of a rule of public policy both wise and salutary, it is not difficult to make choice between the alternatives." In *Odegaard v. City of Albert Lea*, 33 Minn. 351, 23 N. W. 526, the question was whether said city was required by law to care for its poor, under an act which referred in terms to "towns" only, and did not mention cities *eo nomine*; and the court held that the act did apply to cities. The court, in its opinion, among other things, said: "The city or village bears substantially the same relation to the state government, and has substantially the same functions of local government, as the town. Indeed, a city is but an incorpo-

rated town, with such special powers and special mode of government as the circumstances require. * * * The word 'town' is often used as a generic term embracing all such primary municipal corporations as incorporated cities and villages; and, independently of any statutory provision, it has become a well-settled rule of construction that the term 'town,' when used in a general statute, may include cities, unless the contrary appears from the whole statute to have been the intention of the legislature. 1 Bl. Comm. 114; *Road in Milton*, 40 Pa. St. 300; *Board of Com'rs v. McGurrin*, 6 Daly, 349; *Peck v. Weddell*, 17 Ohio St. 271; *State v. Glennon*, 3 R. I. 276; *Flinn v. State*, 24 Ind. 286; *Abb. Law Dict.*, "Town." The foregoing authorities are clearly to the point that in the statute now here under review the word "town" embraces city. And under this view the territory within which the land described in the complaint is situated was reserved from sale, and the officers of the land department of the state had no authority to sell it, no matter what they may have deemed the character of the land—as whether tide lands or not—was. Therefore, there being no law for the sale of said land, its attempted sale, and the patents intended to perfect said sale, are void.

Appellants contend that, although their title to the lands in question may have been invalid under said act of 1868, yet that their title was confirmed and perfected by the act of the legislature approved March 27, 1872 (St. 1871-72, p. 622). That act is entitled "An act to legalize applications heretofore made for the purchase of lands belonging to this state, and to confirm the title of the purchasers under such applications." The first section reads as follows: "All applications heretofore made for the purchase of lands belonging to this state under the provisions of any act authorizing the sale of state lands shall be good and valid, although the land described in such application and affidavit may be styled salt marsh and tide lands, when in fact it is swamp and overflowed land; or may be styled swamp and overflowed land, when in fact it is salt marsh and tide lands; or may be styled swamp and overflowed and salt marsh and tide land, when in fact it may be either." Section 2 provides that "in all cases where patents have been or may hereafter be issued upon any such applications or affidavits as described in section one of this act for any such land, the same shall be deemed and held to convey the legal title to the land in such patent or patents described to the purchaser therein mentioned, by whatever style such land may be designated in such patent." The purpose of this act was clearly simply to legalize applications for lands which were subject to sale under some law of the state, where such applications were defective in manner as described in the act, namely, where the land had been designated in the application as swamp and overflowed land, when in fact it ought to have been de-

scribed as salt marsh and tide land, or vice versa. The language of this court in *Rooker v. Johnston*, 49 Cal. 3, in which the act of March 24, 1870 (St. 1869-70, p. 352), entitled "An act to legalize certain applications for the purchase of lands belonging to this state," was construed, is applicable to the construction of the act now under review. The court there said: "The act, as we construe it, deals with the applications alone, and does not intend or have the effect to offer for sale lands which were not subject to sale under the general law. It is not the purpose of the act to declare that an application for the purchase of land which had not been offered for sale when the application was filed should be good and valid, and that the applicant might proceed with and complete his purchase; but the intent was to make the application as valid as it would have been had it been free from all defects, had it contained within itself all that the statute required it to contain." And so in the case at bar the said confirmatory act of 1872 was merely intended to validate applications for lands subject to sale which were defective, and not intended to apply to lands that were reserved from sale under the general law. This view renders it unnecessary to consider the contention of respondents that on the same day on which said confirmatory act was passed another act was passed, entitled "An act for the relief of purchasers of state land" (St. 1871-72, p. 587), in which it was provided that the act should not apply to any lands within the county of San Diego, and that the two must be construed together, and, thus, construed, exempt the county of San Diego from the operation of either.

There is nothing in the position of appellants that respondents are not in a position to attack the patents under which appellants claim. It is averred in the complaint that the respondents were in possession of the land described in the complaint at the commencement of the action, and one in possession of land is always in a position to contest the right of another claiming under a void patent. *Fruit-Land Co. v. Moir*, 83 Cal. 101, 23 Pac. 359; *Association v. Knight*, 85 Cal. 448, 24 Pac. 818; *Edwards v. Rolley*, 96 Cal. 408, 31 Pac. 267. In *Steel v. Refining Co.*, supra, the United States supreme court, after having said that in certain cases a patent was conclusive, uses this language: "It need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act; the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had previously been disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time, and in any form of action." Moreover, some of the respondents, as, for instance, the board of har-

bor commissioners for the Bay of San Diego, do connect themselves directly with the right of the state to said lands. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; VAN FLEET, J.; GAROUTTE, J.; TEMPLE, J.; HARRISON, J.; HENSHAW, J.

(117 Cal. 465;

BROOKS v. TULARE COUNTY. (Sac. 208.)

(Supreme Court of California. July 7, 1897.)

TAXATION—UNAUTHORIZED ASSESSMENT—RECOVERY OF PAYMENT.

Pol. Code, § 3804, providing that "taxes erroneously or illegally collected may, by the order of the board of supervisors, be refunded by the county treasurer," does not authorize a recovery by a purchaser at a tax sale who paid the tax, though the land was the property of the United States, and not subject to taxation.

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Action by J. S. Brooks against the county of Tulare. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Hannah & Miller, for appellant. F. B. Howard and T. E. Clark, for respondent.

PER CURIAM. This is an action to recover from the defendant taxes alleged to have been erroneously and illegally collected, for the reason that the land upon which the taxes were assessed and collected was, at the time of the assessment, levy, and sale, government land of the United States, and not subject to taxation. A general demurrer to the complaint was interposed and sustained, and, plaintiff declining to amend, judgment was entered in favor of the defendant, from which judgment plaintiff appeals.

It is alleged in the complaint that on March 7, 1888, the tax collector of Tulare county duly offered for sale at public auction certain real property which had been regularly assessed for state and county taxes for the fiscal year ending June 30, 1888; that at the time of the sale the tax collector publicly stated to those present that said taxes had been duly and legally assessed and levied upon said real estate and had not been paid; that plaintiff, relying upon the statements so made, bid in the property for the amount represented to be due and unpaid thereon for taxes, costs, and charges, and thereupon paid to the tax collector the said sum, amounting in all to \$9.58, which was thereafter duly paid into the county treasury; that the tax collector made out and delivered to plaintiff, in proper form, a certificate of sale of said land, which has never been redeemed by any one, and is still owned and held by him; that the land upon which said taxes were assessed was at the time of the assessment and at the time of the said tax sale public land, owned by and the property of the United States, and not subject to taxation; that plaintiff purchased said land

and paid said taxes in good faith, and without notice, knowledge, or information of any kind that said land was public land, and not subject to taxation, and that he first discovered said facts on or about October 1, 1895, when he was preparing to apply for a tax deed of the purchased premises; that upon such discovery, and that the amount so paid by him had been erroneously and illegally collected, plaintiff prepared a statement of his claim therefor, which was duly verified as to its correctness, and that the amount claimed, to wit, \$9.58, was justly due him from defendant, and in November following presented the same to the board of supervisors of the county for allowance, together with documentary evidence showing that said land was public land, and not subject to taxation; and that thereafter, on December 5, 1895, the said board rejected and disallowed said claim, and the whole thereof. Wherefore judgment is demanded against the defendant for the sum of \$9.58, and legal interest thereon from the time of the rejection of the claim, and for costs of suit.

In support of the appeal counsel for appellant cite and rely upon section 3804 of the Political Code and the case of *Hayes v. Los Angeles Co.*, 99 Cal. 74, 33 Pac. 766. The section cited provides: "Any taxes, per centum and costs, paid more than once, or erroneously or illegally collected, may, by the order of the board of supervisors, be refunded by the county treasurer." In the case cited it was claimed that taxes on certain real property had been twice paid, and that the plaintiff, under the provisions of the Code above quoted, was entitled to recover back the amount of the second payment. It appeared that the said property was assessed to the owner thereof, and also to another party for the same fiscal year. The owner paid the tax levied upon the assessment against himself, but the tax levied upon the other assessment was not paid. Thereafter the tax collector, after the usual notice, offered the property for sale, representing that the state and county taxes thereon had not been paid, and were still due and unpaid, and the assignor of the plaintiff became the purchaser of the property, paying therefor the taxes, per cent., and costs represented to be due on account of the taxes thereon. The purchaser received a certificate of sale, which he assigned to the plaintiff. Subsequently the plaintiff presented to the board of supervisors of the county a claim for the amount paid by his assignor on account of the double assessment, and the board refused to allow the same. He then commenced his action to recover the amount so paid, setting out the facts of the case. A demurrer to the complaint was interposed and sustained, and judgment entered in favor of the defendant. On appeal to this court it was held that upon the facts stated the plaintiff was entitled to recover, and that the demurrer was improperly sustained. The court, among other things, said: "When the taxes upon property have for a given fiscal

year been once paid by the owner, the county has no right or power to sell or in any manner affect or incumber the land by a sale thereof. The lien of the tax is gone, and, as the implied right, which, in the event of a failure to redeem, ripens into a title in the purchaser, has no existence, there is no consideration for the purchase money, and he who has paid it ought in justice to be entitled to recover it back." And the court then quotes with approval the following language used in the decision of the case of *Fuel Co. v. Tuck*, 53 Cal. 304: "The authorities appear to be uniform to the effect that where a sum of money has been paid upon a consideration which has wholly failed the law implies a promise to refund it." It will be observed that there is a plain distinction between the *Hayes Case* and this. Here the plaintiff knew, or might have known, when he made his bid, and paid his money, whether the land was vacant public land or not. It may be that some one had a possessory claim on the land which was subject to assessment. At any rate, his bid was voluntary, and he cannot now maintain an action to recover back the money paid. This was, in effect, so held in *Loomis v. Los Angeles Co.*, 59 Cal. 456. In that case the plaintiff purchased at a tax sale certain real property, but it subsequently appeared that the assessment was fatally defective, and that he took no title to the lands attempted to be sold. He brought the action to recover of the county the amount paid by him, basing his right to recover on section 3804 of the Political Code, but it was held that the section did not apply to a case of that kind, and that he could not recover. The judgment must be affirmed. So ordered.

GARVER v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

INDICTMENT—NEGATIVE EXCEPTIONS—ALLEGATION OF INTENT—ESCAPE—INSTRUCTIONS.

1. It is unnecessary to negative an exception not embraced within the same clause which defines and creates the offense, and which constitutes no part of the description of the offense. When an exception is contained in a distinct section, it is a matter of defense.

2. Where the intent to commit the act charged in an indictment is not necessarily an ingredient of the crime, as defined by the statute, then the fact that the act may have been committed under an ignorance or mistake of fact is no defense to the crime charged.

3. Where a defendant is charged with the crime of carelessly permitting a prisoner lawfully held in custody to escape, it is not error for the court to charge the jury that, in determining whether or not the defendant was careless, they might consider the gravity of the crime with which the prisoners were charged, their sentences, physical strength, etc., and that what might be ordinary care for the keeping of prisoners held for petty crimes, or where prisoners were weak and infirm, might be gross negligence in the former.

4. Neither was it error for the trial court to charge that it was the duty of the jailer to use the doors, bolts, and locks of the jail in a manner likely to prevent escapes, and in the way they

were planned to be used for the safe-keeping of the prisoners.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county.

Appeal of J. H. Garver, who was convicted in the district court of Oklahoma county of carelessly allowing prisoners to escape from the jail of Oklahoma county, while he was acting jailer thereof. Affirmed.

R. Wooldridge and Redick, Lewis & Snyder, for appellant. C. A. Galbraith, Atty. Gen., and J. L. Brown, Co. Atty., for the Territory.

DALE, C. J. J. H. Garver, appellant, was indicted at the November, 1893, term of the court, sitting in Oklahoma county, under section 2020 of the Statutes of Oklahoma, charged with carelessly permitting prisoners to escape from the Oklahoma county jail. It appears from the record before us that Garver was the jailer of Oklahoma county, and that William Christian and Robert Christian and James Casey were confined in the jail, the former two upon a conviction had in Pottawatomie county for the crime of manslaughter, for which crime sentences in the penitentiary had been imposed in each case of 10 years, and that after such conviction they were sent to the Oklahoma county jail for safe-keeping for a period of time, in order that they might give bail pending an appeal to the supreme court. Casey was under indictment in Canadian county for the crime of murder, and he also had been ordered for safe-keeping to be held in the Oklahoma county jail, awaiting trial. While the parties were so confined, they escaped, and Garver, being jailer in charge, was indicted for carelessness in permitting them to so escape. A stipulation signed by the attorneys of record, which appears upon page 7, makes it unnecessary for us to examine at length the evidence in the record of the case-made, and practically eliminates all questions save the sufficiency of the indictment and the instructions of the court; the stipulation being to the effect "that appellant would not insist in the supreme court that there was not sufficient evidence to support the verdict under the rulings and instructions of the lower court." This stipulation appears to have been made in order to avoid bringing up the evidence of all the witnesses.

A demurrer to the indictment was duly filed, and counsel insist that such demurrer should have been sustained, because the indictment failed to aver that the negligent acts of Garver, which constitute the offense, and which are set out in the indictment, were not done or committed under an ignorance or mistake of fact, and, in support of this contention, cite division 5, § 2, art. 2, p. 424, St. 1893. The section in which this subdivision is found, together with the explanatory provision of the section found at the beginning thereof, is as follows: "All persons are capa-

ble of committing crimes, except those belonging to the following classes: * * *

Fifth. Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent. But ignorance of the law does not excuse from punishment for its violation." It is contended that the statute applies to the charge contained in the indictment against Garver, and that an omission to negative the exception makes the indictment bad on demurrer; that the statute has a general application to all classes of crimes; and that, if the defendant is guilty, he must come within the excepting clause. It was unnecessary to incorporate the exception in the indictment. The exception was neither expressed in the same clause, nor is it a part of the section that defines and creates the offense, and does not constitute a part of the description of the offense. In fact, the exception is found under article 2 of our crimes act, which has for its title the following words: "Of Persons Liable to Punishment for Crime;" while the offense charged is found in article 14, under the head of "Other Offenses against Public Justice." The two statutes have no direct connection, and it is well settled that unless the exception is embraced in the same clause, or forms a part of the section which describes the offense, it need not be negated in an indictment. *State v. Thompson*, 2 Kan. 432; *Harding v. People*, 10 Colo. 387, 15 Pac. 727.

It is urged that the trial court erred in not instructing the jury, as requested by the appellant, that if the defendant made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, he should not by the jury be found guilty of the crime. The indictment is drawn under the first subdivision of section 2 of article 14 of our crimes act, which reads as follows: "Every sheriff, coroner, clerk of a court, constable, or other ministerial officer, and every deputy or subordinate of any ministerial officer who either: First, wilfully or carelessly allows any person lawfully held by him in custody to escape or go at large, except as may be permitted by law, * * *." St. Okl. 1893, p. 446. It will be seen by the language above used that the legislature intended to denounce two crimes,—one for wilfully allowing a person to escape, and the other of carelessly allowing such escape. The disjunctive "or," as used, clearly indicates that it was the intention to make carelessness alone, in the care and keeping of a prisoner in lawful custody, a crime, if, as the result of such carelessness, a person escapes. This being true, can it be said that the legislature intended to apply the exception contained in section 2 of article 2, supra, to the crime of carelessness permitting a person to escape? If we hold to such a view, it will be seen that section 2 of article 14 will be of no force whatever in so far as it attempts to make carelessness the basis of a crime, as we

cannot think it possible that any person may be found guilty of simply carelessly doing a criminal act if, before conviction could be had, it is necessary for the prosecution to prove beyond a reasonable doubt that he committed such act with a criminal intent, or that he did not commit it, or make the omission charged under an ignorance or mistake of fact. An examination of the language as used in denouncing the crime of carelessly allowing an escape, together with that used in the fifth subdivision of section 2 of article 2, *supra*, demonstrates that the latter can have no application to the former. The word "carelessly," as used in the law, does not import a criminal intent. It is clearly apparent that it was the intention to make the crime complete without regard to the intent; that the fact that, by reason of carelessness alone, a person might escape, was in the mind of the legislature a sufficient reason for punishment. If, then, carelessness alone was the crime sought to be punished, it follows that the intent with which the act was committed is immaterial, and an ignorance or mistake of fact which would disprove a criminal intent would be no defense to the charge. If, under the statute, it is unnecessary to prove or establish a criminal intent, to show that no such intent existed would be no defense. As we view this law, it is of that class of prohibitive statutes which are designed for the protection of the public, such, for instance, as statutes which prohibit the sale of intoxicating liquors without a license, or to prohibit such sale to minors, or prohibit the sale of adulterated goods, or which prohibit sexual intercourse with a girl under 16 years of age, or keeping a house of ill fame, or bigamy, and other statutes of like character. In *Com. v. Sellers*, 130 Pa. St. 32, 18 Atl. 541, 542, a case arose very similar in principle to the one we are here considering. *Sellers* was indicted and convicted for the sale of liquors to minors. It was contended upon appeal that the trial court erred in not quashing the indictment, because it did not aver that the defendant knowingly and willfully furnished the intoxicating liquors; and upon this the court said: "The subject of complaint in the first and second specifications is that the court erred in not quashing the indictment before a jury was sworn, because it does not aver that the defendant knowingly and willfully furnished the intoxicating liquors, etc. To that it may be answered that the indictment is not under the former law, but under the seventeenth section of the act of May 13, 1887, in which the words 'knowingly' and 'willfully' are not employed. It charges the facts substantially in the language of the act prohibiting it, and prescribing the punishment, and is therefore sufficient, according to the provisions of our Code of Criminal Procedure." The same principle was afterwards affirmed in a later case,—*Com. v. Holstine*, 132 Pa. St. 357, 19 Atl. 273. In *Com. v. Boynton*, 2 Allen, 160, a case arose where a man was

convicted of the sale of intoxicating liquors, although he did not know or suppose the liquors sold by him to be intoxicating; and it was held that it was not necessary to allege or prove that the person charged with the offense knew the illegal character of the act, and, in discussing the question, the court takes occasion to lay down the following as the correct doctrine: "The court are of the opinion that the sale of intoxicating liquors, in violation of the statute prohibition, is not one of those cases in which it is necessary to allege or prove that the person charged with the offense knew the illegal character of his act, or in which the want of such knowledge would avail him in defense. If the defendant purposely sold liquor which was, in fact, intoxicating, he was bound at his peril to ascertain the nature of the article which he sold. Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises, unless he knew that he could do so lawfully, if he violates the law he incurs the penalty. The statutory rule that every man is conclusively presumed to know the law is sometimes conducive of hardship in particular cases, and the hardship is no greater where the law imposes the duty to ascertain a fact." This opinion was afterwards cited with approval in *Com. v. Goodman*, 97 Mass. 117, and in *Com. v. Hallett*, 103 Mass. 452; and in the same state the principle announced has been held applicable to bigamy, and also in case of adultery. *Com. v. Elwell*, 2 Metc. (Mass.) 190. And to the same effect is *Harding v. People*, *supra*. As we construe the law, it is unnecessary to allege an intent where the statute does not make the intent a necessary ingredient of the offense, and this view of the law appears to be well supported by the adjudicated cases.

The fourth and fifth errors assigned arise on instructions 16, 17, and 18, and will be considered together. In instructions 16 and 17 the jury were advised that, in determining the carelessness of the defendant, they might consider the gravity of the crime with which the prisoners were charged, their sentences, physical strength, etc.; that what might be ordinary care for the keeping of prisoners held for petty crimes, or where prisoners were weak and infirm, might be gross negligence in the former. And in the eighteenth instruction the court told the jury, in substance, that it was the duty of the jailer to use the bars, bolts, and locks in a way likely to prevent escapes, and in the way they were planned to be used for safe-keeping. These instructions are objected to, because, as stated, the crime would be complete, whether the negligence was gross or otherwise, if thereby the prisoners escaped, and for the further reason that instruction 18 is argumentative. These objections are not well taken. As a matter of law, it would not be negligence to permit a person accused of petty crime, or who was weak or infirm, liberties which

should not be granted to prisoners under long sentences in the penitentiary, or who were awaiting trial charged with the crime of murder. In the former case there would be but small incentive to escape, while in the latter there would exist at all times, in the mind of the prisoner, an uncontrollable desire, as well as an inducement, to escape. This fact is one within the common knowledge of all, and should especially be in the mind of a person who assumes the responsible position of a jailer; and, this being true, it was not error for the court to instruct the jury that the negligence of the defendant should be considered with reference to such fact. Neither was it error to instruct the jury that it was the duty of the defendant to use the jail appliances in the way they were planned to be used. Bars, bolts, and locks are procured to be used for the safe-keeping of prisoners, and if the jailer is negligent in using these, as intended, and thereby makes it possible for prisoners to escape, he is guilty of that degree of carelessness which the law intends to punish.

The sixth objection raised charges that "the instructions as a whole are argumentative, inconsistent, and contradictory, and convey to the jury that the court is of the opinion that the defendant is guilty, and give undue prominence to the territory's side of the case." Counsel for appellant fail in any manner to point out the portions of the instructions that are either inconsistent or contradictory, or the other features which are, as they state, prejudicial, and we do not think we should be asked to search the record to find such errors.

The seventh objection relates to the sufficiency of the evidence. It is asserted that William and Robert Christian and James Casey were not lawfully held in the jail, under the evidence in the case, and that the instruction of the court to the effect that, if the jury should find that they were held by virtue of orders of the courts in Pottawatomie and Canadian counties, then they should find that they were lawfully held, is erroneous; that the only authority of a jailer is the order of commitment. Even if we could consider the contention raised by counsel for appellant, we would hold that, where the orders were shown to have been issued by the courts, the presumption obtains, to the effect that they were delivered to the jailer, and that it would be incumbent upon him to show that they were not so delivered, and that he was not lawfully holding the prisoners; but it might be well also to state in this connection that, where a jailer receives a prisoner unlawfully, he cannot be permitted to show his unlawful act, for the purpose of escaping the punishment which the law justly apportions to those who assume a public duty, and willfully or carelessly perform such duty.

The other assignments of error are waived by virtue of the agreement. We are of the opinion that no prejudicial error has been

shown by this appeal, and that the judgment of the lower court should be affirmed. The other justices concurring.

(7 Wyo. 43)

KUHN v. McKAY.

(Supreme Court of Wyoming. July 7, 1897.)

PLEADING—VARIANCE—AMENDMENT—EVIDENCE OF VALUE—DEMAND—PLACE OF CONTRACT—LIMITATIONS—ACKNOWLEDGMENT AND PART PAYMENT—PAROL EVIDENCE—CONDUCT OF TRIAL—HARMLESS ERROR.

1. Rev. St. 1887, § 2642, provides that no variance between pleading and proof is material unless the party shows that he has been actually misled in a particular respect to his prejudice. Section 2643 provides that, when the variance is not material, the court may order an immediate amendment. Section 2644 provides that, when the allegation is unproved in its general scope and meaning, it is not a case of variance, but a failure of proof. A petition treated the contract sued on as one to pay \$2,500 in 500 shares of stock in a corporation, as part of the price of realty sold defendant by plaintiff. The answer admitted the contract to deliver the shares as part of the price, but denied that they were to be taken as a substitute for a fixed sum of money, and denied any money liability in the first instance. *Held*, the proof having sustained the answer, that it was merely a harmless variance, and not a failure of proof.

2. Where an amendment might have been allowed to cure a variance, the judgment will not be disturbed because no formal amendment was made.

3. Evidence of a sale of 100 shares of stock for \$500, which was the aggregate par value of the shares, justified a verdict valuing at \$5 per share other shares of stock in the same corporation.

4. Where defendant agreed to deliver shares of stock to plaintiff, but the stock was not issued for 2½ years after the time fixed for delivery, and defendant stated at different times that plaintiff would get the stock as soon as it was issued, and no objection was ever made that plaintiff did not demand the stock at the place fixed for delivery, a formal demand at such place was waived.

5. Plaintiff executed in Utah a deed of property in Wyoming, and placed it in escrow in the former state, at the time executing an agreement authorizing delivery of the deed to defendant on his paying to plaintiff a certain sum payable in Utah. By its terms, such agreement was to "terminate" 4½ months later, but nothing was done thereunder; and 9 months later, in Wyoming, plaintiff conveyed the property to defendant, who then executed a bond, whereby he agreed to pay the price named in the prior agreement, if he retained the property after a certain time. Demand for payment of the price in Utah was waived by defendant. *Held*, that the cause of action for the price arose in Wyoming, and not in Utah.

6. Where a purchaser of land agreed to pay part of the price in money and part in stock in a corporation to be subsequently formed, the payment of the money portion of the price, coupled with a written acknowledgment that the purchaser would get the stock as soon as it was issued, and the further fact that the stock was afterwards issued, started anew the statute limiting the purchaser's cause of action for the price, and this, though the statute contained no provision as to part payment or acknowledgment.

7. In an action for the value of shares of stock which defendant had agreed to deliver, error in permitting plaintiff to testify what he claimed to be due, and whether he claimed interest thereon, was harmless, where the only value of the stock which was testified to was the sum that he stated he claimed.

8. In an action on contract, it appeared from testimony that the agreement had been reduced to writing. It also appeared, however, that the writing was not within the jurisdiction of the court, and it was ruled that it need not be produced. *Held*, that any error therein was cured by the subsequent introduction of the writing, where the jury could not, under the instructions, have considered the verbal statements as to the agreement, and no sufficient motion was made to strike out such statements.

9. An attorney employed by plaintiff to secure a settlement of the claim in suit, and to demand payment thereof, might properly state, as a preliminary matter, the amount which it was determined by plaintiff and himself should be demanded.

Error to district court, Sweetwater county; Jesse Knight, Judge.

Action by George McKay against Adam Kuhn. From a judgment for plaintiff, defendant brings error. *Affirmed*.

Evans & Rogers, for plaintiff in error. C. C. Hamlin and Clark & Breckons, for defendant in error.

POTTER, J. In this case, the defendant in error, George McKay, brought suit against Adam Kuhn, the plaintiff in error, to recover a balance of \$2,500 and interest, alleged to be due upon the purchase price of certain mining property situated in Fremont county, in this state, sold by the former to the latter. By the allegations of the amended petition, the indebtedness was averred to have existed on the 21st day of May, A. D. 1888; and the plaintiff in error (who will, for convenience, be referred to as the "defendant") then promised to pay the same in nonassessable stock of the Hub Gold-Mining Company, a corporation duly organized and existing under the laws of the state of Massachusetts, and doing business in the state of Wyoming. It was further alleged that the defendant had neglected and refused to deliver said stock, but that in the year 1893 he had, as the result of a suit instituted by him in 1892 against said company, for the recovery of \$25,000, caused the entire property of said company to be sold to Edward Rosenbaum, who had become the assignee of the judgment obtained by the defendant in said suit; that thereby the stock in said company had become valueless. The prayer of the amended petition was for judgment for said amount, with interest from June 25, 1891. The answer of the defendant denied any indebtedness, as well as any neglect or refusal to deliver the stock, and alleged that defendant had at all times been, and still was, ready, able, and willing to deliver the same upon the request of the plaintiff. The suit against the mining company and the sale of its property were admitted, but that the stock had become valueless was denied. As an affirmative defense, it was alleged substantially that the purchase of the property by the defendant occurred under a contract in writing made at Ogden City, Utah, on the 1st day of March, 1887, between defendant and the plaintiff and one James Kime, where-

by it was agreed that the purchase price of the property was to consist of \$6,000, to be paid to each of the vendors, Kime and McKay, at the office of A. Kuhn & Bro., in Ogden City, Utah territory, and the delivery to each of said parties of 500 shares of the capital stock fully paid up and nonassessable of a mining corporation to be organized on or before July 10, 1887; and it was alleged that said defendant, since the making of said contract, had been, and was, able and willing to convey to the plaintiff said shares of said capital stock. As a further defense, the statute of limitations was pleaded. In the reply, the plaintiff alleged that the agreement set forth in the answer was entered into at Miners' Delight, in Fremont county, Wyo., and that, by the terms of said agreement, the plaintiff and said Kime had agreed to sell and convey the property described in the answer to the defendant, and on the 21st day of May, 1888, did convey the same by deed, in consideration of which the defendant then and there agreed to pay the plaintiff \$8,500 for his share of the property sold, and, as part payment, agreed to deliver to the plaintiff 500 shares of the capital stock of the Hub Gold-Mining Company, fully paid up and nonassessable, of the actual and par value of \$5 per share, and of the total value of \$2,500. Narrowed down, the issue presented by the plaintiff was that the balance of the purchase price of the property was a fixed sum, which the defendant agreed to pay in stock of the mining company, which he had entirely neglected to do, but had rendered the stock valueless, and hence was still indebted for such balance. The answer of the defendant, on the other hand, controverts the allegation or theory that there was any money liability for such balance, but presents the agreement as one requiring only delivery on the part of the defendant of 500 shares of the capital stock of a certain mining company, regardless of the actual value thereof. It is insisted that the verdict is not sustained by sufficient evidence, and is contrary to law, for the reason that the evidence fails to sustain the averments of the petition, and that, if any liability of the defendant is disclosed, it is in the nature of damages for breach of contract, which were not recoverable in this action, inasmuch as the petition was in the form of a count in *indebitatus assumpsit*: one state of facts being averred, and an entirely different state of facts proven. The practical effect of this contention is to charge a fatal variance between the pleading and proof. The case was tried to a jury, and a verdict returned in favor of the defendant in error for the sum of \$3,786.66, upon which verdict judgment was subsequently rendered, motion for a new trial having been duly filed and overruled, to which exceptions were properly preserved.

It appears from the evidence that the agreements between the parties were reduced to writing, and that, until after the commence-

ment of the trial, the written contracts were in the possession of the defendant below, and were produced by him upon the trial, and introduced in evidence by the plaintiff. Plaintiff's Exhibit A, which bears an earlier date than the other of the two contracts found in the record, and which is dated March 1, 1887, and was executed at Ogden, in the then territory of Utah, after reciting that Kime and McKay had theretofore executed a deed to Kuhn, conveying the mining claim in question, and had placed said deed in escrow at the Commercial Bank of Ogden, the time for delivery not having expired, and the conditions of said escrow not having been performed, and it being the desire of the parties to substitute other provisions for the delivery of such deed, provides as follows: "Now it is agreed that said deed shall be delivered to said Adam Kuhn, and said bank is authorized so to deliver it on said Adam Kuhn paying to said parties of the first part each six thousand dollars, in all \$12,000.00, to be paid at the office of A. Kuhn & Bro., Ogden, Utah, and on said Adam Kuhn delivering to each of said parties of the first part 500 shares of the capital stock, fully paid up and nonassessable, of a mining corporation organized or to be organized on or before July 10, 1887, and to include in its property said mining claim." The following clause also appears in said agreement: "And this agreement is to terminate July 15, 1887." This agreement is signed by James Kime and George McKay. The other agreement is in the form of a bond signed by Adam Kuhn, to which is appended a memorandum signed by the three parties. This instrument is dated May 21, 1888, and, according to the undisputed testimony, was made and signed at Miners' Delight, in Fremont county, Wyo. By its terms, Adam Kuhn acknowledges himself bound unto said James Kime and George McKay "in a certain sum of money and a certain sum of stock, payable in the office of A. Kuhn & Bro., Ogden, Utah, stated in a certain agreement between the parties hereto, dated March 1, 1887." The condition of the obligation, in substance, is that if said Kuhn shall on or before the 1st day of January, A. D. 1889, make, execute, and deliver to said Kime and McKay a good and sufficient deed conveying to them, with as good or better title than by him received from them, a certain mining claim therein described, which is the identical claim mentioned in the agreement of 1887, then said obligation is to become void. The memorandum attached to the bond is as follows: "It is understood by the parties hereto that this bond is made for the purpose of securing the said James Kime and George McKay in transferring the property herein described to the said Adam Kuhn, for the purpose of applying for patent thereon, and making a sale of said mining property, and to bind the said Adam Kuhn to return said property by sufficient deed if said sale is not

consummated." Contemporaneously with the execution of said bond, a deed for the property was delivered to Kuhn; and although, upon the trial, there seemed to be some difference between the opposing parties as to whether it was the same deed which had been placed in escrow or not, I am of the opinion that we must construe the testimony as unmistakably showing that the deed which had been placed in escrow had been returned to the vendors, and that a new deed was executed and delivered. It is, however, probably immaterial whether the deed which was delivered was the same one which had been in escrow or not. The money part of the consideration, viz. \$6,000, or, at least, the greater part of it, was subsequently paid to the plaintiff by Kuhn; but the first installment thereof was not paid until the spring of 1889, at which time the plaintiff visited Ogden, on the invitation of the defendant, for the purpose of receiving the money. The remainder of such sum which remained unpaid in 1889 was not paid until the summer of 1891, if, indeed, a small portion of it, at least, did not remain unpaid until 1893, according to the testimony of Mr. Vidal, one of the witnesses for the plaintiff. The shares of stock were not delivered at any time, but were tendered upon the trial. The plaintiff introduced some testimony for the purpose of establishing the value of the shares of stock which he was to receive, and the court instructed the jury, in effect, that the plaintiff's right of recovery depended upon a contract whereby the defendant became liable to him for the delivery of certain mining shares, and that they were to find from the evidence the value of such shares; that if they found the shares were never delivered to plaintiff, and that he was entitled to receive them, that a contract was made, that it was binding upon the defendant, and for a consideration, then the plaintiff was entitled to recover; and that, if they found that the plaintiff was entitled to recover under the evidence, he would be entitled to recover interest from the time when he should have received the mining stock, upon the amount which they should find as the value of that mining stock; and that amount must be determined by the evidence in the case.

Upon the entire case, as presented by the pleadings and the evidence, this court is asked to declare that there was a fatal variance, and for that reason to reverse the judgment. Upon the subject of variance the provisions of our statute are as follows: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended on such terms as are

just." Rev. St. 1887, § 2642. "When the variance is not material the court may direct the fact to be found according to the evidence and may order an immediate amendment without costs." Id. § 2643. "When the allegation of the claim or defense to which the proof is directed is unproved not in some particular or particulars only, but in its general scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof." Id. § 2644. A careful consideration of the pleadings and the proof in this case has convinced us that there is not a failure of proof, as defined in section 2644. With regard to the materiality of the variance between the allegations of the petition and reply, and the evidence, it is to be remarked that the plaintiff in error did not aver upon the trial that he was misled, as is required under the provisions of section 2642; and inasmuch as the contract in the particular respect wherein the proof differed from the allegations of the petition and reply was set out in the defendant's answer, and the contracts were in the possession of the defendant, and produced by him upon the trial, we can hardly conclude that he was in fact misled. It was, indeed, stated during the trial, by counsel for the defendant below, that they were taken by surprise by an amendment made in the morning immediately preceding the trial, which amendment seems to have consisted only of a change in date, and on account of which alleged surprise an adjournment was taken to permit the defendant to procure the contract, which he had for some reason failed to bring with him; but during the entire proceedings, so far as the record discloses, not the slightest intimation was made that they were misled in the respect to which it is now claimed there was a variance. The par value of the stock which was agreed to be delivered was not stated in either written agreement, but the testimony conclusively establishes the fact that it was thoroughly understood between the parties that such par value was to be \$5 per share. The amended petition treats the contract, as has perhaps already been suggested, as one to pay a balance of \$2,500 in 500 shares of such stock; while the answer admitting the contract to deliver the shares, and that the delivery of such shares constituted a part of the agreed purchase price of the property, denied that they were to be taken as a substitute or as an equivalent for a fixed or certain sum of money, and controverted the idea and allegation of any certain money liability in the first instance. It is to be observed that this conflict between the defendant's and plaintiff's pleadings constitutes the alleged difference between the allegations of the petition and the reply, on the one hand, and the proof, on the other. This being so, in view of the answer of the defendant, which sets forth the fact in this respect in accordance with the evidence, we are unable to say that he was prejudiced. *Crane v. Ring* (Kan. Sup.) 29 Pac. 696; *Herman v. Hecht*

(Cal.) 48 Pac. 611; *Crothers v. Acock*, 43 Mo. App. 318; *Stokes v. Brown* (Or.) 26 Pac. 501; *Stearns v. Reidy*, 135 Ill. 119, 25 N. E. 762; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69; *Lenke v. Daegling*, 52 Wis. 498, 9 N. W. 390. In *Pope v. Allis*, supra, the court, in its opinion, say: "The answer of the plaintiffs in error denied that the contract provided for the delivery of the iron in Milwaukee; averred that the iron was to be delivered at Copley. We do not think that the evidence offered by defendant in error, which tended to establish the averments of the answer rather than of the complaint, was such a variance as could mislead the plaintiffs in error to their prejudice in maintaining their defense upon the merits. But, if they had been really misled, they should have proved the fact to the satisfaction of the court upon the trial. Having neglected to do this, they cannot now complain." That case arose in Wisconsin, and the point was decided under a statute similar to our own.

Both parties in the case at bar concede the purchase of the mining property. That purchase, the record shows, was actually consummated by the execution and delivery of a deed on May 21, 1888, the time alleged in the petition. Both parties, in their pleadings, conceded (and the contrary is not now asserted) that McKay was to receive a further consideration for the sale than the sum of \$6,000, provided to be paid in money; and it is likewise admitted that the additional consideration was to consist of 500 shares of stock in a certain mining company, the plaintiff below insisting by his pleadings that the stock was in lieu of a certain sum of money agreed upon as the balance of the purchase price, which was denied by the defendant. The suit was brought to recover the balance of such purchase price. The proof, which rested entirely upon the evidence offered on behalf of the plaintiff, seems to sustain the averments of the answer respecting the points of difference alluded to, and the rule of damages applicable thereto was adopted by the trial court, viz. that plaintiff could recover only the actual value of the stock if there had occurred a default in its delivery. This is the measure of damages contended for by the plaintiff in error, and he is therefore hardly in a position to complain. The case is one in which an amendment might have been allowed to correspond with the facts proven. Such an amendment would not have amounted to a change in the cause of action, which was and would have remained a claim for the balance due upon the purchase of certain mining property. In such a case the judgment will not be disturbed because no formal amendment was made. *Railroad Co. v. Caldwell*, 8 Kan. 244; *Sibila v. Bahney*, 34 Ohio St. 399; *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228, 1 Enc. Pl. & Prac. 609; *Warder v. Gibbs*, 92 Mich. 29, 52 N. W. 73; *Enright v. Insurance Co.*, 91 Mich. 238, 51 N. W. 928; *Numbers v. Bowser*, 29 Ind. 491; *Elmore v. McCrary*, 80 Ind. 544. It was held in *Sibila*

v. Bahney, *supra*, that, where the variance is such that an amendment to conform the pleading to the proof without costs would have been proper, it cannot be deemed so far material as to justify a reversal of the judgment.

In further support of the contention that the verdict is not sustained by sufficient evidence, it is urged that the shares of stock agreed to be delivered are not shown to have had any value. The evidence upon this point is meager; nevertheless, there is evidence that, at the time when the first installment of the money consideration was paid, one of the vendors, Mr. Kime, sold to the plaintiff in error 100 shares of the stock which he was to receive, for the sum of \$500, which was also its par value. Mr. Kuhn offered no denial or explanation of that purchase, and we can only conclude that it was an actual bona fide sale, and we think it sufficient to sustain a verdict placing such a value upon the stock.

It is also insisted that the defendant in error did not demand the stock at Ogden, at which place only counsel contends the agreement required the delivery. Conceding that the place of delivery as originally fixed was at Ogden, in view of the fact that the certificate of stock was not issued until November, 1891, about two years and a half after the payment of the greater part of the money consideration, as well as the fact that the plaintiff in error stated to Mr. McKay, at Lander, when a delivery of the stock was requested at that place, that he would get the stock as soon as it was issued, and a like statement contained in a letter written by the plaintiff in error to Mr. Vidal, the attorney for Mr. McKay, in October, 1891, and the fact that no objection was made on the ground that the demand was not made at the proper place, we think it clearly unnecessary that a demand at Ogden should have been shown. The law will not require a useless thing to be done. The plaintiff in error, by his own admissions, did not have the stock at Ogden, or at any other place, ready to deliver, until so long a time after the obligation to deliver it had matured that it is doubtful, at least, if, when it had been issued, the defendant in error would have been required to receive it if he had not desired to do so.

The point is strenuously urged upon our consideration that the action was barred by the statute of limitations, for the reason, as contended, that the cause of action arose in Utah; and in respect to the statute of limitations it is controlled by section 2379 of the Revised Statutes of 1887 of this state, which provides that if, by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state. The fact that Kuhn had continuously resided in Utah during the period in question was brought out upon cross-examination of the defendant in error, when a witness in his own behalf; and, to further establish this particular affirmative defense, certain provisions of the Utah statute upon the subject were of-

fered in evidence, and, upon objection, they were rejected by the court. This ruling is assigned as error. The statute of Utah offered in evidence is incorporated in the record, by which it appears that the period for bringing the action upon any contract obligation or liability founded upon an instrument of writing, except those mentioned in a preceding section, is limited to four years. The limitation upon such causes of actions prescribed by the statute of this state is five years (section 2369, Rev. St.), unless a cause of action arose in some other state or country, and it is there barred. If, however, the laws of Utah are not applicable, the action would not be barred under section 2369, for the reason, if no other, that the plaintiff in error was not a resident of this state. Section 2378, Rev. St. In the first place, the action cannot be said to be affected by the Utah statute, unless the cause of action arose in that state. The first contract, that of March, 1887, was, it is true, executed in Utah; but, under that contract, no sale of the mining property to which it related was then made, although a deed for such property was in escrow, and, by the terms of said contract, was to be delivered upon the performance of certain conditions. It was to terminate on the 15th day of July, 1887. Up to that time nothing seems to have been done towards completing the sale; and, as I understand the evidence, the deed which had been in escrow had been returned. On the 21st day of May, 1888, in this state, the property was conveyed by a deed duly executed and delivered, and at the same time the plaintiff in error, the purchaser of said property, executed a bond to secure the vendors for a return of said property by due and proper reconveyance on or before the 1st day of January, 1889; and, if no such reconveyance was made, then the plaintiff in error, under his bond, was obligated to pay the purchase price, the amount of which was determined by a reference to the contract of March, 1887. It is doubtful, to say the least, whether the plaintiff in error was previously under any obligation whatever to receive the deed which was in escrow, or to pay the money or any other consideration. He had not signed the escrow agreement; had not, at least in writing, agreed to buy the property or pay for it; and it does not appear that he had been placed in possession of the property. A new deed was delivered in May, 1888, and an obligation then entered into by the plaintiff in error to pay the purchase price if he retained the property. The contract, therefore, upon which the liability of plaintiff in error depended, was made in Wyoming, and not in Utah. The fact that the escrow agreement was referred to, to determine the precise amount of the purchase price, does not, in my judgment, alter the situation. We are, on the other hand, inclined to consider the contract as originally providing for the payment of the money and the delivery of the stock at Ogden, Utah, but

do not regard that fact as controlling, for several reasons, some of which have already been stated: First. The subsequent voluntary payment of part of the money in Wyoming, and the statement or promise made to deliver the stock as soon as it was issued, without objecting to the place where the request for the stock had been made, or any condition as to place of delivery being attached to such statements, must be held to have operated as a waiver of the necessity for a formal demand or delivery in Utah. Second. The part payment of the money portion of the purchase price within four years before the commencement of the suit, coupled with the written acknowledgment or promise of the plaintiff in error, in October, 1891, that the defendant in error would get the stock as soon as it was issued, together with the further fact that the stock was afterwards issued, in November, 1891, had the effect of starting the statute of limitations anew; and this would be true whether the statute of Utah contained a provision to that effect or not, unless, indeed, it expressly provided to the contrary, and that we are not required or permitted to presume.

If the writer of this opinion is not mistaken, the statute of Michigan was silent respecting part payment. Nevertheless, the courts of that state uniformly held that a part payment operated as an acknowledgment of the continued existence of the demand, which would take it out of the statute of limitations. *Miner v. Lorman*, 56 Mich. 212, 22 N. W. 265. Such, also, was the law in respect to acknowledgments as announced by the English courts, under the original statute of limitations (21 Jac. I.), although that statute contained no provision concerning them. The fact that such part payments and written acknowledgments had been made was before the court at the time of the offer of the Utah statute. Upon either phase of the question, that statute was ineffectual to bar the claim sued upon, and was properly excluded.

The remaining assignments of error relate to the ruling of the court upon matters of evidence, and the refusal of certain instructions to the jury, proffered by the plaintiff in error. These we will dispose of in their order.

The plaintiff below was permitted to testify that he still claimed as due him for the stock "\$2,500, as to what the stock was worth then," and that he claimed interest. It is contended that the reception of such testimony violated the rule against permitting a witness to fix the amount of damages or injury, and allowed the witness to determine the measure of damages. It does not seem clear to me that the testimony went to that extent. The witness was asked what he "claimed" to be due, and if he claimed interest. The questions were doubtless immaterial, but we do not think that the plaintiff in error was prejudiced thereby. The only value of the stock which was testified to was the sum which he stated he claimed. If the jury found that

the defendant in error was entitled to recover, they had no evidence of any other value. If the proposition includes the contention that McKay was testifying to the value, and was not a competent witness upon that subject, we suggest that the plaintiff in error had all the advantage before the jury which could be derived from the fact that his knowledge of such values was limited, if, indeed, he had any knowledge at all.

Previous to the introduction of the contracts in evidence, some testimony of the defendant in error and the witness James Kime, as associate vendor, had been received upon the subject of the sale of the mining property, and the agreement between the parties. Upon the disclosure that such agreements had been reduced to writing, it was discovered that they were not within the jurisdiction of the court, whereupon it was ruled that it was unnecessary for the defendant in error to produce them. This is assigned as error. Contrary to the view of counsel, we think the error, if any, was cured by the subsequent introduction of the written agreements, as, under the instructions of the court, it can hardly be held that the jury considered, in determining what the contract was, the verbal statements of the witnesses. It is true that a motion was made to strike out all of the testimony of those witnesses relating to the sale and the agreement, which motion was overruled, but the motion as made was too broad and indefinite. Some of the testimony relating to the sale and the agreement was entirely proper, such as the par value of the shares of stock to be delivered, the execution and delivery of the deed, and the place of its delivery. It does not seem possible, moreover, that the testimony respecting the agreement, in so far as it may have conflicted with the terms of the written contract, could have resulted in any prejudice to the plaintiff in error, in any view of the propositions upon which the case was finally submitted to the jury.

Objection is taken to the ruling of the court with reference to certain testimony of the witness Vidal, who, as an attorney for the defendant in error, had entered into some negotiations by letter with the plaintiff in error for a settlement, and was employed to demand payment of the amount claimed to be due. In explanation of the settlement which was made, which included some of the payments made upon the purchase price of the property, he was permitted at the outset, over the objection of counsel for the plaintiff in error, to state the amount which it was determined should be demanded. The fact of the demand was competent. His statement was that the amount found due and demanded was \$4,000, including an amount for labor, and, in addition thereto, 500 shares of the mining stock. The trial court held that such statement was preliminary only, and refused, upon motion, to strike it out. We find no prejudicial error in these rulings. He subsequently testified that, upon a settlement which

was made in his presence, the plaintiff in error had agreed that the amount of money due to the defendant in error was \$3,600, and that a settlement was made on that basis. While it may be true that, so far as such matters affected by the settlement were not connected with the purchase price of the mining property, they were immaterial, the testimony respecting them could not, by any possible presumption, have influenced the verdict.

The plaintiff in error submitted several instructions, all of which were refused. So far as they related to the measure of the damages, they were covered by the charge as given, except the second instruction, as requested, which submitted the proposition that the recovery must be limited to nominal damages. The refusal of that instruction was not error. The fourth and sixth instructions related to the alleged bar of the statute of limitations. For reasons already given, it follows that said instructions were improper. The fifth instruction was to the effect that the place of delivery of the stock would be at the place of making the contract, and that demand must be there made; that the contract was made at Ogden, and, in the absence of evidence showing a demand at that place, the plaintiff could not recover. The propositions involved in this instruction have received attention in an earlier part of this opinion. For the reasons there given, the instruction did not present the law applicable to this case; and, for the same reasons, the court did not err in refusing to give the seventh and eighth instructions, which defined the agreement of March, 1887, as the contract sued on, and under which alone the liability, if any, accrued.

This disposes of all the assignments of error. A careful investigation of the entire case and the questions involved has failed to convince us that there is any prejudicial error in the record. The judgment of the district court will be affirmed.

BRAMEL, J., of the Second judicial district, sat in the place of CORN, J., who, having been of counsel in the court below, announced his disqualification.

CONAWAY, C. J., and BRAMEL, Special Judge, concur.

(15 Utah 265)

WATSON et al. v. MAYBERRY.

(Supreme Court of Utah. June 16, 1897.)

APPEAL—FINAL JUDGMENT—FINDING OF FACTS—LOCATION OF MINING CLAIM.

1. "Final judgment," as used in the constitution of the state (article 8, § 9), means a judgment that has terminated the litigation between the parties in the court rendering it. When a motion for a new trial has been duly made, the judgment becomes final for the purposes of an appeal when it is overruled, and an appeal may be taken from such judgment within one year after the entry of such order, but an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on such appeal, unless taken within 60 days next after the order overruling such motion. Miner,

J., dissenting, holding that an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on appeal from the judgment, unless such appeal is taken within 60 days after the rendition of the judgment, under section 3635, Comp. Laws Utah 1888.

2. An appeal from an order overruling a motion for a new trial is not allowed.

3. The appellate court will not reverse a finding of fact of the trial court without finding from the evidence in the record that there was no evidence to support the finding of the court below as to the fact, or that the finding was clearly against the weight of evidence; that it was so manifestly wrong as to leave no reasonable inference from the evidence that it was right.

4. The location of a mining claim is void when its discovery point is placed within an existing valid claim.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Action by Harriet Ann Watson and David Key against Andrew P. Mayberry. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bennett, Harkness, Howat & Bradley, for appellant. C. D. Dey and S. H. Lewis, for respondents.

ZANE, C. J. The defendant applied to the United States for a patent of the Harrison mining claim, situated in West Mountain mining district, in Salt Lake county; and the plaintiffs protested, and filed an adverse claim to a part of the ground, which they alleged was included in the Diana mining claim, owned by them; and they filed a complaint in the district court on the 28th of July, 1891, in which they alleged the facts relied upon to establish their rights. The defendant filed an answer, in which he denied the essential allegations of the complaint, and set up the facts upon which he relied to establish his title. On the trial of the case, all the essential facts in issue were found by the court for the defendant, except the issue as to the discovery point of the Harrison claim. The court found the issue as to that fact for the plaintiffs,—that the discovery point of the Harrison was within the Red Rover claim. On September 30, 1896, the court rendered judgment for the plaintiffs on the findings. The defendant, in due time, entered a motion for a new trial on a statement of the case; and on December 30, 1896, the court overruled the motion, and on January 4, 1897, the defendant perfected his appeal from the judgment against him, and from the order overruling his motion for a new trial. The plaintiffs move the court to dismiss the appeal from the order overruling the motion for a new trial, because they claim that no appeal lies from such an order.

Section 3635, Comp. Laws Utah 1888, authorized appeals from numerous judgments and orders that were not final, as well as from final judgments; and section 2 of article 24 of the state constitution contains this language: "All laws of the territory of Utah,

now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the legislature." So much of the statute of the territory referred to as authorizes appeals from judgments and orders not final was repugnant to section 9 of article 8 of the same constitution, which limits appeals to such judgments as are final. The framers of that instrument doubtless believed such a rule would be conducive to speedy and complete justice. This rule was announced in *North Point Consol. Irr. Co. v. Utah & Salt Lake Canal Co.* (not yet officially reported) 46 Pac. 824.

We will now consider whether a judgment on a verdict or on the finding of the court is final when rendered, for the purposes of an appeal, when the motion is filed and notice of intention is served in due time, or whether such judgment becomes final for such purposes before the motion is overruled. In other words, the question is: Must the appeal in such case be taken within one year from the rendition of the judgment, or within sixty days from its rendition, when the exception is to the decision or the verdict, on the ground that it is not supported by the evidence, or within one year in the one case, or sixty days in the other, from the date of the order overruling the motion? Statutes providing for appeals are remedial, and they should be liberally construed, in furtherance of the remedy. *Brown v. Evans*, 18 Fed. 56; *Rutherford v. Insurance Co.*, 1 Fed. 456; *Telegraph Co. v. Eyser*, 19 Wall. 419. A judgment terminating the litigation between the parties in the court rendering it is final. The litigation is not terminated while a motion for a new trial, made within the time given by law, may be lawfully decided. Until the order granting or overruling the motion is made, it cannot be known that the judgment is final. If the motion is allowed, the litigation may continue. If it is overruled, the litigation is terminated, and the judgment then becomes final. At common law, a motion for a new trial must be made before final judgment is entered; but the statutes of this state require the judgment to be entered upon the verdict within 24 hours after it is returned, unless the court orders the case to be reserved for further consideration, or grants a stay of proceedings. Under the laws of this state, motions for a new trial in criminal cases must be applied for before judgment, as at common law; but in civil cases notice of intention to move for a new trial must be served on the opposite party, and filed with the clerk, within 10 days after verdict, or, when the trial is by court or referee, within 10 days after notice of the decision. The provision requiring the entry of judgment immediately upon the return of the verdict, or upon the findings of the court, was enacted to secure the benefit of the judgment to the successful party, to enable a lien to be secured on defendant's property without

delay. The purpose was not to prevent a review of the action of the trial court in the appellate court within a reasonable time after judgment, or after an order overruling a motion for a new trial. Divisions 1 and 2, § 3635. Comp. Laws Utah 1888, provided for appeals from final judgments, and from orders granting or refusing new trials, and from any special order made after final judgment, and from various interlocutory judgments and orders.

On appeal from final judgments, exceptions to the decision or verdict on the ground that they are not supported by the evidence cannot be reviewed unless upon appeal taken within 60 days after the rendition of the judgment. But the same section gives 60 days within which to appeal from orders granting or overruling motions for new trials, and the same time for appeals from various other orders and judgments mentioned in it. As we have said, the constitution continued in force such provisions of the statutes of the territory as were not repugnant to it. That instrument only allows appeals from final judgments; but the same exceptions may be taken, and the same errors assigned thereon, under the constitution, as could have been taken and assigned under the territorial government, with a few exceptions. While the appeal is from the final judgment, all the rulings and orders of the court that could be reviewed before upon various appeals may now be reviewed upon appeal from a final judgment, with the exception of errors in granting new trials, in refusing preliminary injunctions, and possibly some others. The party appealing must file his motion for a new trial, if he wishes to make one, with the clerk, and serve on the opposite party notice of his intention, within 10 days after verdict, or, in case of trial by the court or referee, within 10 days after notice of decision, or his right is lost. If the moving party desires a bill of exceptions or a statement, he may within the same time, or such further time as the court may allow, present it to the court, and have it settled. The opposite party has the same right to insist upon an early hearing of the motion made as the moving party has, and, if so insisted upon, no unnecessary delay, without the fault of the court, can result. A party to an action should not be required to appeal for the purpose of having the appellate court review the action of the trial court in overruling a motion for a new trial until the ruling is made. Until that time, the parties cannot know whether the motion will be granted or denied. If granted, that order cannot be reviewed. If it is not granted, the court, in deciding the motion, may convince both parties that the ruling is not erroneous, or he may remit a portion of the verdict or finding, or some modification of the judgment may be made, rendering an appeal unnecessary, in their opinion. A party should not be compelled to appeal to have an order reviewed until he knows what the order is, or until there is an order to be review-

ed and reversed or affirmed. The judge cannot tell what his ruling will be upon a motion until he considers it; much less can the parties know.

If the errors in overruling a motion for a new trial are to be reviewed on appeal from the judgment on the verdict, or on the findings, in many cases it takes much time to transcribe the evidence after judgment rendered; and the motion cannot be heard upon a statement or bill of exceptions until that is done, and the statement or bill is settled. In the meantime 60 days may intervene after judgment. In such cases, if the judgment is regarded as final for the purposes of an appeal upon its entry, the appealing party will not have 60 days within which to prepare his appeal, and to get ready for a hearing in the appellate court on the errors assigned on the order overruling his motion after it is denied, as was the case according to the law before statehood. And as to the matter of delay it may be said the judgment, when rendered on the verdict or findings, becomes a lien at once on defendant's real estate, and it may be executed at once, unless otherwise ordered by the court, or an undertaking on appeal is executed, having the effect of staying its execution, as was the case under the law before the constitutional modification. Section 3652, Comp. Laws Utah 1888, provides that, "upon appeal from a judgment, the court may review the verdict or decision, or any intermediate order, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken." The irregularity, misconduct, accident, or surprise, excessive damages, insufficiency of the evidence, or errors in law for which a new trial will be granted, occur or exist before or at the time the judgment is entered; while the order granting or overruling the motion for a new trial is made after the rendition of the judgment, but before it becomes final, if it should be held to become so when the motion is overruled. The motion for a new trial necessarily affects the judgment if granted. If not, it affirms it, and necessarily affects it in that way. A motion for a new trial on the ground of newly-discovered evidence, if granted, must be for the reason that evidence was not heard on the trial that, in the light of the affidavits, should have been. While the ruling upon the motion under the statutes in this state is usually after judgment rendered, under the common law the ruling must be before. Under our statutes, we regard it as an intermediate order, and not a final judgment. If such orders are not final judgments, within the meaning of the constitution, and cannot be reviewed on appeal from the final judgment, errors committed in making them cannot be reviewed at all.

There appears to be no sufficient reason why a judgment rendered should be regarded as final, for the purposes of an appeal, before a motion for a new trial, entered within the

10 days allowed after verdict or judgment, and within the time during which an order overruling it may be properly made; while there are very cogent reasons, as we have seen, why such judgments should not be regarded as final, for the purposes of an appeal, until that time. We construe the phrase "final judgment," as used in section 9 of article 8 of the state constitution, to mean a judgment that has terminated the litigation between the parties in the court rendering it. When a motion for a new trial has been duly made, the judgment becomes final for the purposes of an appeal when it is overruled. And we hold that an appeal may be taken from such judgment within one year after the entry of such order, but that an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on such appeal unless taken within 60 days next after the order overruling such motion. This appeal having been taken from the judgment within 60 days after the entry of the order overruling the motion, we hold the exception to the judgment, on the ground the finding that the discovery point of the Harrison mining claim was within the Red Rover claim, can be considered. Plaintiffs' motion to dismiss this appeal from the final judgment, on the ground it was not taken until after the expiration of 60 days after the judgment on the findings was rendered, and that the only errors relied upon for reversal are based upon exceptions to the sufficiency of the evidence to support the finding that the discovery point of the Harrison claim was within a patented claim, viz. the Red Rover, and on the ground of newly-discovered evidence, is denied. The motion to dismiss the appeal from the order overruling the motion for a new trial is granted.

In *Brown v. Evans*, 18 Fed. 56, the question arose under an act of congress similar in effect to the statute of this state. The question was: When did the judgment on the verdict become final for the purpose of a supersedeas, and when did the 60 days given by statute for the same begin? The court held that it did not become final for such purpose until the motion for a new trial was overruled, and that the 60 days began to run at that time. In *Railway Co. v. Doane*, 105 Ind. 92, 4 N. E. 419, the court said: "A motion for a new trial is not a collateral one, but is one directly connected with the judgment, and is essential to present for review errors occurring on the trial, and, so long as it remains undisposed of, there can be no final judgment, within the meaning of the statute regulating appeals. A pending motion for a new trial keeps the cause in the trial court, provided, of course, that the motion was seasonably made." In *Rutherford v. Insurance Co.*, 1 Fed. 456, the court used this language: "Now, the judgment cannot be said to be finally rendered until the determination of the motion for a new trial in this case. This is very clear when it is considered that the motion

might have been sustained, and in that case the effect of the action of the court would have been as if there had been no judgment, or it had been the other way. And, if the doctrine contended for by the plaintiff should be sustained, it must result that there would be a case pending in the supreme court on appeal from a judgment which was never rendered in point of fact in this court." These authorities, it is true, are law cases, and the one in hand is in equity; but the rule is established by more abundant authority in equity cases. *Memphis v. Brown*, 94 U. S. 715; *Railroad Co. v. Bradleys*, 7 Wall. 575; *Brockett v. Brockett*, 2 How. 238.

The remaining question is one of fact. The defendant insists that the court erred in finding the Harrison discovery was within the Red Rover claim. We cannot reverse for that reason without finding from the evidence in the record that there was no evidence to support the finding of the court below as to that fact, or that the finding was clearly against the weight of the evidence; that it was so manifestly wrong as to leave no reasonable inference from the evidence that it was right. It appears that the Red Rover claim was owned by one Moylan C. Fox, and had been patented prior to the location of the Harrison claim; that the defendant did not know of the Red Rover location when he located the Harrison; that he commenced a tunnel on the former, and posted his location notice on October 26, 1888, within about 21 feet of the mouth of that tunnel. This tunnel on the Red Rover ground the defendant designated in his testimony the "Harrison Tunnel." The defendant's testimony is very contradictory as to when he first became acquainted with the boundaries of the Red Rover. He stated on cross-examination that he was told in the summer of 1889 that his work on the tunnel might be stopped, and that he then came to Salt Lake City, and inquired of Mr. Fox about it. In view of this fact, and other evidence bearing on the point, it is not at all probable the defendant changed the discovery point of his claim until he knew it was on the Red Rover,—until he thought the location of the discovery on that claim would render his location void. The location of a mining claim is absolutely void when its discovery point is within another valid claim. In that case the locator can treat his location as absolutely void and make another location, placing his discovery at a point where there is valuable mineral of the character described in the laws of the United States, on ground subject to location. The defendant's first attempt to locate the Harrison claim was absolutely void, because the discovery point was on a patented claim. How or when the new discovery was made and fixed does not clearly appear from the evidence. Whether the change was made before or after the plaintiffs' location, there is room for a reasonable difference of opinion. The Diana claim was located by the plaintiffs on May 28, 1890.

The Harrison claim was surveyed by Wilder on 2d and 3d of December, 1890, more than six months after the location of the Diana. Wilder states the Harrison tunnel was 185 feet long; that he measured it at the time he made the official survey; and that the discovery shown him by the defendant was 21 feet from its mouth. He also says he was not shown a tunnel 16 or 19 feet long near which it is now claimed the discovery was placed. He also testified that, if it is now at any other point than 21 feet from the mouth of the long tunnel, it has been changed. Some of the courses and distances with respect to other points and objects mentioned in Wilder's survey corroborate his statement; while other courses and distances given with reference to other points and objects in evidence support the contention of the defendant that the discovery point shown Wilder by the defendant was where defendant claims it was, near the cut or short tunnel. There is other evidence supporting this view. However, the evidence is so conflicting on this point that there is room for a difference of opinion among reasonable men as to which was considered the place of discovery at the time Wilder made his survey, more than six months after the plaintiffs had made their location. To avail against the plaintiffs' contest, the discovery must have been placed at a point outside of the Red Rover, and within the Diana claim, before the plaintiffs' location was made.

Finally, the defendant claims the court erred in overruling his motion for a new trial, in view of the newly-discovered evidence stated in his own affidavit and the affidavits of Wilder and Gorlinski. These affiants were witnesses on the trial, and they were carefully examined by counsel for the defendant, and cross-examined by counsel for the plaintiffs at considerable length. The testimony of Mayberry and Wilder on the trial was very conflicting and unsatisfactory, and, if a new trial were granted, the evidence they propose to give would add to the contradictions on the first trial. The affidavit of witness Gorlinski relates principally to surveys made since the plaintiffs' claim was located, and is not of a decisive character. The statements in the affidavits would not be at all decisive when considered with the testimony given by the same persons on the trial of the case. We find no error in overruling the defendant's motion for a new trial. The judgment of the court below is affirmed.

HART, District Judge, concurs.

MINER, J. (dissenting). I cannot concur in the opinion of the Chief Justice with reference to the time in which an appeal should be taken from a judgment. Section 3635, Comp. Laws Utah 1888, provides that "an appeal may be taken to the supreme court from the district court: (1) From a final judgment in an action or special proceeding commenced in the court in which the same is rendered,

within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." In *White v. Pease* (decided at this term of court) 49 Pac. 416, we held that any error committed by the trial court in granting or refusing a new trial might, if embraced in a bill of exceptions or otherwise preserved in the record, be reviewed on appeal from the judgment. Section 3652, Comp. Laws Utah 1888, provides that, "upon an appeal from a judgment, the court may review the verdict or decision, or any intermediate order, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken." This court has repeatedly held that an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, unless such appeal is taken within sixty days after the rendition of the judgment; that an appeal from the judgment must be taken within one year from the time of the entry of judgment; and that the court cannot extend the time fixed by statute for taking an appeal. *Hanks v. Matthews*, 8 Utah, 181, 183, 30 Pac. 504; *Reever v. White*, 8 Utah, 189, 30 Pac. 685; *Voorhees v. Manti City* (Utah) 45 Pac. 565; *Brough v. Mighell*, 6 Utah, 317, 23 Pac. 673; *Young v. Shallenberger* (Ohio) 41 N. E. 522; *Robinson v. Orr*, 16 Ohio St. 284; *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983; *Fornl v. Yoell*, 99 Cal. 173, 33 Pac. 887; *Curran v. Kennedy*, 89 Cal. 98, 26 Pac. 641; *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689; *Fatzo v. Swasey*, 111 Cal. 628, 44 Pac. 225; *Greenwood v. Adams*, 80 Cal. 75, 21 Pac. 1134; *Mogk v. Peterson*, 75 Cal. 496, 17 Pac. 446; *Turner v. Reynolds*, 81 Cal. 214, 22 Pac. 546; *Jones v. Insurance Co.* (Utah) 47 Pac. 74; *Improvement Co. v. Beale* (Okla.) 47 Pac. 481.

The judgment in this case was rendered September 3, 1896. The appeal was taken January 4, 1897, over 120 days after the rendition of the judgment. The appeal, not having been taken within 60 days from the time of the rendition of the judgment, should be dismissed. Section 3635 expressly declares that an appeal may be taken from a final judgment within one year after the entry of the judgment. The judgment is entered when it is docketed, and from that time it becomes a final judgment. In the other case the appeal must be taken within 60 days after the rendition of the judgment; not 60 days after final judgment, but 60 days after the rendition of the judgment. This means that the appeal must be taken within 60 days from the rendition of the judgment, as this court has repeatedly held. The judgment becomes final, for the purposes of an appeal, when it is rendered, and not when the motion for a new trial is denied. The constitution, where it provides that appeals may be

taken from final judgments only, does not change or affect this portion of the statute. The legislature has fixed the time within which appeals may be taken, and this court has no power to enlarge that time.

(17 Wash. 389)

DU CLOS v. BATCHELLER et al.¹

(Supreme Court of Washington. July 17, 1897.)

PLEADING—REDUNDANT MATTER IN ANSWER—INTERROGATORIES.

1. Where a certain paragraph of the answer stated a defense, though containing redundant matter, a motion to strike the entire paragraph was properly denied.

2. A motion to strike defendant's interrogatories, filed under Hill's Ann. St. § 1661, was rightly denied, where they were directed to the discovery of facts material to the defense.

3. It was not reversible error to strike certain of plaintiff's interrogatories, where they were covered by statements in defendant's answer, verified by him personally.

4. A verdict on conflicting evidence will not be disturbed.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by John B. Du Clos against J. W. Batcheller and another. From a judgment on verdict for defendants, plaintiff appeals. Affirmed.

N. S. Porter, for appellant. John C. Kleber, for respondents.

SCOTT, C. J. The plaintiff brought this action to recover the amount due on three promissory notes, dated June 6, 1894, executed by defendant J. W. Batcheller and his wife, since deceased, to the plaintiff, aggregating the sum of \$1,000, maturing at different times, but all of them within one year from date. The defendants filed separate answers, which were, however, substantially alike, both alleging a want of consideration for the execution of such notes, and also that they were obtained by reason of certain fraudulent misrepresentations of the plaintiff. The verdict and judgment being for the defendants, the plaintiff has appealed.

The first error alleged is the refusal of the court to grant the plaintiff's motion to strike the second paragraphs of the answers, containing the allegations of fraud as to the procurement of the notes, the substance of which was that the plaintiff for a number of years had claimed to be a spiritualistic medium, and have supernatural power; that, by reason of his acts and representations, he had obtained an undue influence over the defendants, who belonged to that denomination, and that he induced them to believe that there were certain spirits which demanded that they execute the notes in question, for the purpose of what he called a materialization; that the notes were never understood to be executed for the plaintiff's benefit in any way, but simply for the purpose of accomplishing the spiritualistic object referred to; that all of said representations were false and fraudulent; that plaintiff was

¹ Rehearing pending.

an impostor, etc. The motion was directed to the whole of this paragraph. Conceding that it was redundant, and that certain parts of it would have been obnoxious to a motion to strike, the paragraph stated a defense, and the motion was properly denied.

The next error complained of was the denying of the motion to strike the defendants' interrogatories, for the reason that they were not such as were contemplated under section 1661, 2 Hill's Ann. St. These interrogatories were five in number, and were directed to the discovery of facts material to the defense. The motion was rightly denied.

Plaintiff filed two sets of interrogatories, one for the defendant J. W. Batcheller to answer, and the other for the defendant J. M. Batcheller, as administrator. The court granted a motion to strike the interrogatories submitted as to J. W. Batcheller. These were sixteen in number, and it is unnecessary to set them out in detail. Some of them were immaterial, and all of them were covered by statements in the answer of said defendant, which was verified by him personally. The said defendant was also a witness upon the trial, and it is apparent that no harm resulted to the plaintiff in consequence of the striking of said questions, and there was therefore no reversible error committed, conceding that some of the questions were competent ones under the statute.

The next error complained of was in permitting the defendant J. W. Batcheller to testify to transactions between himself and the plaintiff for a period of some 18 years previous to signing the notes in suit. The objection is not specially indicated in the brief, and we find but one in the record, which is as follows: "We object to any evidence being given in this case with reference to the matter alleged in the answer of the defendants as to the reason for the signing of these notes, as being no defense whatever," and was simply a presentation in a different form of the question raised upon the motion to strike the second defense pleaded in the answer, and was properly overruled.

Error is also alleged upon the overruling of an objection to the admission of certain letters written by the plaintiff to defendants, but these were a part of their dealings, and were relevant.

The next errors alleged are with reference to the instructions given. By the record it appears that only the second and third instructions were excepted to. The first one was immaterial, and could have resulted in no possible harm, being a statement with reference to the conduct of the trial as to the voluminous evidence admitted, but contained no intimation whatever of the court's opinion thereon. The third instruction was in the main in the plaintiff's favor, being to the effect that the notes were prima facie evidence of an honest indebtedness. The part specially objected to was contained in the following clause: "And unless the defendant has established by a preponderance of the evidence that the notes were

given without consideration, or that the consideration has failed in whole or in part," etc., that the jury should allow the plaintiff the full amount of his notes. The part criticised is the statement with reference to the failure of the consideration, the plaintiff contending that there was no evidence tending to show a failure. It was evidently intended to cover the feature of the case disclosed by the evidence to the effect that the plaintiff had represented that the execution of the notes was demanded by a certain spirit for its purposes in the matter of effecting a materialization, whatever it might be, and that such materialization had never come to pass. Whether relevant or not, we are clearly of the opinion that it could have resulted in no harm.

The next error alleged is the assertion that there was no evidence to support the defense, but this is untenable also. It is unnecessary to go into the evidence in detail. It showed, in substance, that the plaintiff had made his home at the defendants' house for a good many years prior to the execution of the notes, and had obtained a great influence over them; that they had worked in common in the matter of spiritualism, holding almost nightly communications with the spirits, as is claimed by them; also, that while the plaintiff had worked for the defendants in clearing up lands, they being farmers, and attending to an orchard, etc., he was not working for wages, but simply made his home with them, and worked as a member of the family, not continuously, but only when he felt inclined to do so; and there was testimony also to show that various sums of money had been given to him at different times by the defendants when he asked for it, aggregating several hundreds of dollars. There was a square contradiction between the testimony of the defendant J. W. Batcheller and that of the plaintiff with reference to there being any understanding that he was to have pay for his work, and also with reference to the moneys paid him as aforesaid, as well as to the circumstances attending the giving of the notes; and, if the jury believed the defendant, there was a good defense established, with which we could not interfere, however the weight of the testimony might appear to us.

The only other points alleged relate to propositions of law which are conceded, but were covered by the instructions, or as to other matters that have been sufficiently disposed of in what has been said. Finding no error in the record, the judgment is affirmed.

GORDON, ANDERS, and REAVIS, JJ., concur.

NOMMENSON v. ANGLE et al.
(Supreme Court of Washington. July 17, 1897.)
MORTGAGES—SATISFACTION OF RECORD—DEED—
SUBSEQUENT LIEN—REINSTATEMENT.

1. Without searching the records, a mortgagee accepted a quitclaim deed to the premises, and entered a satisfaction of the mortgage of record.

A subsequent mortgage had been executed to secure a loan made by M. as agent. M. was the agent of the mortgagor in delivering the deed, and when the grantee objected to it because it was merely a quitclaim, M. assured him that it was sufficient. M. did not know whether the second mortgage had been paid, but knew that the grantee was ignorant of it. *Held*, that the grantee was entitled to have his mortgage lien reinstated.

2. A subsequent assignment of the second mortgage to one for whom M. was agent did not affect the grantee's rights.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by Marie E. Nommenson against C. C. Angle and others. From a judgment giving one of defendants a superior lien, plaintiff appeals. Affirmed.

Robinson & Linn, for appellant. Geo. H. Funk, for respondents.

SCOTT, C. J. The plaintiff brought this action to foreclose a mortgage executed by the defendant Angle to one Christina Nommenson in May, 1893, and by her assigned to the plaintiff. The defendant Finch had held a prior mortgage executed in November, 1890, on the lands covered by the plaintiff's mortgage. Thereafter, in July, 1894, said defendant, in pursuance of negotiations with Angle, took a quitclaim deed to said lands in payment of his mortgage debt, and entered a satisfaction of the mortgage of record. In his affirmative answer to the complaint, Finch asked that the cancellation aforesaid be set aside, and that he be restored to his original rights under said mortgage, and that the same be decreed a prior lien upon the lands. The court having found in his favor, the plaintiff has appealed.

One Mottman was the agent of Christina Nommenson in making the loan to Angle and obtaining the mortgage security to her, and was also the agent of Marie Nommenson, the plaintiff, in procuring the assignment of said mortgage, which was alleged to have been made in December, 1894, some months after the quitclaim deed had been executed to Finch, and his mortgage satisfied of record. The plaintiff contends that defendant Finch is not entitled to any relief under the facts shown; that the discharge of his mortgage and the acceptance of the deed were due to carelessness and negligence on his part in not examining the record for subsequent incumbrances, and equity should afford him no relief. The finding of the court that Mottman, appellant's agent, had full knowledge that Finch did not know of the existence of the second mortgage, and that Mottman knew that the same had not been paid at the time of the acceptance of the quitclaim deed, is contested.

Upon the first proposition—as to whether a party in discharging a first mortgage would be entitled to be restored to his rights thereunder as against a second mortgage, then in existence, where he had failed to make any examination of the records—the authorities are conflicting. But, if the finding aforesaid of

the court is to be sustained, we think, under that finding, that the weight of authority clearly sustains the decision of the lower court. *Hitchcock v. Nixon* (Wash.) 47 Pac. 412; 2 Ping. Mortg. §§ 1241, 1243; 2 Pom. Eq. Jur. (2d Ed.) § 856. There is a conflict between the testimony of Mottman and Finch as to what took place at the time of the cancellation of the mortgage. At that time Mottman was also acting as agent for Angle, and he offered the deed to Finch. Finch says that when he discovered that it was a quitclaim deed he objected to it, and wanted to take it to his attorney, and suggested doing so, but that upon Mottman's representations to him that the deed was all right he accepted it without any investigation. Mottman concedes that he told Finch that the deed was all right, but evidently means to be understood as having advised him that it was sufficient to pass the title, and that he did not consider a warranty from Angle as of any value, in consequence of Angle's being insolvent. Mottman also says that he did not know at that time whether the second mortgage had been paid or not. He made no mention of such a mortgage ever having been given, and it is apparent that Finch did not know of it. He says that his mortgage exceeded the value of the land, and that he did not suppose any one would take a second mortgage on it. Without discussing the testimony in detail, we are fully of the opinion that it is not strong enough in favor of the plaintiff's contentions to justify a setting aside of the finding made by the lower court, and under that finding and the testimony of Finch the judgment re-establishing Finch's rights under his mortgage as a prior lien was right.

Finch also questions the finding of the court as to there having been a consideration for the transfer of the mortgage from Christina Nommenson to the plaintiff. These two parties and Mottman were related by marriage, and the testimony is not clear or satisfactory as to showing a consideration; but it is unnecessary to pass upon it, for the finding that Mottman had full knowledge of the situation is sufficient, even though he did not know at the time Finch canceled his mortgage whether the second mortgage had been paid or not. It is evident, if Finch's testimony is to be believed, that by reason of Mottman's representations as to the sufficiency of the deed Finch was induced to forego counseling with his attorney in regard to accepting it, and that he would not have accepted it had he known of the second mortgage. Had he counseled with his attorney, he would have been put upon his guard. He desired a covenant against incumbrances, and a good title. Mottman had knowledge of the existence of the first mortgage when the second one was executed. He does not claim that he thought the second mortgage had been paid at the time the quitclaim deed was accepted. He merely says he did not know whether it had been or not. It was his duty to have disclosed the situation to

the defendant Finch; at least he should have said nothing to induce Finch to forego a full investigation of the matter. Affirmed.

ANDERS, GORDON, and REAVIS, JJ., concur.

RAMAGE v. LITTLEJOHN.

(Supreme Court of Washington. July 16, 1897.)

UNNECESSARY EVIDENCE—EXCLUSION—ATTORNEY'S FEES—ALLOWANCE—PRESUMPTION OF CONTRACT—REBUTTAL—FINDINGS OF FACT—REVIEW.

1. Error cannot be predicated on the exclusion of evidence offered in proof of an admitted fact.

2. In an action to recover an attorney's fee allowed in another action, the presumptions are that it was fair and reasonable, and that there was a contract of employment.

3. Where an issue of fact is submitted under correct instructions, and the evidence is conflicting, the finding will not be disturbed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by J. F. Ramage against A. J. Littlejohn. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Sharpstein & Blattner, for appellant.

REAVIS, J. G. W. Van Fossen and respondent were attorneys at law in Tacoma, and in 1891 brought an action and obtained judgment in a suit wherein the appellant was plaintiff, and Duncan & Brown defendants, in the superior court of Pierce county. There was an attachment, pending the action, procured by plaintiff, and in the judgment the sum of \$400 was allowed plaintiff as attorney's fees. Respondent, as the assignee of Van Fossen, and for himself, brought suit against appellant in the superior court; alleging the rendition of the legal services in the suit mentioned, and alleging that the services were performed for appellant, and that the defendant promised and agreed to pay for them the sum of \$400. There were in the complaint allegations of other services by respondent for appellant. Appellant answered, denying generally all the allegations of the complaint, and alleging payment for whatever services respondent had performed as attorney for appellant.

The errors assigned by appellant are upon instructions given to the jury, and the rejection of testimony tendered by appellant. Appellant offered in evidence the judgment roll in the case of Littlejohn against Duncan & Brown, and particularly the writ of attachment, for the purpose only of enabling the jury to compare the signature of Peter O. Butts on the affidavit for attachment, and upon objection the court excluded this testimony. Upon cross-examination the respondent testified relative to the affidavit for attachment as follows: "I recognize the paper handed me, which is the affidavit for attachment on file in the case of Littlejohn v. Duncan & Brown, and notice that there is an erasure under the name of A. J. Littlejohn

in the title; also, an erasure where Mr. Littlejohn's signature appears. I do not know anything about that paper. It is not my handwriting, but it is the affidavit upon which the writ of attachment was issued." This was all the testimony of the respondent concerning this paper, and was upon his cross-examination. The appellant testified in his own behalf that his suit against Duncan & Brown was upon promissory notes indorsed to him by Peter O. Butts, and one such note so indorsed was introduced in evidence, and is an exhibit here. The testimony of appellant tended to show that Peter O. Butts, and not himself, had employed the respondent and Van Fossen to conduct the suit against Duncan & Brown, and that it was conducted in the name of appellant because of some indebtedness from Butts to appellant, and to adjust matters between them. Appellant there testified in his own favor that such an understanding existed between himself and Van Fossen. The testimony of the respondent was that he himself had prepared all the papers and conducted the litigation in the action of Littlejohn against Duncan & Brown, and that Littlejohn was to pay the attorney's fee. It is not understood that the affidavit of attachment upon which the writ was issued in that case was material in the case at bar. Appellant had testified that some papers had originally been prepared in Butts' name as plaintiff, and these were changed so that appellant appeared as the plaintiff. This was uncontradicted by respondent, and we do not see of what value the signature of Butts to the affidavit for the attachment would have been to the defendant, as tending to contradict the employment of Van Fossen and respondent by appellant, or to rebut any testimony offered by respondent. The court, in substance, instructed the jury that the amount allowed as attorney's fee to plaintiff in the action of Littlejohn against Duncan & Brown raised a legal presumption that such attorney's fee was fair and reasonable between the party and his attorney, and that the presumption was raised that Van Fossen and respondent were employed by defendant to prosecute the action; but the court also instructed that, while this was a presumption which arose upon the facts, it was a presumption that might be contradicted by evidence of an agreement between the attorneys and their client contrary to such presumption,—that is, that it might be overcome by evidence showing that such an inference should not be drawn from the facts of the record in the case of Littlejohn against Duncan & Brown,—and also instructed that the appellant must establish by a preponderance of evidence that the parties made an agreement other than as presumed from the record in the case, and that the compensation must be paid by another than the plaintiff in that case. We do not observe any error in the instructions given to the jury by the superior court. The issue submitted to

the jury was one of fact, under correct instructions from the court, and the testimony was conflicting. The jury having found in favor of respondent, it is not the province of the court to weigh the testimony or disturb the finding. Judgment affirmed.

SCOTT, C. J., and ANDERS and GORDON, JJ., concur.

RYAN et al. v. TOWN OF SUMNER.

(Supreme Court of Washington. June 23, 1897.)

RES JUDICATA—SPECIAL ASSESSMENTS—ESTIMATE OF BENEFITS.

1. An assessment for a local improvement was set aside by judgment, on the ground that it did not appear to have been made according to benefits. A reassessment was made for the same amount against each of the respective tracts as the original assessment. *Held*, that the judgment was not conclusive as between the town and the owners of said tracts, that the reassessment was not made according to benefits.

2. Where only a portion of a 40-acre tract abutting on an improved street, a special assessment could not be levied against the land not so fronting, nor could the benefits such portion might derive from the improvement in front of the other portions be taken into consideration in levying the assessment.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Separate proceedings by George H. Ryan and others against the town of Sumner, on appeal to the superior court from a decision of the town council levying a reassessment for local improvements. From a judgment for defendant, plaintiffs appeal. Modified.

Remington & Reynolds, for appellants. Thomas Carroll, for respondent.

REAVIS, J. This is an appeal from a judgment of the superior court of Pierce county affirming a reassessment upon abutting property for street improvements in the town of Sumner. The town of Sumner, in 1892, caused Main and Wood streets, within its limits, to be improved by grading and graveling, at the expense of the lots and lands fronting thereon. The original assessment made for the payment of expense of improvement was declared void in the superior court. The third finding of fact in the case at bar, on the reassessment, is as follows: "That thereafter an assessment was made against the property fronting upon said improvement, and subsequently, in action No. 10,860, in the superior court of the state of Washington for Pierce county, wherein the town of Sumner is plaintiff, and Lucy V. Ryan is defendant, and also in other actions between said town and the other parties plaintiff in this proceeding, all of which actions were brought to enforce the original assessment, said superior court of Pierce county made and entered, after a full trial, the finding of fact that said original assessment was not made according to the benefits received or accruing to the tracts of land abutting upon said im-

provements, and entered final judgment in all of said actions, setting aside said assessment, on the grounds that the same did not appear to have been made according to the benefits, and that it appeared to be in two separate assessments, being a separate assessment for Main street, and a separate assessment for Wood street, whereas the improvement seems to have been made under one contract and one single improvement." The tenth finding is: "That the said reassessment made by said council of the town of Sumner against the abutting property in question was for the same amount against each of the respective tracts of lands as the original assessment, which original assessment was set aside by the superior court of Pierce county, for the reasons hereinbefore found." The cause is a consolidated one, in which the appellants had severally appealed from the validity of the reassessment, and, by stipulation of the parties in the lower court and order entered therein, the several property owners joined in the hearing of their objections to the reassessment and their appeal here.

Two questions are involved in this appeal. Appellants contend that the third finding of fact, set out above, constitutes an adjudication in the original assessment case, and that the original assessment was not made according to benefits received by the property assessed; and it is argued that a decision in the original case was upon the same facts relating to benefits as in the present cause.

This court said, in *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367: "Besides, the first assessment, having been held void, could serve no purpose whatever in the reassessment, excepting to bring the improvement within the provisions of the charter providing for such reassessment. Before such provisions could be invoked for the purpose of providing the means for paying for the improvement by an assessment upon adjoining property, it must have appeared that theretofore there had been an attempt made to collect the cost of such improvement by an assessment. Except for this single purpose, the first assessment and all proceedings thereunder could have no force in determining the legality of the reassessment." See, also, *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364.

We do not think the trial in the superior court upon the original assessment was conclusive of any fact that appeared in issue at the trial upon the reassessment. But the appellant Wood is the owner of 40 acres of land, which, when assessed, was the property of Lucy V. Ryan, and was known as the "William N. Kincaid Donation Claim." It is a square tract of land, wholly unplatted, used exclusively for farm purposes, and abutting on the improvement for a distance of 640 feet. The entire tract was assessed for this improvement. The estimate of the benefits and assessment must be confined to that portion of the land fronting on the improvement,

It was not competent to tax the land not so fronting, or to take into consideration the benefit such portion might derive by improving the street in front of other portions. It appears plainly that a large portion of this tract of land did not abut on the improvement. We see no way that the assessment can now be segregated, so that the payment of the tax can be made by the portion which does abut upon the improvement.

Some question is made by respondent of the appeal taken by Wood, but the record here discloses that he has properly appealed. The judgment of the superior court is modified so that the southeast quarter of the William N. Kincaid donation claim, containing 40 acres, is relieved from the lien and charge of the assessment, and in all other regards it is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

COMMERCIAL NAT. BANK OF SEATTLE v. JOHNSON et al.

(Supreme Court of Washington. June 28, 1897.)

COSTS ON APPEAL.

Where two appeals are taken from a judgment, and respondent files only one brief, and the judgment is reversed as to one appellant, and affirmed as to the other, it was not error to tax the costs of respondent's brief to the appellant against whom the judgment was affirmed.

Motion to strike out two items of cost taxed. Denied.

For former opinion, see 48 Pac. 267.

Chas. E. Patterson and Allen & Powell, for appellants. Blaine & De Vries, for respondent.

PER CURIAM. Appellant Klosterman moves to strike two items of cost taxed against him in this action, one being for the respondent's brief, and one the attorney's fee provided by statute. There were two appeals, one by Dougan, and one by Klosterman. Their interests were conflicting, and they filed separate briefs. The respondent, however, answered them both in one brief. The judgment was reversed as to Dougan and affirmed as to Klosterman. 48 Pac. 267. Costs were taxed in favor of Dougan against the respondent, and in favor of respondent against Klosterman. No cost bill was filed by the respondent, and costs were taxed in his favor against Klosterman by the clerk, as provided by Rule 14 (40 Pac. x.) in such cases.

It is objected by the respondent that we cannot entertain this motion, for the reason that the remittitur has been sent down. Owing to the practice not to enter judgments until petitions for rehearing have been disposed of, and for the remittitur to go down immediately thereafter, parties have no notice of the terms of the judgment before it is entered; and, in instances where there has been a mistake in

the entering of the judgment, we have recalled the remittitur, on the ground that the same was not the judgment of the court, and the remittitur had issued without authority. But in this instance there was no mistake. The respondent was entitled to the attorney's fee as against Klosterman, and the respondent's brief was not in such a condition that the clerk could have separated it, and taxed a part only against Klosterman. If a separate brief had been filed against him, that only would have been taxed, or perhaps, if a separate part of the single brief filed by the respondent had been devoted to answering his brief, only that part would have been taxed; but such was not the case. The matters relating to the several appeals are so intermingled through the respondent's brief that it was the clerk's duty to tax the whole of it, in the absence of any order by the court. The court might properly have allowed costs for only a part of the brief to be taxed, which would have made a difference of a few dollars in favor of Klosterman, and likely we would have done so had application been seasonably made therefor, or attention called thereto. Properly, there should have been a request before judgment for such a course in case of an affirmance as to one, and a reversal as to the other. But there was no such request in this case, and we would not recall the remittitur at this time for that purpose. Motion denied.

FISHER v. KIRSCHBERG.

(Supreme Court of Washington. July 2, 1897.)

APPEAL—FAILURE TO FILE EXCEPTIONS.

Under Act March 8, 1893, § 3 (providing that an exception may be taken by filing written exceptions within five days after the filing of a decision, or within five days after service of a copy of such decision, or of written notice of the filing thereof), an appeal will be dismissed though no written notice was served, if exceptions are not filed within five days after appellants have actual notice of the entry of the judgment appealed from.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by George E. Fisher against Joseph I. Kirschberg. Judgment for plaintiff. Defendant appeals. Affirmed.

W. L. Marquardt and Clarence P. Brown, for appellant. Allen Weir, for respondent.

GORDON, J. This appeal is from a decree of the superior court of Clallam county. Respondent has moved to strike from the record what purports to be exceptions to certain findings of fact and conclusions of law, and to dismiss the appeal on various grounds, only one of which will be noticed. The decree was entered on October 24, 1896. No exceptions to the findings or conclusions were filed until January 4, 1897. Section 3 of the act of March 8, 1893 (Sess. Laws 1893, p. 112), provides that exceptions to the findings of fact or conclu-

sions of law may be taken "by filing like written exceptions within five days after the filing of the report or decision, or * * * within five days after the service on such party of a copy of such report or decision, or of written notice of the filing thereof." Appellant's counsel urge that no notice was ever given to them of the judgment or decision, and that these exceptions were filed immediately upon discovery that a decision had been rendered, and a judgment entered. The record shows, however, that appellant had actual knowledge of the entry as early as December 22, 1896, on which day he made a motion in writing, supported by affidavit, to reraise costs in the case. Actual knowledge of the existence and entry of the decree is equivalent to written notice, and it was appellant's duty to have filed his exceptions within five days after the existence of the decree became known to him. In *Irwin v. Waterworks*, 12 Wash. 112, 40 Pac. 637, we said: "The only effect that the want of such notice could have would be to extend the time within which the appellant could file his exceptions to five days from the time he received notice." See, also, *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56; *Braely v. Marks*, 13 Wash. 224, 43 Pac. 27. The motion to strike the exceptions must be granted, and upon the record the decree must be affirmed.

SCOTT, C. J., and REAVIS, DUNBAR, and ANDERSON, JJ., concur.

(17 Wash. 282)

CITY OF SEATTLE v. WHITTLESEY,
County Treasurer.

(Supreme Court of Washington. July 7, 1897.)

DELINQUENT TAXES — LOCAL IMPROVEMENT — ASSESSMENT — REMISSION OF PENALTY.

Laws 1897, c. 71, § 118, remitting all penalties in excess of 6 per cent. per annum from delinquency, "on all state, county, school district, road district, and municipality taxes levied for the year 1895 and previous years, and which have not been sold at tax sale to parties other than the county or municipality for which the original tax was levied," does not include assessments levied for local improvements.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by the city of Seattle to restrain Charles F. Whittlesey, as county treasurer and ex officio tax collector of the city of Seattle, from remitting any portion of the penalty and interest on delinquent assessments levied for local improvements. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

James F. McElroy and John B. Hart, for appellant. John K. Brown and F. B. Tipton, for respondent.

PER CURIAM. The only question to be decided in this case is whether the provision of section 118 of chapter 71 of the Laws of 1897 that "all costs, penalties and interest, in

excess of six per cent. per annum from the date of delinquency, on all state, county, school district, road district and municipality taxes levied for the year 1895 and previous years, and which have not been sold at tax sale to parties other than the county or municipality for which the original tax was levied, be and are hereby remitted, and the county treasurers of the respective counties in this state are authorized to receive and receipt for the net amount of such taxes, as originally levied, with six per cent. interest per annum from the date of delinquency," with a provision in relation to the time of the payment of the taxes, includes assessments levied for local improvements. The lower court held that it did not. We think the court properly construed the act, and the judgment will be affirmed.

(17 Wash. 256)

SPOUL v. CITY OF SEATTLE.

(Supreme Court of Washington. June 26, 1897.)

DEFECTIVE SIDEWALKS — NOTICE OF CLAIM — QUESTION FOR JURY.

1. Evidence was sufficient to show that a claim for injuries received through a defective sidewalk was filed with the city within six months after the accident, where the clerk of plaintiff's attorney testified that he served it, and a copy of the claim was identified by him without objection, and the injury was received on the 4th of January, and the action was brought in April.

2. Where an abutting owner had obtained a permit to excavate under the sidewalk, and had done so, and had placed a temporary sidewalk in its place, and subsequently removed it, and such excavation had existed for several weeks without a barrier, it was for the jury to say whether the street had remained in a dangerous condition so long that the city, in the exercise of ordinary care, could have known thereof.

3. Where a city has notice of the unsafe condition of the sidewalk, caused by an excavation made by the abutting owners therein, and failed to cause it to be made safe, it cannot escape liability because before the accident it gave the owner authority to make the excavation.

4. Where defendant has introduced evidence as to the condition of the sidewalk where the accident occurred the day after the injury, plaintiff, for purposes of impeachment, can show that its condition was other than as stated.

5. Where plaintiff, aged 57, is so injured that he is unable to perform any labor, and his earning capacity is greatly impaired, a verdict of \$5,150 is not excessive.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by William Spoul against the city of Seattle. Judgment for plaintiff for \$5,150, and defendant appeals. Affirmed.

John K. Brown and F. B. Tipton, for appellant. Brady & Gay, for respondent.

GORDON, J. This action was to recover for a personal injury alleged to have been received by the respondent from a fall through an excavation in the sidewalk and street within the corporate limits of the city of Seattle. There was a trial and judgment in favor of respondent in the superior court, from which the city has appealed.

1. The first error complained of is that

there was no proof that the claim for damages was ever presented to the city council or filed with the city clerk, as required by section 29 of article 4 of the charter of the city, and for that reason the court should have granted appellant's motion for a nonsuit. That section is as follows: "All claims for damages against the city must be presented to the city council and filed with the clerk within six months after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon pursuant to such reference. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council, and sixty days have elapsed after such presentation." Charles E. Gay, a witness on behalf of respondent, testified that on or about the 1st of February, 1896, he was stenographer and clerk in the office of respondent's attorneys, and that, under their direction, on behalf of the respondent, he served upon the city respondent's claim for damages, and a copy of such claim was identified by him, and admitted in evidence, without any objection. It is the contention of appellant in this behalf that there is no proof that the claim was served within six months after the time when such claim for damages accrued, or that it was either presented to the council or filed with the city clerk. The copy, which went into the record without objection, shows that the claim was based upon an injury sustained on the 4th of January, 1896; the claim itself was verified on February 1, 1896; and the record shows that this action was brought in April, 1896, and issue of fact actually joined within six months from the date of the injury. Manifestly, therefore, the claim, if presented at all, was presented within the time prescribed by section 29, supra. As to the further objection that the proof does not show that the claim was presented to the council or filed with the clerk, it is sufficient that the witness was permitted without objection to testify that he served the claim upon the city. In the absence of specific objection, we think it is but reasonable to presume that the service referred to by the witness was a good and sufficient legal service. The claim is addressed "to the city council of the city of Seattle," and contains the following recital: "Which said claim is herewith filed with the clerk of the said city council." Without extending the discussion on this point, we think the objection is without merit.

2. It is next contended that there is no proof that appellant was negligent in the premises, or that it had any notice, actual or constructive, of the condition of the excavation within a reasonable time prior to the accident. It is conceded that the injury occurred

at a point on Main street, in the city of Seattle, between Commercial and South Second streets. Some time prior thereto the city had given a permit to the owner of the abutting property to remove the sidewalk on the street, and excavate thereunder, for the purpose of erecting a brick building. A temporary sidewalk had been built over this excavation, and subsequently it had been removed, and "stringers" for a permanent sidewalk had been put in place; and at one end of the excavation a so-called "barrier" had been placed, extending from the outer edge of the sidewalk to the building. The character and sufficiency of this barrier were one of the disputed questions at the trial, and there was considerable evidence on the part of plaintiff tending to show that it consisted simply of an ordinary "two by four," resting loosely, one end upon a keg or barrel, and the other on a box, and that such was the condition for a period of some weeks prior to the time of the accident. There was also testimony tending to show that, from about 3 o'clock in the afternoon of the day of the accident, there was no barrier whatever to protect persons, or prevent them from falling into the excavation. The accident is alleged to have occurred between 6 and 7 o'clock in the afternoon. The street, at the point where this injury is alleged to have occurred, was in the business part of the city, and very much traveled. The excavation into which respondent is alleged to have fallen was from 10 to 12 feet in depth, and contained broken stones and bricks, against and upon which the respondent fell. From the excavation he was removed to the hospital, where he remained under medical treatment for a period of over two weeks. Considering the length of time that the street and sidewalk, at the point where the injury was sustained, remained in the condition already described, we think the lower court did not err in refusing to hold, as matter of law, that the city had no notice, either actual or constructive, of the dangerous condition of this excavation within a reasonable time prior to the accident; and it was correctly left for the jury to say, under the evidence, whether it had remained in an unsafe and dangerous condition so long that the city authorities, in the exercise of ordinary care and diligence, should have known of its condition.

3. The city cannot escape responsibility upon the theory that the unsafe condition of the walk was brought about by the act of the owner of the abutting property. If, from the evidence, the jury might properly have found that the authorities had either actual or constructive notice of such unsafe condition, and failed thereafter, within a reasonable time, to make, or cause it to be made, safe, its responsibility to the public and to the plaintiff is in no way lessened or affected by the fact that it had prior to the accident granted a permit to the owner to make the excavation. Under any and all circumstances, it is liable for such injuries arising

ing from defects in public walks as the exercise of ordinary care upon the part of its authorities would prevent, and that was the theory upon which the case was submitted to the jury by the learned trial judge. The foundation of respondent's action was neglect of duty by the corporate authorities. *Dooley v. Town of Sullivan* (Ind. Sup.) 14 N. E. 566, is inapplicable to the facts in the present case.

4. The court did not err in denying appellant's motion to strike from the record the answer of witness Price to the following question: "Q. What was the barrier placed up there by somebody the next day [referring to the day of the accident]? A. The next day there was a ladder made, and constructed of two by four's, fastened up with a post,—nailed to a post, and that post had a brace from there down to the stringer; and the next night (Sunday night) there was a lantern hung on the corner." In answer to the motion to strike out, respondent's counsel stated that the testimony was for the purpose of impeaching Mr. Down, a witness for the city, who had testified as to the condition of the premises at the place where the accident occurred on the day following the accident. From such statement, made, as it was, in the presence of the jury, concerning the purpose for which the evidence was offered, it is but fair to presume that the jury understood the use which they were permitted to make of this testimony, and, if appellant's counsel had desired a particular instruction limiting its effect, it should have proffered a request therefor. The other errors assigned relate to instructions requested and refused. We have carefully examined appellant's requests for charge, but are clearly of the opinion that those which were applicable to the case were embraced within the general charge, which was clear and comprehensive, and correctly stated the rules of law by which the jury were required to be governed.

5. Lastly, it is contended that the verdict is excessive, and appears to have been given under the influence of prejudice and passion. The evidence of the respondent and his physicians shows that he was injured in his back, right shoulder, and arm, and across the abdomen, in consequence of which injury the muscles of the arm and shoulder had become shrunken and weakened to such an extent that it is extremely difficult, and at times quite impossible, for him to raise his arm, and it is probable that the injury in this respect will be permanent. For several days following the accident he suffered intense and excruciating pain. The abdomen was very much distended, and his bowels were paralyzed. At and prior to the time of receiving the injury complained of, he was enjoying good health, was robust and vigorous, and capable of earning two dollars per day. From the time of the accident down to the trial, as a result of the injuries sustained by him, he was unable to perform any labor, and it is not too much to say that his

earning capacity has been greatly impaired. Under such circumstances, we cannot say that the damages awarded by the jury are excessive. Cases might be multiplied in which verdicts for even greater sums have been upheld where the injuries received were not so serious as those sustained by the respondent, and the record in the present case presents no sufficient reason for interfering with the verdict on the ground that the damages awarded were excessive. This case seems throughout to have had the careful consideration of the trial judge, and the record is exceptionally unobjectionable. Affirmed.

SCOTT, C. J., and DUNBAR, REAVIS, and ANDERS, JJ., concur.

(17 Wash. 263)

BOTHELL v. CITY OF SEATTLE.

(Supreme Court of Washington. June 26, 1897.)

DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

1. The fact that plaintiff had within three months before he was injured, by falling into an excavation in the sidewalk, traveled the sidewalk, was insufficient to show contributory negligence.

2. In an action for personal injuries, evidence of exclamations of pain by plaintiff some time after the accident is admissible.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by George Bothell against the city of Seattle. Judgment for plaintiff. Defendant appeals. Affirmed.

John K. Brown and F. B. Tipton, for appellant. Brady & Gay, for respondent.

PER CURIAM. This case was argued by the same counsel and submitted together with that of *Sproul v. City of Seattle* (just decided) 49 Pac. 489. It was brought to recover for injuries received by respondent at the same time and place, and occasioned in the same manner, as those occurring to Sproul. The principal questions in it are ruled by that case. Aside from the questions there discussed, we deem it necessary only to say that, from an examination of the evidence, we think the court did not err in denying the motion for nonsuit, upon the ground of contributory negligence of the respondent. The mere fact that, within three or four months prior to the time of the injury, respondent had traveled the sidewalk in that portion of the city, was not of itself sufficient to defeat his recovery in the present action.

2. The testimony of witness Sproul as to the condition in which he found the respondent some time after the accident, and respondent's exclamations of pain and suffering testified to by the witness, was, we think, both competent and material, and the court did not err in receiving it over appellant's objections. The judgment must be affirmed.

RAYMOND v. JOHNSON et al.

(Supreme Court of Washington. June 25, 1897.)

STATUTE OF FRAUDS — MINING PARTNERSHIP — PLEADING—DENIAL OF KNOWLEDGE.

1. Where plaintiff and defendant orally agreed to prospect for mines, mining claims, water rights, and mill sites on the public lands, and on discovery or acquisition of any such to locate, hold, and work them for their joint benefit, the agreement was not within the statute of frauds (1 Hill's Code, § 1422), providing that all conveyances of real estate or any interest therein shall be by deed.

2. Where the complaint set forth an agreement between the parties, defendant could not evade a positive denial by a denial in the answer of information or knowledge sufficient to form a belief as to the facts set forth.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Suit by W. A. Raymond against S. W. Johnson and others. From a judgment in favor of plaintiff, defendant Johnson appeals. Affirmed.

Cyrus Happy, for appellant. Wm. T. Stoll and R. E. Porterfield, for respondent.

REAVIS, J. Respondent brought suit to have appellant, Johnson, declared respondent's trustee for an undivided one-fourth interest in the Keystone quartz mining claim, located in Flathead county, Mont., and to have the defendant Finch pay to respondent part of the bonded price of five-sixteenths of the claim, which is claimed to be proportionate to respondent's interest, instead of paying the same to appellant, Johnson, through the defendant bank, as required by a bond held by Finch from Johnson; and, in default of Finch's paying the price mentioned in the bond, that then appellant, Johnson, be required to convey to the respondent an undivided one-fourth interest in the claim, and that the defendant the Exchange National Bank be enjoined from delivering to the defendant Finch, or any other person, a deed in its custody, made by appellant, Johnson, to an interest in the claim, and that appellant, Johnson, be enjoined from assigning any interest thereafter in the mining claim. The fourth allegation of the complaint is as follows: "That in the summer of the year 1895 the said plaintiff and the said defendant S. W. Johnson entered into a mining partnership, by which they mutually agreed with each other that they would each diligently prospect for and locate and develop mines, mining claims, water rights, and mill sites in the states of Idaho and Montana on the public lands of the United States, and upon discovering or acquiring the same, or any such, that they would locate and hold and work the same in the joint names of and for the joint use and benefit of the plaintiff and defendant Johnson, and that they should own in equal shares any and all mineral claims, mines, water rights, and mill sites so discovered, or in any manner acquired, by either of them." Respondent alleges that he has duly performed

all the conditions of the agreement on his part, and that he diligently prospected as required by the agreement, in behalf of Johnson and himself; that while respondent and Johnson were prospecting, in pursuance of the agreement, they discovered some float or particles of ore which they thought came from a ledge of ore further up the mountain or hill upon which they were working, and Johnson requested respondent to follow up and trace the float, and prospect for a supposed ledge from which the float was thought to have come; and that he (Johnson) would go over on the other side of the mountain, and search there, under the agreement, for mines and claims, and that while respondent was prospecting on the float, for the equal benefit of himself and Johnson, the latter went over the mountain or hill and continued to work, and there, with one Whitcomb, whom he chanced to meet, Johnson discovered a great and valuable lode of free milling gold ore on the unsurveyed and unclaimed public lands of the United States, and that Johnson, in violation of his agreement with respondent, and for the purpose of cheating and defrauding him, located the claim under the general mining laws of the United States in the names of Johnson and Whitcomb, excluding the respondent from all interest therein, and ever since has so fraudulently and dishonestly excluded respondent therefrom; that thereafter Johnson sold to defendant Gorham, by deed, an undivided one-sixteenth interest, and to one Watson an undivided two-sixteenths, and thereafter bonded to the defendant Finch, who was representing as trustee unknown parties, by a sufficient bond, an undivided five-sixteenths interest for the sum of \$3,906.25, \$100 of which was paid; that the deeds and the bond were duly recorded in Flathead county; that they were executed for the purpose of defrauding respondent out of his interest in the mining claim; that all the transfers and the bond were made without the knowledge or consent of respondent; that the mining claim is reasonably worth \$20,000; that after the deeds and bond were executed Johnson executed a deed sufficient in form to the interest described in the bond in favor of Finch, trustee, and deposited the deed with the defendant bank at Spokane, Wash., to be delivered to Finch, trustee, when the purchase price mentioned was paid to the bank; that the bank received and now holds the deed, and has agreed to deliver it to Finch upon the payment of the money for the use and benefit of Johnson; that Finch has the money in his possession, and is about to pay the same to the bank; that Johnson is insolvent; that Whitcomb was a locator in good faith, and is the owner of an undivided one-half interest in the claim, and that he had at the time of the location no notice of the relation existing between respondent and Johnson; that defendant Gorham claims an interest in the mining claim in addition to the one-sixteenth interest conveyed by deed, and Gorham also claims an

interest in the moneys due on the bond on the five-sixteenths interest, but that Gorham's claim is inferior to that of respondent to the money and to respondent's interest in the mining claim; that after Johnson made the location as before mentioned he denied respondent's right to share in the claim, and respondent's right to share in the purchase price of the claim that is now due. Defendant denied having sufficient information to form a belief as to the matters stated in the fourth allegation of the complaint, and denied that the defendant Gorham claims an interest in addition to the one-sixteenth interest in the mining claim, or that Gorham claims an interest in the moneys due, mentioned in the bond to Finch; denies his insolvency; denies that the deed and bond were given to defraud respondent; admits the discovery and location of the mining claim by himself and Whitcomb; admits the bonding of the five-sixteenths interest in the claim to Finch, as alleged in the complaint, and for the sum mentioned. The superior court, after hearing the testimony, found that the defendant Finch was trustee having charge of the matter of the bond for other persons, and that the averments in the fourth allegation of the complaint were true; that the respondent had performed his agreement; that the contract for partnership in prospecting and locating mines as set forth in the fourth allegation of the complaint was carried on, and that Johnson discovered the quartz mine described while such agreement existed; that the mine was located in the names of Johnson and Whitcomb; that Johnson had excluded respondent from any interest therein; and that Johnson had made the conveyances and the bond alleged in the complaint. The tenth finding by the court was that the deeds and bond were given for the purpose of cheating and defrauding respondent out of his interest in the claim; and the eleventh, that they were made without the knowledge or consent of respondent; that the claim is reasonably worth \$12,500; that Johnson had executed the deed and deposited the same with the defendant bank as alleged, and the bank had received the same; that Whitcomb was in good faith a locator, as alleged in the complaint, of the mining claim; that Johnson is insolvent, and is now the owner of five-sixteenths of the Keystone mining claim; that the respondent, by reason thereof, is owner of and entitled to the undivided one-half thereof,—that is, is the owner of and entitled to receive one-half of the unpaid portion of the amount due from the defendant Finch, trustee, as the purchase price, that is, to \$1,950; and decree was entered according to the prayer of the complaint. Defendants moved for a new trial, which motion was overruled. Defendant Johnson excepts to several findings of fact on the ground that the evidence is insufficient to justify the same. It is not necessary here to review the testimony. It has been carefully examined, and we are satisfied with the conclusions of fact reached by

the superior court. The respondent and Johnson agreed to prospect together, and share alike the benefits of any discovery or location of mining properties, water rights, and other things mentioned in the fourth allegation of the complaint. It is true there was but little investment, if any, beyond a small "grub stake," by either in the enterprise, but they were to put their labor into it. Each was to diligently and faithfully prospect. In mining operations, this is usual. Frequently very humble and small beginnings lead to great results.

We observe no error in the superior court's ruling upon the proposed amendment to the answer after the trial was concluded. The proposed amendment was inconsistent with the answer upon which the cause was tried, and, if made, could not have changed the result of the trial. Defendant urges here that the contract between respondent and Johnson was oral, and is within the statute of frauds, as expressed in section 1422, 1 Hill's Code. This contention cannot be maintained. The defendant Johnson, if the acquisition of the mine was an interest in real estate, would be a trustee. The weight of authority in the mining states is that such contracts are not within the statute of frauds. *Gore v. McBrayer*, 18 Cal. 583; *Hirbour v. Reeding*, 3 Mont. 15; *Murley v. Ennis*, 2 Colo. 300; *Welland v. Huber*, 8 Nev. 203.

Appellant's answer to the fourth allegation of the complaint is a denial of information or knowledge sufficient to form a belief as to the facts set forth in the paragraph mentioned. It will be observed that the averment is an agreement between respondent and appellant. Presumptively, appellant had positive knowledge of these facts. The approved rule seems to be, when such knowledge is with the defendant, he cannot evade a positive denial by a disavowal of knowledge. We very much question whether the answer to the fourth paragraph of the complaint is sufficient to raise any issue of fact. The judgment of the superior court is affirmed.

SCOTT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

STATE v. HEATON et al.

(Supreme Court of Washington. July 8, 1897.)

FORGERY—WHAT CONSTITUTES.

1. In Pen. Code, § 63, providing that "every person who shall falsely make * * * any * * * assignment of any bond, writing obligatory, or promissory note for money or property, or any other instrument in writing, * * * or any person who shall utter * * * shall be deemed guilty of forgery," the clause "or any other instrument in writing" relates to and has the word "assignment" as its antecedent.
2. A mere account, which creates no obligation, and is of itself neither an evidence of debt nor of title, is not the subject of forgery, as being within the meaning of the words "other instrument," if otherwise construed.

Appeal from superior court, King county; O. Jacobs, Judge.

Information against W. H. Heaton and another for forgery. From an order sustaining a general demurrer to the information, the state appeals. Affirmed.

James F. McElroy and John B. Hart, for the State. John F. Dore, Daniel T. Cross, and John S. Crockett, for respondents.

GORDON, J. This appeal is by the state, and is from an order of the superior court of King county sustaining a general demurrer to an information charging respondents with uttering a forged instrument. The charging part of the information is as follows: "Tuey, the said W. H. Heaton and F. S. Kinney, in the county of King, state of Washington, on or about the 30th day of April, A. D. 1896, and within three years previous to the filing of this information, then and there being, did then and there willfully, knowingly, falsely, fraudulently, unlawfully, and feloniously utter and publish as true to the county of King, the same being a body corporate under the laws of the state of Washington, and duly existing as such, and to the board of county commissioners duly elected, qualified, and acting as such in and for King county, and to one Fred Gasch, a certain forged, false, and counterfeited writing on paper, the same being an instrument in writing and an order certifying that certain labor had been done for and on behalf of said King county, and that the amount due the person, or purported person, which was then and there in said certificate certified to have performed said labor, was the sum of ninety (\$90.00) dollars. Said written instrument or order, with the indorsement thereon, in its tenor and effect is as follows, to wit: On the outside portion is 'Certificate No. 1,' and following said 'Certificate No. 1' appears: 'I hereby certify on honor that I have furnished labor amounting to \$90.00, for which the within account is rendered; that — have not received payment of same, or any part thereof; and that said account is justly due me from King county. Levi Hays.' Immediately above 'Certificate No. 1' appears the following: 'Audited. Charged. Warrant No. 6,884. Road and Bridge Fund. Road District No. 16, Commissioner's District No. 3. Claim of Levi Hays for labor, road No. 80, amount claimed \$90.00, allowed in the sum of \$90.00 by Fred Gasch, chairman board of county commissioners, King county, state of Washington, May 7th, 1893.' Immediately under said 'Certificate No. 1' appears the following: 'Certificate No. 2.' 'I hereby certify on honor that the within described labor has been performed. F. S. Kinney, Overseer Road District No. 16.' 'I hereby authorize payment of this claim. W. H. Heaton, Commissioner's District No. —.' On the reverse outside of said written instrument appear certain printed directions for the filling in of said written instrument, together with a copy of a certain section of a certain

act of the legislature of the state of Washington. On the reverse inside of said certificate appear certain printed directions, and also a certain form for the assignment thereof, together with the following: 'Renton, April —, 1896. County of King to Levi Hays, Dr., Road — Fund. Road District No. 16. Commissioner's District No. 3. In grubbing and grading 150 rods of road No. 80, near town of Renton, at 60c. per rod, \$90.00.' And they, the said W. H. Heaton and the said F. S. Kinney, then and there being, did then and there well know the said instrument in writing to be false, forged, and counterfeited, and that the signature or purported signature of the said Levi Hays to said instrument, as aforesaid, was false, forged, and counterfeited, and that the county of King was not indebted to the said Levi Hays in any sum or for any purpose whatsoever, and that the said Levi Hays was then and there a fictitious person, and the same was then and there so uttered by the said W. H. Heaton and the said F. S. Kinney with the intent then and there to injure and defraud the said county of King, the same being a body corporate as aforesaid, together with other persons now unknown."

Among other contentions of the respondents, it is urged that the instrument described in the information is not the subject of forgery. The instrument is, at most, a mere account or claim for services purporting to have been rendered King county. Section 63 of the Penal Code is as follows: "Every person who shall falsely make, or assist to make, deface, destroy, alter, forge or counterfeited, or cause to be falsely made, defaced, destroyed, altered, forged, or counterfeited, any record, deed, will, codicil, bond, writing obligatory, promissory note for money or property, receipt for property, power of attorney, certificate of a justice of the peace or other public officer, auditor's warrant, treasury note, county order, acceptance or indorsement of any bill of exchange, promissory note, draft or order, or assignment of any bond, writing obligatory, or promissory note for money or property, or any other instrument in writing, or any brand prescribed by law on tobacco, beef, bacon or pork cask, lard keg or barrel, salt-barrel, or hay-bale, or any person who shall utter or publish as true any such instrument, knowing the same to be false, defaced, altered, forged, or counterfeited, with intent to defraud any person, body politic or corporate, shall be deemed guilty of forgery, and on conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year, and be fined in any sum not exceeding five thousand dollars." It will be observed by a reading of the foregoing section that the instrument set forth in this information is not of the class specially enumerated. It must therefore, if within the statute at all, fall within the words "or any other instrument in writing." The section is singularly and inartificially drawn, but we think that the clause "or other

instrument in writing" relates to and has "assignment" as its antecedent, and a grammatical interpretation of the section discloses that it is the forging or uttering of an "assignment" of such "other instrument in writing," and not the forging or uttering of such instrument itself, which is made unlawful. Aside from this, we think that the words "other instrument in writing" cannot be construed to include a mere account as the subject of forgery. Bouvier says the term "instrument" "includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters, or memoranda." 1 Bouv. Law Dict. p. 815. In Anderson's Law Dictionary, at page 555, it is said that the expression "written instrument," or "instrument in writing," "does not comprehend all written papers," and "scarcely includes accounts, letters in ordinary correspondence, memoranda, and similar writings with respect to which the creation of evidence to bind the party, or the establishment of an obligation or title, is not the primary motive." See, also, State v. Kelsey, 44 N. J. Law, 1; Hankinson v. Page, 31 Fed. 184. We think that, within the rule of noscitur a sociis, the words "or any other instrument in writing," as found in the section under consideration, must be construed to mean instruments of like character with "bond, writing obligatory, or promissory note for money," and their meaning cannot be extended so as to include a mere paper, which creates no obligation, and is of itself neither an evidence of debt or of title. Counsel for respondents seem to concede that their clients might be proceeded against under the statute relating to false pretenses, but, as that question is not involved in this appeal, it would be unprofitable to discuss it. The order of the superior court sustaining the demurrer was right, and it is affirmed.

SCOTT, O. J., and ANDERS and REAVIS, JJ., concur. DUNBAR, J., did not sit at the hearing.

(17 Wash. 277)

BENTON et al. v. JOHNCOX et al.¹

(Supreme Court of Washington. July 2, 1897.)

NATURAL WATER COURSES—RIPARIAN RIGHTS—COMMON LAW—WHEN RIGHTS ATTACH.

1. The common-law doctrine touching riparian rights is not within any of the exceptions specified in Laws 1863, p. 68, as amended by Code Proc. § 108, providing that the common law, so far as it is not inconsistent with the constitution and laws of the United States and the organic act and laws of Washington, nor incompatible with the institutions and condition of society "in this state," shall be the rule of decision in all the courts of the state; and hence such doctrine applies to the arid portions of the state.

2. Such doctrine was not made inapplicable to Yakima county by Laws 1873, p. 520, entitled "An act regulating irrigation and water rights in the county of Yakima, Washington Territory," so far as concerned riparian owners, who by such act (section 1) were entitled to the use of the water of Ahtanum river "to the full extent of the

soil thereof," and whose rights had attached before such act was passed, especially since the doctrine of appropriation applies only to public lands.

3. The riparian rights of a patentee of the government attach at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land.

Appeal from superior court, Yakima county; Sol Smith, Judge.

Action by H. M. Benton against Philip A. Johncox and others for an injunction, with which was consolidated three other cases in which similar relief was sought, and in which persons not originally parties intervened and joined the plaintiffs in claiming the relief sought. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

J. B. Reavis and I. P. Englehart, for appellants. D. J. Crowley and Whitson & Parker, for respondents.

ANDERS, J. An action was instituted in the superior court of Yakima county by the plaintiff Benton, a riparian proprietor on the Ahtanum river, in said county, to restrain certain of the appellants from diverting the waters of said stream, and conducting the same to and upon their land, situated at a distance therefrom, for the purposes of irrigation. Three separate actions were also commenced by other parties, seeking similar relief; and by stipulation of all the parties, and an order of the court, all of those causes were consolidated and tried in this action. Many riparian owners became parties by intervention, and joined the plaintiffs in claiming the relief sought by them, and the defendants in the several causes were all made defendants in the consolidated case. The complaint in each case, briefly stated, alleges riparian ownership on the part of the plaintiff, and appropriation of the water, and the date thereof, and the use of the water for irrigation, and its diversion by the defendants. Each of the nonriparian landowners alleges ownership of lands, and appropriation and use of the water for irrigation, and date of such appropriation, and the making of valuable improvements on the land. And each party to the action avers that his land, without artificial irrigation, is arid and unproductive, and prays that he may be decreed entitled to a certain specified quantity of water for the purpose of irrigating his premises. The action involves the rights of a multitude of farmers located on the banks of the river, as well as those of a great number of nonriparian landowners. The evidence preserved in the record is exceedingly voluminous, but the facts deduced therefrom and stated by the court are so satisfactory to counsel that we have been relieved of the labor of examining it in detail. Of the 91 findings of fact made by the court, none of any special importance is disputed by counsel for appellants. The trial court awarded a perpetual injunction restraining each and every of the nonriparian owners of land from

¹ Rethearing pending.

diverting or interfering with the water of the river. Appellants excepted to the conclusions of law as announced by the court, and to the whole decree, as founded on erroneous conclusions of law, and here insist that the rights of all parties should be determined by this court by the application of the doctrine of appropriation, in accordance with the facts found by the superior court. It may be stated generally that the court found from the evidence the date when each party settled upon his land and took the initiatory step in the acquisition of title thereto, as well as the date at which he appropriated the water for agricultural purposes. While the court recognized the existence in this state of the doctrine of prior appropriation, it nevertheless held that the plaintiff and plaintiff interveners, who settled upon their respective lands, and acquired their title thereto by complying with the laws of the United States, and appropriated and used the water of the stream for irrigation and domestic purposes, prior to the diversion by appellants, were entitled to have the stream continue to flow as it naturally flowed through or by their lands at the time their possessory rights attached. In other words, the court held that the respondents were entitled to the common-law rights of riparian proprietors, as against subsequent appropriators of the water, from the date of their occupancy, with intent to acquire the title of the government in pursuance of law. And this ruling of the trial court was not at variance with the rule repeatedly announced by this court, and the territorial supreme court, except upon the question as to the date at which riparian rights become vested in lawful occupants of public land. That such rights, as well as the right of prior appropriation, have hitherto been recognized in the decisions in this state, will be disclosed by an examination of the following cases: *Thorne v. Ditch Co.*, 1 Wash. St. 566, 20 Pac. 588; *Ellis v. Improvement Co.*, 1 Wash. St. 572, 21 Pac. 27; *Geddis v. Parrish*, 1 Wash. St. 587, 21 Pac. 314; *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28; *Rigney v. Water Co.*, 9 Wash. 576, 38 Pac. 147; *Isaacs v. Barber*, 10 Wash. 124, 38 Pac. 871. Nor did the legislature disregard the rights of riparian owners in the general act of 1890 relating to appropriation of water for irrigation. 1 Hill's Code, § 1718 et seq. On the contrary, sections 1761 and 1774 of that act especially recognize the existence of riparian rights, and we do not see anything in that statute or the subsequent act of 1891 evincing an intention on the part of the legislature to disregard such rights.

But it is most earnestly insisted by the learned counsel for appellants that the common-law doctrine touching riparian rights is not applicable to the arid portions of the state, and especially to Yakima county; and this court is now urged to so decide, notwithstanding anything it may heretofore have said to the contrary. The legislature of the territory of Washington in the year 1863 (*Laws 1863*, p.

68) enacted that "the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory." The language of this provision was changed by the state legislature in 1891 by omitting the words "of England," substituting the word "state" for "territory," and inserting the clause, "nor incompatible with the institutions and condition of society in this state." Code Proc. § 108. But the meaning remains substantially the same. It thus appears that the common law must be our "rule of decision," unless this case falls within the exceptions specified in the statute. Now, the common-law doctrine declaratory of riparian rights, as now generally understood by the courts, is not, in our judgment, inconsistent with the constitution or laws of the United States or of this state. Nor is it incompatible with the condition of society in this state, unless it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition,—a proposition to which, we apprehend, no one would assent for a moment. It is held by practically all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land in its accustomed channel is an incident to his estate, and passes by a grant of the land, unless specially reserved. It is not an easement in or an appurtenance to the land, but, as Angell says, is as much a part of the soil as the stones scattered over it. *Ang. Watercourses*, § 5.

"By the common law," says the court in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 753, "the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned." And one of the purposes thereafter mentioned was irrigation. In *Washburn on Easements and Servitudes* (4th Ed., pp. 316, 317), the learned author says: "The right of enjoying this flow without disturbance or interruption by any other proprietor is one jure nature, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." (In this state, by statute, an adverse possession for 10 years would destroy the right.) And the law on this subject is laid down by Prof. Pomeroy in language equally clear and explicit. He says: "The law is

the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility." Pom. Rip. Rights, § 152.

While the doctrine announced by the foregoing authorities has never, so far as we are advised, been directly denied, it has been apparently ignored by the courts in some of the Pacific states and territories, on the theory that the principles and rules of the common law respecting the rights of private riparian owners were inapplicable to the condition and necessities of the people of the particular localities where the causes of action arose. *Coffin v. Ditch Co.*, 6 Colo. 446; *Drake v. Earhart* (Idaho) 23 Pac. 542; *Stowell v. Johnson* (Utah) 26 Pac. 290; *Mover v. Preston* (Wyo.) 44 Pac. 845; *Clough v. Wing* (Ariz.) 17 Pac. 453; *Trambley v. Luteran* (N. M.) 27 Pac. 312. But the legislatures of those states and territories have attempted to abolish the common-law doctrine relative to private property in water courses and to riparian rights generally. Pom. Rip. Rights, § 106. And the decisions above cited are presumably in accordance with the local statutes, though some of them, it appears, were grounded solely on the assumption that the rules of the common law were inapplicable, by reason of the aridity of the soil and the consequent necessity for extensive irrigation. But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they can irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United states, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation. If it be true, as claimed by appellants, that, if the judgment of the court below is affirmed, their lands will again become a barren waste, and cease to "blossom as the rose," it is equally true that, if the waters of the river are diverted from its channel, the premises of the respondents will become unproductive and utterly worthless. "The aridity of the soil and air being made

the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated." *McKinstry, J.*, in *Lux v. Hagglin*, *supra*. The question of the applicability of the common law in controversies respecting water rights in the mineral districts of California was lucidly discussed by Chief Justice Sanderson in *Hill v. Smith*, 27 Cal., at page 482. With reference to the charge of the trial court, which seemed to be based on an erroneous view of the law with respect to the rights of miners and ditch owners using the water of a stream for mining purposes, the learned chief justice said: "This is due in a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, 'Sic utere tuo ut alienum non ledas,' upon which they are grounded, has lost none of its governing force. On the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel,—*ubi currere solebat*,—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use." In *Atchison v. Peterson*, 20 Wall. 507, the supreme court of the United States stated, as claimed by appellants, that, as respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessi-

ties of miners, and inadequate to their protection. That action was brought by parties who were ditch owners, for an injunction to restrain the defendants from carrying on certain mining operations on Ten-Mile creek, in Montana, and the question of riparian rights does not seem to have been involved therein. In fact, in the course of the opinion it is observed that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship in respect to the waters of those streams,"—meaning the streams on the public lands, the waters of which were subject to appropriation and use under the customs obtaining among miners. In *Basey v. Gallagher*, Id. 670, the question on the merits in the case, as stated by the court, was whether a right to running waters on public land of the United States for the purposes of irrigation could be acquired by prior appropriation, as against parties not having the title of the government, and the court held that it could. But the question of riparian rights was not in the case, and the court said that: "Neither party has any title from the United States. No question as to the rights of riparian proprietors can, therefore, arise. It will be time enough to consider those rights when either of the parties has obtained a patent from the government. At present both parties stand upon the same footing. Neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim." But in the later case of *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, the question as to the rights of the riparian proprietor as against an appropriator of the water did arise, and was determined by the court. The facts were that one John Smith settled on a tract of government land in the territory of Dakota in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to one Beck. He made his homestead application or entry on March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The waters of a certain creek flowed in its natural channel across Smith's homestead, and in May, 1880, Sturr went upon that homestead, located a water right thereon, and constructed a ditch by which the waters of the creek were diverted to his own land. Beck went into possession under his deed from Smith, and in 1896 notified Sturr to cease diverting the water and maintaining the ditch, whereupon Sturr commenced an action to enjoin Beck from interfering with his alleged water right and ditch, and the use of the water of the creek. Sturr claimed the right to divert and use the waters of the stream for the purposes of irrigation by virtue of a prior appropriation, and Beck defended and asked affirmative relief on the ground of riparian ownership. It will thus be seen that the question there raised was identically the same

as that which is presented for determination here. In that case it appeared that neither Smith nor his grantee, Beck, had ever diverted the waters of the creek from the natural channel prior to the location of the alleged water right by Sturr; but the court unanimously held that Smith's patent related back to the date of his homestead filing, and cut off completely the alleged claim of Sturr. The learned chief justice, in delivering the opinion of the court, after referring to the act of congress of July 26, 1866 (Rev. St. § 2330), and the amendatory act of 1870, and quoting from the opinion in *Atchison v. Peterson*, supra, said: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow ut curere solebat, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect." And after quoting certain sections of the Civil Code of Dakota, and setting out the local custom of diverting and appropriating the waters of flowing streams for the purpose of irrigation, he concluded the opinion in the following language: "The question is not as to the extent of Smith's interest in the homestead as against the government, but whether, as against Sturr, his lawful occupancy under settlement and entry was not a prior appropriation, which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the supreme court to that effect." It seems to us that the soundness of that decision can scarcely be doubted. While the court fully recognized the doctrine of prior appropriation of water on the public lands, in accordance with the local customs, laws, and decisions of courts, it announced and established the just and equitable rule that the riparian rights of a patentee of the government attach, by relation, at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land. That case, it would seem, settles the law adversely to the contention of the appellants in this case. The doctrine that the rights of a patentee or grantee of the government relate back to the first act of the settler necessary in the proceedings to acquire title is also announced in the following cases: *Shepley v. Cowan*, 91 U. S. 330; *Larsen v. Navigation Co. (Or.)* 23 Pac. 974; *Faull v. Cooke (Or.)* 26 Pac. 662. See, also, *Kin. Irr. § 210*; *Mining Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas No. 14,370.

The trial court in this case followed the rule laid down in the case of *Sturr v. Beck*, and other cases above referred to, and in so doing, we think, committed no error. But it is claimed

by appellants that the act of the territorial legislature entitled "An act regulating irrigation and water rights in the county of Yakima, Washington territory" (Laws 1878, p. 520), fully authorized them to divert and use the waters of the Ahtanum river as they had done. It is perhaps sufficient to say with reference to that act that the rights of many of the respondents who own riparian lands had attached, under the law as announced in the Sturr Case, prior to its passage, and were therefore in no wise affected by it. And besides by the first section of that act the respondents were entitled to the use of the water for the purpose of irrigating their lands "to the full extent of the soil thereof." Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public, and become private, property it is no longer applicable. Gould, Waters, § 240; Pom. Rip. Rights, § 30; *Curtis v. Water Co.* (Or.) 23 Pac. 808. It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the courts, that the ninth section of the act of congress of July 23, 1886, the substance of which is included in section 2339 of the Revised Statutes, was enacted. It was apparent to congress, and, indeed, to every one, that neither local customs nor state laws or decisions of state courts could vest the title to public land or water in private individuals without the sanction of the owner, viz. the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; but, when it disposed of land without reserving the water, the latter passed to its grantee free from interference thereafter by the grantor. "The object of the section [Rev. St. § 2339] was to give the sanction of the United States, the proprietor of the lands, to possessory rights which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." *Jenkinson v. Kirk*, 98 U. S. 456, 457.

It is suggested on behalf of the appellants that the use of water for irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for that purpose by riparian proprietors is recognized by the courts of that country. It is expressly so stated in Gould on Waters (section 217), where a number of English cases are cited; and in Pomeroy on Riparian Rights (section 125) it is declared that the common-law rule that every riparian proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes; and the author there cites several Eng-

lish and many American decisions in support of that declaration. See, also, 2 Washb. Real Prop. (5th Ed.) pp. 367, 368; Gould, Waters, § 206; *Lux v. Haggin*, supra, and cases cited; *Mining Co. v. Ferris*, 2 Savy. 177, Fed. Cas. No. 14,371. A careful consideration of all the questions raised on this appeal discloses no error, and the judgment is therefore affirmed.

SCOTT, C. J., and GORDON, J., concur. DUNBAR and REAVIS, JJ., being disqualified, did not sit in this case.

(17 Wash. 243)

BARDSLEY v. STERNBERG, Treasurer.¹

(Supreme Court of Washington. June 25, 1897.)

MANDAMUS—QUESTIONS OF FACT—CITY WARRANTS — NEGOTIABILITY — ESTOPPEL — CITY TREASURER—AUTHORITY.

1. An application for mandamus to compel a city treasurer to pay certain warrants is a proper remedy, though there was a question as to whether they had not been in fact previously paid, where the material facts were not controverted, but the controversy was rather as to the construction to be put upon them, thus creating substantially a question of law, and not of fact.

2. In mandamus to compel the payment of certain warrants paid by the city treasurer, and reissued by him, the report of the finance committee after such reissue, showing that the funds acquired on the reissuance had been transferred to the city's credit, is inadmissible to estop the city, where there was no proof that, when the report was made, any of the city officers, except the treasurer, knew that they had been paid and reissued.

3. Where the proofs offered on application for mandamus were inadmissible under any form of action, and judgment is rendered in favor of the respondent, the question as to whether the remedy is a proper one was immaterial.

4. City warrants are not negotiable in the sense of excluding inquiry into the legality of their issuance when in the hands of third persons.

5. A city treasurer cannot bind the city by an unauthorized reissue of city warrants after payment of the same.

6. Where the treasurer pays out city money to obtain city warrants from the holders thereof, his mere intent to afterwards reissue them cannot defeat the city's right to treat them as paid.

7. All parties dealing with a city treasurer are bound to take notice of the fact that he has no authority to issue city warrants.

8. Under Laws 1889-90, p. 223, § 6, providing that elective officers shall receive such salaries as may be prescribed in the city charter, an ordinance providing for compensation to councilmen is invalid, where the charter provides none.

Dunbar and Gordon, JJ., dissenting.

Appeal from superior court, Pierce county; J. A. Williamson, Judge.

Application by W. C. Bardsley for a writ of mandamus against W. A. Sternberg, treasurer of the city of Tacoma. Judgment for defendant, and petitioner appeals. Affirmed.

Alfred E. Buell, Crowley & Grosscup, Hornblower, Byrne, Taylor & Miller, Tillingshast & Pritchard, Doolittle & Fogg, Charles Richardson, and F. D. Nash, for appellant. John A. Shackelford, Joseph S. Whitehouse, David F. Murry, and John C. Stallcup, for respondent.

SCOTT, C. J. This was an application by the appellant to the superior court of Pierce

¹ Rehearing pending.

county, for a writ of mandate against the city treasurer, to compel him to pay the amount of five city warrants held by the appellant. The decision below was in favor of the treasurer. In passing upon the questions presented by the appeal, we will first devote some attention to the point as to whether the appellant sought an appropriate remedy.

Two of the warrants were originally issued to George H. Boardman and R. A. Gove, respectively, for salaries for certain months as city councilmen. The other three warrants had been issued to J. M. Bunn, George McD. Arkley, and A. S. Dautrick, respectively, but it does not appear for what they were issued. The warrants were in the ordinary form, payable to said respective parties or their order, and drawn on the general fund. No question is raised about their being regular in form and fair upon their face. Nor, except the two salary warrants, is it disputed that they were lawfully issued to the first holders. Payment was resisted upon two grounds. It was contended upon the part of the respondent, as to the salary warrant issued to Gove, and the three other warrants, that they had been once presented to the treasurer, and paid. It was also contended that the councilmen were not entitled to salaries under the law, and that the issuance of the salary warrants was entirely unauthorized, this being the only defense to the salary warrant issued to Boardman. In *Abernethy v. Town of Medical Lake*, 9 Wash. 112, 37 Pac. 306, we held, where a claim had been regularly allowed, but where the warrants issued therefor were irregular, and the treasurer refused to pay them, that an action would not lie on the claim against the town, but that the remedy was by mandamus to compel the issuance of regular warrants. And in *Cloud v. Town of Sumas*, 9 Wash. 399, 37 Pac. 305, we held that an action would not lie upon the warrants there in controversy, but that the remedy was by mandamus to compel payment. In both of these cases, however, only questions of law were presented upon conceded facts relating to the validity of the claims; and when the matters involved in the last case were again before the court, in *Cloud v. Lawrence*, 12 Wash. 163, 40 Pac. 741, we held the town estopped, upon the record, from raising a question as to the regularity of the warrants, in consequence of their having conceded in the first action that they were regular, and in the last action relator had sued for a mandamus to compel their payment. No questions of fact were presented for consideration in those cases. But the same state of facts does not exist with reference to all the warrants involved in the matter now before us. The remedy would have been appropriate as to the one salary warrant which was not claimed to have been paid, as only a question of law is presented thereby. Ordinarily, a mandamus could only lie to compel the performance of a ministerial duty where the facts are conceded. In this case the question of the payment of the warrants aforesaid was a

disputed one, but, as presented, it was substantially a question of law upon the facts, the material facts not being controverted, and the controversy being rather as to the construction to be put thereon.

It is admitted that the warrants, excepting the one issued to Boardman, were, after their issuance, presented to the city treasurer for payment, and that he paid to the holders thereof the respective amounts called for out of the funds of the city in his hands; that, instead of canceling them, he, or some one in his office, thereafter disposed of them to other persons, but in just what manner is not made to appear, and they afterwards found their way into the hands of the appellant. One controversy is as to whether such action on the part of the treasurer constituted a payment of the warrants. The appellant contends that said warrants could not have been regularly paid at that time, as there were prior warrants outstanding, entitled to be first paid, and that there were not sufficient funds to take them all up. This was one of the disputed facts in the case, but it is not very material here. The appellant further contends that there was no intention upon the part of the treasurer to pay said warrants at that time, and that his acts in question did not constitute payment. This will be considered later.

The court seems to have admitted all the proof offered with reference to the issuance of these warrants and the facts relating to the question of payment in the first instance; so that this is substantially a question of law only. But it was further contended by the appellant that the city was estopped from denying the validity of these warrants, in consequence of the fact that, upon their reissuance, the parties who obtained them paid into the city treasurer's hands the amount of money called for by them respectively, and that said treasurer gave the city credit therefor. The facts as to this matter are disputed, and it is apparent that such a question could not be properly triable in a proceeding of this kind, nor would a disputed question of payment by the treasurer where the facts were in controversy. Upon such matters the respondent was entitled to a jury trial. Also, matters of estoppel must ordinarily be raised by the pleadings. But in this case the question of the availability or appropriateness of the proceeding is not a very material one. The respondent was the objecting party, and, of course, he can claim no prejudicial error with regard to the manner of the trial, for the judgment was ultimately rendered in his favor. The question could become material only in considering the refusal of the court to permit the appellant to introduce in evidence a report of the finance committee, purporting to cover the times in controversy, it being contended that the statement of the amount of money in the treasury, etc., would show that the funds received upon the reissuance of these warrants had been transferred to the city's credit, and this would apply directly

upon the question of an estoppel, which could not be properly tried in this proceeding. But, in any event, there was no error in excluding this report, as there was no proof, and no offer of any proof, to show that at the time this report was made by the finance committee, and adopted by the council, any of the city officers, aside from the treasurer, knew that these warrants had been once paid, and subsequently reissued by the treasurer, and unless they knew that fact, and knew for what the money had been received, there could be no estoppel. Had the city known these facts, it might have preferred to treat the warrants as paid and satisfied, instead of valid outstanding obligations; and in such case the most the parties holding such warrants would be entitled to would be to recover from the treasurer the money that they paid therefor. It may be also that, if the original payment was unauthorized in consequence of there being prior outstanding warrants entitled to payment, the holders of such warrants would be entitled to some rights in the premises; and what action the city would take with such knowledge might have depended in a measure upon the claims of these parties, and the amount of its available moneys. The proof in question was insufficient to base an estoppel upon, and there was no further proof tendered to make it relevant or competent.

The only other matter complained of is that the court refused to admit in evidence an ordinance purporting to ratify and confirm warrants which had been issued between April 19, 1892, and October 31, 1893, which had not been specially authorized. But we see no relevancy in this proof, for this ordinance did not purport to authorize a reissuance of any warrants which had once found their way into the hands of the treasurer. The appellant having sought his remedy by mandamus, and the proof offered by him, which was rejected, not being admissible under any form of action, and the judgment having been in favor of the respondent, the question as to whether the remedy was a proper one or not is, as stated, immaterial at this time, although we have seen fit to consider to some extent the question in order to settle, if possible, the practice in the future. It may occasionally be a matter of doubt as to whether the remedy of a warrant holder should be by mandamus to compel payment by the treasurer, or should be by an action against the municipality. Ordinarily, the ground upon which payment was refused would be known; and if the facts were conceded, and the liability a question of law only, mandamus would be appropriate. Otherwise, in the case of disputed facts, the remedy should be sought in an ordinary action. *People v. Johnson*, 100 Ill. 537.

What we have said with reference to the facts disposes of some of the contentions of the appellant in the further consideration of the case, and we will now consider the question as to whether the facts stated constituted

a payment of the warrants as against the appellant. While it is not shown how or from whom appellant obtained the warrants, we start with the proposition that a subsequent holder would have no greater rights than the party to whom they were first reissued; for, while title to such choses in action may pass by delivery or indorsement, they are not negotiable in the sense of excluding inquiry into the legality of their issue, or to exclude defenses thereto. *Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467; 1 Dill. Mun. Corp. (4th Ed.) § 487; *People v. Johnson*, supra; *Mayor v. Ray*, 19 Wall. 468, 477; *District of Columbia v. Cornell*, 130 U. S. 655, 661, 9 Sup. Ct. 694; *Hill v. Memphis*, 134 U. S. 198, 204, 10 Sup. Ct. 562. Therefore, whoever held them subsequent to their reissuance was charged with notice that the treasurer had once obtained them by paying out the city's money. It goes without saying that the treasurer had no authority to deal with warrants in that way. The appellant does not controvert either of these propositions. In fact, in relation to the last one, he says in his brief: "Neither appellant nor his counsel would admit for a moment the right of treasurers to use public funds to speculate in warrants, and they insist that the courts ought to set their faces strenuously against such practice. And it is submitted that the most efficient means of accomplishing that end would be for the courts to hold the treasurers strictly to the law, and, if they cash a warrant out of its order, to treat it as a defalcation and misappropriation of funds." Undoubtedly, the city would have a right to so treat it. But a different question is presented when considered with reference to the case presented by the appellant. While the city might repudiate the action of the treasurer in taking up the warrants out of their regular order, if he did so, other parties might not have that right. The city would also have a right to treat the matter as a payment and satisfaction of the warrants, even though they were paid out of their regular order. The parties who obtained the warrants from the treasurer can claim no benefit from such irregularity as to the time of payment. This could only affect the city and holders of other prior warrants, if there were any. Of course, if the city, with knowledge of the facts, had ratified the action of the treasurer, or knowingly appropriated the money obtained by the treasurer on their reissuance, such action would have been the foundation for a claim against the city on the part of those parties obtaining or holding the warrants after their reissuance, for the money paid. And if the city, with such knowledge, had repudiated the action of the treasurer, then a right of action might have arisen as against the treasurer on the part of the parties obtaining the warrants, for a recovery of the money so paid to him, but this would not have been a valid claim against the city. But, as before stated, there was no proof that the

city council or officers other than the treasurer had any knowledge that he had obtained these warrants, and reissued them, and none of any custom or practice upon his part to so deal in them as treasurer, or even to buy and sell them as an individual. No estoppel could arise by the unauthorized act of the treasurer. If he could not bind the city by a direct contract, he could not do it indirectly by other acts upon his part which might operate as an estoppel if the authority to contract existed.

A number of authorities have been cited by the appellant upon what constitutes a payment, which hold that it is an act calling for the exercise of the will or requiring consent; and he contends that it is evident that there was no intention upon the part of the treasurer to regard the paying out of the city's money in the first instance as a payment of the warrants, in consequence of his thereafter, for a time, carrying the warrants as so much cash, and subsequently disposing of them to other parties. But it seems to us that the intention of the treasurer in this instance could make no difference. The city was the party directly and vitally interested. It was the city's money that was being used, and, after the act had been so done, it was for the city to indorse or repudiate it. It is claimed by the appellant that the city failed to give the treasurer credit for the moneys paid out in the first instance, but there is no proof as to this. The treasurer might have credited himself upon his books with the money so paid if he saw fit to do so; and there is nothing to show whether he ever had any subsequent settlement with the city or not with reference to that matter, nor to show what became of the moneys he received upon a reissuance of the warrants, whether he had such moneys on hand, or whether the money was lost or misappropriated in some manner. The ordinary presumption would be that, when these warrants found their way into the hands of the treasurer, they had been paid. *Bank v. Harris*, 7 Wash. 139, 143, 34 Pac. 466; *Lawson's Pres. Ev. Rule 75, B*; *Mayor v. Ray*, *supra*. This is substantially conceded by the appellant. He says: "It is not disputed that, from the unexplained possession of a warrant by the treasurer upon whom it was drawn, the court might presume payment." But the appellant contends that this is a rebuttable presumption, and that it is rebutted by the facts shown here. Undoubtedly, the first holders who presented the warrants understood that they were paid. The treasurer intended to, and did, pay out the city's money to obtain them from such holders, and his mere intention to afterwards reissue them could not defeat the city's right to treat it as a payment. In 2 Daniel, Neg. Inst. (4th Ed.) § 1221, cited by appellant, it is said: "By 'payment' is meant the discharge of a contract to pay money by giving to the party entitled to receive it the amount agreed to be paid by one of the parties who entered

into the agreement. Payment is not a contract. It is the discharge of a contract in which the party of the first part has a right to demand payment, and the party of the second part has a right to make payment."

The contention that the parties who first presented the warrants were not at that time entitled to receive the money is based upon two grounds, one being that there was not sufficient money in the treasury to take them up. But the proof is not clear upon this point, for the treasurer was receiving money continually from various sources. It is also based in part upon the case of *Eldemiller v. City of Tacoma*, 14 Wash. 376, 44 Pac. 877, in which case it was held that such warrants were payable in the order of their issuance. But in that case section 58 of the charter of 1886 (Laws 1885-86, p. 205) was not called to the attention of the court. By this provision, such warrants were to be paid in the order of their presentation for payment, and it in effect repealed the ordinance upon which the decision in that case was based. The new charter of 1890 superseded the 1886 charter, and it contained no provision as to the order of payment. But, as we have said, the point is not material here as affecting the rights of the appellant. Conceding that the parties who first presented the warrants might have objected to their payment out of the regular order, they did not do so. Apparently, the city has not objected to it, and the appellant has no right to object.

We do not think the case of *Willey v. Town of Greenfield*, 30 Me. 452, is entitled to much weight as an authority upon the question of payment arising from the possession of the warrants by the treasurer, for evidently the case received little consideration by the court, the opinion consisting of a statement of the decision in three or four lines. *McConnell v. Simpson*, 36 Fed. 750, cited by appellant, is directly against his contention. Appellant would concede this were it not for the fact that it appeared in that case that the treasurer was forbidden to buy or sell, or in any manner deal in, warrants, and he contends that there is no such prohibition in this state. But, however that may be, when applied to the treasurer as an individual, it is immaterial, for in this case he was dealing in them with the city's money.

Appellant insists that *Mayor v. Ray*, *supra*, is not an authority upon the proposition that when the warrants came into the hands of the treasurer, as evidence of indebtedness, they were thenceforth functus officio, and ceased to have any validity, holding that this part of the opinion was never indorsed thereafter by the court, and was but an expression of a minority. But it seems to us that the rule is a sound one, and sustained by other authorities cited herein, that, when a city's money obligation comes into the hands of its treasurer by the use of the city's money, it is thereafter dead, and cannot be given life by a reissuance on the part of the treas-

urer, although under some circumstances it might be evidence of a claim or the foundation of an action to recover the money of the treasurer by the person subsequently obtaining it. *Blake v. Johnson Co.*, 18 Kan. 266, has no particular bearing, as that was an action by the county on the treasurer's bond for a breach of official duty. Without discussing particularly the case of *Chemung Canal Bank v. Board of Sup'rs of Chemung Co.*, 5 Denio, 517, cited, it is sufficient to note that the action was substantially regarded by the court as one upon the original claims, rather than upon the orders which had been substituted without authority. *Morrow v. Surber* (Mo. Sup.) 11 S. W. 48, does not apply, for that was an action by the treasurer to recover money paid to a warrant holder, who was not then entitled to payment; the money having been paid under a mistake by a clerk upon the representations of the warrant holder that it was due and payable. We have no doubt of the right of the treasurer to repudiate such an action, and recover the money paid.

Authorities are also cited upon the proposition that a company may purchase its own bonds as an investment, and reissue them, if the facts show that there was no intention of paying them when purchased, and that they would be valid obligations in the hands of a subsequent holder. We have no doubt of this proposition as applied to private corporations, and it may be true under some circumstances when applied to public corporations, as in *Elser v. City of Ft. Worth* (Tex. Civ. App.) 27 S. W. 739, cited. But the investment of municipal money in the obligations of the municipality, negotiable or otherwise, should be held to work a cancellation of them to the extent that they could not be reissued without express municipal authority and action. In this instance it would have required an ordinance, conceding that the power to pass such a one existed. The duties of a city treasurer are fixed by law, and all parties dealing with him are bound to take notice of the limitation upon his powers, and that, as such, he has no authority to issue municipal obligations. The treasurer's acts, here involved, certainly bordered on criminality, to state it mildly. The parties who obtained from him the warrants on their reissuance, and the subsequent holders, stand charged with notice of his acts. Their claims must be viewed in the same light as if they had fully participated therein, and that ends the case with the paid warrants. We are of the opinion that the issue of the salary warrants was unauthorized, under the holding of this court in *Taylor v. City of Tacoma*, 8 Wash. 174, 35 Pac. 584. The case of *City of Tacoma v. Lillis*, 4 Wash. 797, 31 Pac. 321, does not help appellant, for in that case the claim had been paid in money, and the authority to pass an ordinance providing for the salary was not in question. Therefore there was a good defense as to the Boardman war-

rant. The judgment of the lower court is affirmed.

REAVIS and ANDERS, JJ., concur. DUNBAR and GORDON, JJ., dissent.

STEWART v. MAJOR.

(Supreme Court of Washington. June 25, 1897.)

SLANDER—CHARGES OF UNCHASTITY—PRIVILEGE—MALICE.

1. The words, "She is nothing but an old whore," and, "This woman acknowledges that you sleep with her every night, and I have reason to know that you are not the only one," are actionable per se, under Code Proc. § 798, providing that every charge of "whoredom" falsely made against a female shall be actionable in the same manner as slanderous words charging a crime which would subject the offender to death or other degrading penalties.

2. The words, "She is an objectionable character; that man Adams is keeping her," are actionable as a charge of "whoredom," under Code Proc. § 798.

3. Where defendant charged plaintiff with being a whore, the communication was not privileged because the words were spoken to a police officer, when defendant's purpose was not to prevent a crime or to protect himself.

4. Where defendant spoke concerning plaintiff defamatory words, which were not privileged, it was not necessary for plaintiff to prove malice.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Christine Stewart against J. M. Major. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Crow & Williams, for appellant. Wm. T. Stoll and E. Fitzgerald, for respondent.

DUNBAR, J. This is an action for defamation of character. Upon the trial of the cause the jury returned a verdict in favor of the respondent for \$1,000. Six communications defamatory of the respondent were alleged to have been made by the appellant, three of which were taken by the court from the consideration of the jury. The other three were submitted, and it will be necessary to notice only these. They were as follows: "That on the 18th day of February, 1896, the defendant, in a certain discourse which he had with one J. T. Sullivan, in the presence and hearing of divers persons, spoke the following words concerning the plaintiff: 'She is nothing but an old whore, and I can get her out of my building on that charge; but I don't want to resort to that means, as it would be bringing respectable women into court. It is a well-known fact that she is a whore.'" "That on the 5th day of February, 1896, the defendant, in a certain discourse which he had with one John O'Brien, in the presence and hearing of divers persons, spoke the following words concerning the plaintiff: 'She is an objectionable character. That man Adams is keeping her. I have been trying to get her out of my house for six months.'" "That on the 15th day of December, 1895, the defendant, in a certain discourse which he had with one L. M. Adams,

in the presence and hearing of divers persons, spoke the following words concerning the plaintiff: "This woman acknowledges that you sleep with her every night, and I have reason to know that you are not the only one. Ever since the night that she attempted suicide in my building, I have wanted her out."

The brief of the appellant has been prepared in such an irregular manner that it has been with some difficulty that we have followed his argument. Many of the assignments of error, however, are based upon the theory that the words alleged to have been spoken by the appellant were not actionable per se, and did not fall within the purview of section 798 of the Code of Procedure, which is as follows: "Every charge of incest, fornication, adultery, or whoredom falsely made by any person against a female, also words falsely spoken of any person charging such person with incest or the infamous crime against nature, either with mankind or the brute creation, shall be accountable [actionable] in the same manner as in the use of slanderous words charging a crime the commission of which would subject the offender to death or other degrading penalties." As to whether the words alleged to have been spoken to Sullivan fall within this statute, there is no room for discussion, and the same may be said of the words alleged to have been spoken to L. M. Adams. In regard to the words alleged to have been spoken to John O'Brien, it is claimed by the appellant that the expression, "That man Adams is keeping her," might mean an entirely different thing from the meaning placed upon it by the court; but we think that the expression used, in connection with the other language employed at that time, is not susceptible of any two constructions, and that, with the other expressions mentioned above, it falls squarely within the statute.

As to the first, third, fourteenth, and sixteenth assignments of error, which are first discussed by the appellant, the record shows that they cannot properly be raised here, as the objections were not raised in the court below; and, if they had been, we think the objections could not obtain under the pleadings, since the pleadings show that all the material allegations of the answer going to show the privileged statement were denied by the reply, and were in issue in the case. In relation to the privileged character of these statements, so far as the testimony is concerned, while it is true that Sullivan was a police officer, it appears that it was really not for the purpose of preventing any crime that the communication was made to Sullivan, for the appellant stated to Sullivan that he did not wish to resort to the law to put the respondent out of his house, for reasons which he then assigned; and the testimony of Sullivan was that it was after he informed the appellant that the police had no jurisdiction in the matter that he spoke the words attributed to him by the complaint. It is not enough that the appellant should have been making this communication to an officer,

but he must have made it for the purpose of preventing a crime, or to protect himself. This purpose is not even alleged in his defense, outside of the proof in the case. The rule is thus stated by Newell on Defamation, Slander, and Libel (page 500): "Upon grounds of public policy, communications which would otherwise be slanderous are protected as privileged if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal. All material statements made by the persons interested in the detection of the crime during their investigation, and relevant thereto, are privileged. For the sake of public justice, charges and communications which would otherwise be slanderous are protected if made in good faith in the prosecution of an inquiry into a suspected crime. The law requires such charges to be made in the honest desire to promote the ends of justice, and not with spiteful or malicious feelings against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly. They must always be warranted by some circumstances reasonably arousing suspicion. And they should not be made unnecessarily to persons unconcerned, nor before more persons nor in stronger language than necessary." The communication made to O'Brien was utterly void of any privileged character. O'Brien was not an officer of the law, and the words spoken to him were evidently spoken in a spiteful manner.

This case does not fall within the rule announced by this court in the case of *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866. So far as the question of malice is concerned, and the burden of proof, the rule is stated as follows by Newell on Defamation, Slander, and Libel (page 322): "If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So, if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

In relation to the omission of the word "malicious" from the complaint, we cite *White v. Nichols*, 3 How. 266. On the objection to the question asked L. M. Adams (assignment No. 5), see *Burt v. McBain*, 29 Mich. 260. This will apply also to the objection to instructions given in relation to the intention of the person using the language. Many of these assignments, we think, are absolutely without merit. We have read the brief and the authorities cited carefully, and have also examined the record from beginning to end.

We think the complaint was sufficient to sustain the judgment; that the law given by the court was substantially correct; that the instructions which were asked by the appellant, and refused by the court, had been in substance already given by the court where they properly stated the law; and that no reversible error was committed by the court during the trial. So far as the weight of the testimony is concerned as to whether the appellant sustained the charges which he had made against the character of the respondent, those questions were submitted to the discretion of the jury, and it has pronounced against him. The judgment is affirmed.

SCOTT, C. J., and ANDERS, REAVIS, and GORDON, JJ., concur.

SEATTLE TRUST CO. v. PITNER.

(Supreme Court of Washington. July 14, 1897.)

APPEAL BOND—PARTIES—GARNISHMENT.

On appeal by plaintiff, in an action accompanied by garnishment, from a judgment holding defendant not indebted to plaintiff, an appeal bond, which Laws 1893, p. 123, § 6, requires to be given to the "adverse party," need not be given to the garnishee.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the Seattle Trust Company, a corporation, against Lee J. Pitner. From a judgment for defendant, plaintiff appealed. Defendant moves to dismiss appeal. Denied.

Strudwick & Peters, for appellant. Donworth & Howe, for respondent.

ANDREWS, J. Appellant instituted an action in the superior court of King county against the respondent Pitner to recover the sum of \$3,533.25, and sued out a writ of garnishment therein, directed to the Washington National Bank, as garnishee, requiring it to answer in what amount it was indebted to Pitner, and what effects, if any, of the said Pitner, it had in its possession or under its control. The bank, by its cashier, appeared, and filed its answer to the writ, admitting an indebtedness to Pitner in the sum of \$407.43, the same being an ordinary deposit, and subject to the check of said Pitner. This answer of the garnishee was not controverted either by the respondent Pitner or by the appellant. The respondent Pitner also answered, denying most of the allegations of the complaint, and setting up a counterclaim against the plaintiff. The cause was tried by the court, without a jury, and on the 22d day of December, 1896, judgment was rendered in favor of the defendant Pitner for the sum of \$195.28, with costs. On the same day, on motion of appellant, the court fixed the penalty of the bond to be given to stay proceedings in the sum of \$1,000. Thereafter, and on the 31st day of December, 1896, appellant served notice of appeal upon

the defendant Pitner, and also upon the garnishee, and at the same time filed its bond in the sum of \$1,000 to the respondent Pitner only.

Counsel for respondent now move to dismiss the appeal, upon the ground that the appeal taken became ineffectual for any purpose, by reason of the failure of appellant to execute an appeal bond to the respondent the Washington National Bank. Our statute declares that the appeal is effected by the giving or service of notice of appeal as prescribed therein, and that such notice shall be served upon all parties who have appeared in the action. Laws 1893, p. 121, § 4; Id. p. 122, § 5. And it is conceded by counsel for the respondent that the appeal in this case was properly taken in the first instance, but it is claimed that it is no longer effectual, because the appeal bond filed by appellant does not run to the garnishee bank, as well as to the respondent Pitner. By serving the notice of appeal upon the garnishee, the latter was made a party to this appeal, if it was a party to the action between the plaintiff and the defendant in the court below. If it was not such party, then no notice of appeal was required to be served upon it, and no bond was required to be given to it by appellant. But it is not necessary for the appellant to give and file a bond to all parties who have appeared in the action, but only to the "adverse party." Id. p. 123, § 6. The question, then, is whether the garnishee, in view of the facts in the case, is an "adverse party" to appellant, in contemplation of the statute. This question has frequently been determined by the courts of the various states, and the decisions are generally based upon the same propositions of law, and supported by the same course of reasoning. It was determined by the supreme court of California, in the case of Senter v. De Bernal, 38 Cal. 637, and the decision thereon is so clear, definite, and reasonable that it is scarcely subject to criticism. It will therefore be considered as fully expressive of our views upon the question. In that case certain of the defendants appealed from the judgment, but failed to serve the notice of appeal upon co-defendants, who were granted relief by the judgment. For that reason a motion to dismiss was filed, and the court said: "The Code provides that any party aggrieved by the judgment of the district court may appeal, and the party appealing shall be known as the appellant, and the adverse party as the respondent. Code, § 335. By 'any party' is to be understood, as we consider, any person who is a party to the action. The appeal may be taken by filing a notice with the clerk, and serving a copy upon the adverse party or his attorney. Id. § 337. The question is as to the meaning of the words 'adverse party,' as here used, and as to that, we think, there can be no rational doubt. Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is, we think, an 'adverse party,' within

the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." The court in that case adopted the construction of these words given by Chancellor Walworth in the leading case of *Thompson v. Ellsworth*, 1 Barb. Ch. 627, and the doctrine announced is certainly sound. Now, it seems to us that the bank has no interest in the subject-matter of this appeal which will be substantially affected by a reversal or modification of the judgment appealed from. In fact, it never had any interest in the action between the plaintiff and the defendant, further than to see that whatever judgment might be rendered therein against the defendant was valid, and such as would constitute a basis for a binding and legal judgment against the garnishee. The garnishee was not even a party to the original action, in the ordinary sense of the term. Wap. Attachm. (2d Ed.) § 473; *Cook v. Whitney*, 3 Woods, 715, Fed. Cas. No. 3,166. It had no right whatever to control the proceedings, or interfere therein in favor of the one party or the other. It was its duty to stand aloof from both parties, and to do nothing in aid of either. It was only required to know that the proceedings against itself were valid, and such as it was legally bound to act upon. Under our statute, a proceeding against a garnishee is essentially an action, or at least in the nature of an action. The clerk of the court is required to docket the proceeding in the name of the plaintiff as plaintiff, and of the garnishee as defendant; and, if the answer of the garnishee is controverted either by the plaintiff or the defendant, issues are formed and tried as in other cases. Laws 1893, c. 56. In fact, it seems to be generally understood that a proceeding against a garnishee is an action. Wap. Attachm. (2d Ed.) §§ 470-472; 2 Wade, Attachm. §§ 332, 340. But the proceeding against the garnishee is, nevertheless, subsidiary and incidental to the main action, and ultimately depends for its efficacy upon it, and hence this court stated, in *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478, that "it [the garnishment proceeding] is inseparably connected with the result of the pending action, and, if the original action has been concluded to judgment, then it is limited by that judgment."

It is urged that the bank, as garnishee, is interested in sustaining the judgment of the court below—First, because it has itself been discharged; and, second, because, if the judgment in favor of Pitner is affirmed, the bank will not be liable to appellant. But the fact that an order was entered expressly discharging the garnishee is of no special significance. If no such order had been made, the judgment against appellant, in the absence of an appeal, would have discharged the garnishee, by operation of law, for the reason that the garnishee could not be held liable to appellant unless the defendant was indebted to him. But the order discharging the writ of garnishment made by the court below was not final, because the

appeal which was properly taken without delay had the effect to continue the garnishee before the court, and bring up the question of its liability. *Kennedy v. Tlernay*, 14 R. I. 528; Wap. Attachm. (2d Ed.) § 961; 2 Shinn, Attachm. § 704. See, also, *Puff v. Huchter*, 78 Ky. 146; *Erickson v. Railway Co.* (Mich.) 63 N. W. 420. This results from the fact already mentioned that a proceeding against a garnishee is incidental to the principal action, and an appeal from a judgment in favor of the defendant carries with it all of the legal incidents.

The respondent cites the case of *Bauer v. Adkins* (Tex. Civ. App.) 28 S. W. 1009, as fully sustaining the position that the garnishee in this case is an adverse party to the appellant; but, in our judgment, that case differs from the case at bar in at least one important particular. That was a garnishment proceeding, commenced in a justice's court, and was based upon a judgment previously rendered in the same court, in favor of Adkins, and against Bauer. The writ of garnishment was sued out by Adkins, and directed to the Knights of Honor, as garnishee. The Knights of Honor, by its agent and treasurer, answered that the garnishee, the Knights of Honor, at the time the writ was served upon it, was indebted to the defendant Bauer in the sum of \$2,000, which sum was paid over to Bauer, after the writ was served, by said garnishee, upon the filing by said Bauer of a replevy bond, as provided by law. The defendant Bauer filed a motion to quash the affidavit and writ of garnishment, and also filed a plea to the jurisdiction of the court, and, at the same time, a plea controverting the answer of the garnishee. The cause was appealed to the county court, and there proceeded to trial; and, the motion and pleas having been overruled, judgment was entered against Mrs. Bauer and her sureties, and also against the garnishee, the Knights of Honor, with the provision that the satisfaction of the judgment against Bauer and her sureties should satisfy the judgment against the Knights of Honor. Bauer appealed, and filed an appeal bond, payable to Adkins only, the law requiring such bond to be "payable to the appellee or defendant in error." The court held, upon these facts, that the Knights of Honor was a necessary party, and, not having been properly brought before the court, the appeal was for that reason dismissed. The garnishee in that case, having paid the amount of its debt to the plaintiff, was substantially and peculiarly interested in having no modification or reversal of the judgment against Bauer or her sureties; since, if the judgment should not be paid by her or them, the garnishee would be obliged to make a second payment to the plaintiff, and to look to the original defendant, Bauer, and her sureties, for indemnification. There is no such situation of affairs presented here, and for that reason the case is not deemed decisive of the question under consideration.

We have carefully examined all of the cases cited for the respondent, and we do not think

that they sustain the contention of respondent's counsel. The motion is denied.

SCOTT, C. J., and REAVIS and GORDON, JJ., concur.

STATE ex rel. MANHATTAN TRUST CO.
v. SUPERIOR COURT OF KING
COUNTY et al.

(Supreme Court of Washington. July 15, 1897.)

APPEAL—MANDATE AND PROCEEDINGS BELOW—
RECEIVERSHIP—MORTGAGE FORECLOSURE.

1. Final decree in a foreclosure suit, made by the superior court pending appeal from interlocutory order, may, on the case being remanded, be modified to conform to the opinion on appeal.

2. To authorize the court, in a suit to foreclose deed of trust on the property of an insolvent corporation, to determine priorities between the general creditors and those represented by the trustee, it is immaterial whether the receiver appointed is a special or general one, all the parties being before the court, and all the property in its custody.

Anders, J., dissenting.

Application by the Manhattan Trust Company, a corporation, trustee, for writ of prohibition to the superior court of King county. Denied.

Struve, Allen, Hughes & McMicken, for relator. Bausman, Kelleher & Emory, Donworth & Howe, Strudwick & Peters, and Preston, Carr & Gilman, for respondents.

REAVIS, J. Application for a writ of prohibition against the superior court of King county. Pending proceedings to foreclose a mortgage and trust deed by plaintiff, a receiver was appointed by the superior court, and, after taking possession of the property embraced in the trust deed, an issue arose between certain unsecured creditors of the mortgagor and the plaintiff trustee. The superior court heard and determined such controversy, and adjudged the mortgage lien superior, from which the unsecured creditors, Murphy, Grant & Co. and others, appealed to this court.

The cause is found reported in 16 Wash. 499, and 48 Pac. 333, entitled "Manhattan Trust Co. of New York v. Seattle Coal & Iron Co. et al." Before the decision of the cause here, plaintiff procured a decree of foreclosure and sale in the superior court, and the property was sold subject to confirmation; but before the confirmation the remittitur from this court went down. The superior court thereupon, in effect, vacated the order of sale, and proceeded, in accordance with the mandate of this court, to adjudge the superiority of the claims of Murphy, Grant & Co. and other appealing creditors over the mortgage and all claims of plaintiff, and also proceeded further, and directed that other general creditors of the insolvent corporation, Seattle Coal & Iron Company, should file their claims to priorities over the mortgage and over plaintiff's claim, if priorities were asserted, within a specified time for hearing and determination by the superior

court; and that court also directed a sale of all the property embraced in the mortgage and in the custody of the receiver at public sale, by the receiver, at a sum of not less than \$130,000. The relator maintains that the superior court had no power to disturb its decree entered pending the appeal of Murphy, Grant & Co. and other creditors in this court, and that it could go no further when the remittitur was filed than direct priority of payment of the claims of Murphy, Grant & Co. and other creditors who had joined in the appeal. But the order of sale did not provide funds for the payment of these creditors. Such order only provided for the payment of counsel fees and expenses and compensation of the receiver, and the remainder of the purchase price could be paid in bonds of the defendant corporation held by the plaintiff trustee. It is not necessary here to determine whether the pending appeal of Murphy, Grant & Co. and other creditors stayed a final decree and sale of the mortgaged property, for, in any view, the plaintiff, pending the appeal from an interlocutory order, proceeded at its peril. On the appeal from the interlocutory order in Manhattan Trust Co. of New York v. Seattle Coal & Iron Co., it was said: "In this case no question has been raised or considered as to the whole property of this corporation being a trust fund now in the possession of the court for the benefit of the creditors of the corporation alike." The foreclosure suit of plaintiff trustee against the Seattle Coal & Iron Co. was begun in February, 1894, and from that time until the present the entire property of the defendant corporation has been in the custody of the receiver. The receiver, it now appears from the record in this proceeding, by order of the court entered October 12, 1895, was directed to publish notice to all creditors of the Seattle Coal & Iron Company, notifying them to present all claims against the company, duly verified, to him, within 40 days after date of publication. A great many creditors then presented their claims duly verified, which were approved by the receiver. All this was done with the consent of the plaintiff trustee. The plaintiff trustee, in a supplemental complaint, filed in 1894, asked that the receiver take into his custody all the property of the coal company, and the mortgage, by its terms, specifically embraced all the property of the defendant coal company, and under the notice given by the receiver to the creditors to file claims the plaintiff trustee filed an individual account for \$37,000. When the remittitur from this court was filed in the superior court, the question was presented to that court upon the petitions of various creditors whether the pending receivership was a special and limited one under a foreclosure proceeding, or had become, by the action of the plaintiff trustee and receiver, a general receivership of an insolvent corporation. The superior court seems to have assumed that it could properly determine the priorities between the general creditors of the defendant

coal company and the plaintiff trustee as representative of the bondholders. The question of general or special receivership is, however, more of form than substance, as all parties were before the court, and all the property in its custody. Upon issues properly framed, it ordered a sale by the receiver of all the property of the insolvent corporation, and directed certain appropriations of the proceeds when paid into the registry of the court. It reserved the question of priorities among certain creditors until further hearing and final distribution. The superior court has proceeded in conformity to the opinion of this court in the case heretofore mentioned, and so far as the mandate ordered, and seems to have proceeded properly in the further administration of its trust with the property of the defendant coal company in its custody. We find no reason for interference with its order and decree. The writ is therefore denied.

SCOTT, C. J., and GORDON, J., concur.

ANDERS, J. (dissenting). I think the remittitur from this court did not authorize the superior court to vacate the judgment entered in the regular foreclosure suit, but only to so modify it as to make the claims of the petitioning creditors prior to those of the mortgagees. When the court in effect set aside and vacated the entire judgment and decree of foreclosure, and ordered a new sale of the property in the foreclosure suit, by a receiver in that suit, I think it proceeded without authority of law. I therefore am of the opinion that the writ prayed for should issue.

BURROWS v. McALLEY et al.

(Supreme Court of Washington. June 30, 1897.)

FIRE INSURANCE—VALIDITY OF POLICY—WHO MAY RAISE OBJECTIONS—WAIVER—PARTIES—MONEY RECEIVED—DEMAND BEFORE ACTION.

1. The executor of one of two mortgagors of a mill insured the mill, and paid the premium, having the policies made payable to P., mortgagee, "as his interest may appear." His interest exceeded the amount of the insurance. The executor had no interest in the property, and the policies provided that they should be void if the interest of the insured was other than unconditional ownership, or if the building insured was on ground not owned by the insured in fee. *Held* that, in the absence of written application and fraudulent representations of title, the policies were valid as to the mortgagee.

2. Even if the companies could have avoided the policies, they were the only parties who could assert the conditions; and hence such executor and the owner of the property could not claim the money voluntarily paid by the companies in settlement of the loss, as against the mortgagee, on the ground that the policies were void.

3. Where one who had no interest in property insured it, having the policies made payable to a mortgagee as his interest might appear, and he and the mortgagee joined in suits on the policies, in which they alleged that the former was the owner of the property, and in possession when the policies were issued, he was in no position to afterwards claim that the mortgagee was not

entitled to the money paid in settlement of the loss, on the ground that the policies were void.

4. Nor were their attorneys, to whom the money was paid, in a position to make such claim.

5. Suits were brought on the policies by the executor and the mortgagee, and judgments obtained by agreement with the companies. Drafts in payment of the judgments were turned over to plaintiff's attorneys; and they were about to pay the money to the executor and others who were not entitled to it, instead of the mortgagee. *Held*, that such attorneys were proper parties defendant to an action by the mortgagee to compel payment of the money to him.

6. Where the attorneys denied plaintiff's right to the money, no demand on them before bringing suit was necessary.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action by Charles E. Burrows against Mary A. McCalley and others to foreclose a mortgage sold and assigned to plaintiff, and to compel the payment to plaintiff of certain money paid by insurance companies in settlement of a loss under policies issued on property mortgaged, which were made payable to the mortgagee, as his interest might appear. From a decree of foreclosure, and denying the other relief asked, plaintiff appeals. Reversed.

Wellington Clark and Richard Belcher, for appellant. Thomas & Dovell, for respondents.

GORDON, J. In the year 1885, Robert M. McCalley and Andrew McCalley (their wives joining with them) executed a mortgage upon certain real estate in Walla Walla county, to one Pierce, to secure a loan of \$12,000. Upon the mortgaged premises there was a large merchant flouring mill, and the mortgage contained a covenant to keep the improvements insured "in a sum equal to half the cost value, and to have the losses in case of fire made payable to the party of the second part [Pierce] as his interest may appear." Andrew McCalley and his wife and Robert McCalley died prior to the year 1892, and their estates were in course of administration at the time of the commencement of this action. Respondent Mary A. McCalley is the sole executrix of the last will and testament of Robert M. McCalley, one of the mortgagors. Respondent Bover is the administrator of the estate of Sallie V. McCalley, wife of Andrew McCalley, one of the mortgagors. Respondent Walter S. McCalley is sole executor of the last will and testament of Andrew McCalley. In October, 1892, respondent Walter S. McCalley insured the improvements upon said mortgaged premises in three different companies, for a sum aggregating \$8,000, and paid the premium thereon. Each of said policies was made payable in case of loss to the said Pierce, the mortgagee, "as his interest may appear." In the spring of 1893 the insured property was totally destroyed by fire. In the fall of that year, respondent Walter S. McCalley and Pierce united as plaintiffs in actions brought in the superior court of said county on the policies aforesaid, against the respective companies. Thereafter stipulations were filed providing that

judgments should be entered therein in favor of the plaintiffs, and against the companies, for amounts aggregating \$6,150, and conditioned that such judgments should be forthwith paid. Subsequently said companies delivered to the clerk of the court bank drafts for the amount of the respective judgments so entered against them. These drafts were by the clerk turned over to respondents Thomas & Dovell, attorneys of record for the plaintiffs McCalley and Pierce in the actions upon said policies, who thereupon satisfied the judgments of record, and deposited the drafts for collection in the Baker-Boyer National Bank of Walla Walla. In April, 1894, the executors of the estate of Pierce sold and assigned to the appellant, Burrows, the mortgage hereinbefore mentioned, and the debt secured thereby. The present action was brought by Burrows to foreclose the mortgage, and also to have the proceeds of the drafts applied in partial satisfaction. The complaint sets out all the facts hereinbefore detailed, and further sets forth that the respondent Walter S. McCalley, at the time of obtaining the insurance upon the property, was or claimed to be the owner of the mortgaged property, and had or claimed to have an insurable interest therein, subject to the lien of the mortgage. A temporary injunction issued, restraining the bank from disbursing the money among the respondents pending the action, and subsequently, by a stipulation of the parties, the proceeds of the drafts were deposited with the clerk of the court to abide the result of the action. Such of the respondents as are interested in the disposition to be made of the case in this court united in a demurrer to the complaint in foreclosure, upon the grounds that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and subsequently they interposed a further demurrer, on the ground that two causes of action were improperly united; and the lower court declined to entertain this latter demurrer,—very properly, we think,—for the reason that it was not competent for a defendant to interpose different demurrers to the same complaint. Thereafter respondents answered, affirmatively alleging that, at the time of taking out the insurance by respondent Walter S. McCalley, Mary A. McCalley was the owner of the premises, and the insurance was procured by Walter, as the agent of Mary, for her sole use and benefit, and not otherwise, and that the insurance companies, without liability on the part of either of them to the said Walter S. McCalley or Pierce mortgage, voluntarily paid the sums hereinbefore referred to, for the use and benefit of Mary A. McCalley, and not otherwise. The trial resulted in a decree of foreclosure, and ordering a sale of the mortgaged premises, but denying the right of the appellant to a lien upon the drafts or proceeds of the drafts paid by the insurance companies, and denying to appellant the relief sought in respect to such drafts, and directing the clerk of the court to turn over to Thomas & Dovell

the proceeds of the drafts which had theretofore been deposited with said clerk, under stipulation of the parties, and awarding to said respondents costs of the action.

The present appeal is from that portion of the decree only which denied to appellant the right to have the proceeds of the drafts applied in satisfaction of the mortgage. Very little difference or dispute exists between the contending parties in this case as to the controlling facts in the case. Each of the policies contained in substance the following language: "This entire policy * * * shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." The lower court found: "That said Walter S. McCalley did not have at the time of the issuance of said policies of insurance, or either of them, nor since said time, any right to, interest in, or claim upon, said land and premises in said complaint described, or any part thereof, nor any insurable interest therein, or any part thereof;" and concluded: "(2) That inasmuch as the defendant Walter S. McCalley had no insurable interest in the property so insured, or supposed to be insured, at the time of the issuance of said policies of insurance, or at any time since then, said policies were, and each of them was, void and of no effect, and said insurance companies nor either of them was under any legal obligation to pay said sums, or any sum or sums, thereunder on account of the loss or destruction of said property, and that said plaintiffs in said actions thereon, Charles E. Burrows and Walter S. McCalley, were not entitled to recover in said actions so brought thereon as aforesaid. (3) That the judgments rendered in said actions were not recovered by said Burrows and McCalley upon said policies of insurance, or either of them, but were so recovered under and pursuant to the stipulations of the parties filed therein, for the purpose of compromising and settling their asserted claims in said actions respectively. (4) That said Thomas and Dovell, having received said drafts as the attorneys of said Charles E. Burrows and Walter S. McCalley in said actions, and no demand having been made upon them by said Burrows, plaintiff herein, for the same, or the proceeds thereof, or for any part of such proceeds, before the commencement of this action, are not liable to said Burrows, as such plaintiff or otherwise, in this action for the conversion of the same or otherwise, and especially in the absence of a showing of their insolvency or of the insolvency of said Walter S. McCalley, to whom they intended to pay such proceeds; and that only an action at law, after a demand for an accounting between him and them, and a demand by him upon them therefor, and refusal on their part to pay or deliver his share or proportion of the same, if any, can be maintained against them; and that such cause of action, if any he has, being only cognizable at law, no recovery can be had against

them thereon in this action, nor the rights of the respective parties to the moneys paid upon said drafts, and deposited in this court, as aforesaid, adjudicated in this cause; and that the same, so far as the same relates thereto, should be dismissed without prejudice, and the preliminary injunction granted herein against them dissolved; and that said Thomas and Dovell should recover their costs and disbursements against said plaintiff herein." No evidence was offered by the respondents in the trial below.

We think the trial court erred in concluding that the policies were void and of no effect, and that appellant and respondent Walter S. McCalley were not entitled to recover upon them. It appears from the record that no written application was made for the insurance, and it does not appear that any fraudulent representations of title were made at the time of effecting the insurance. Under such circumstances, it is very doubtful if the companies could have successfully defended upon that ground, even as against McCalley. *Dooly v. Insurance Co.* (Wash.) 47 Pac. 507; *Wood, Ins.* § 212. But, as to the mortgagee who had a separate and distinct interest in the policies, we think the insurance was valid. His interest was separate and distinct from that of the insured. As was said in the cause of *Hastings v. Insurance Co.*, 73 N. Y. 141: "The tendency of the recent cases is to recognize these distinctions, and thus protect the rights of the mortgagee when named in the policy, and the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance." See, also, *Pioneer Sav. & Loan Co. v. Providence Wash. Ins. Co.* (decided in this court, June 18, 1897) 49 Pac. 231. It was found by the court that the amount due upon the mortgage exceeded \$15,000, while the total amount of insurance was but \$8,000. In other words, the interest of the mortgagee in the premises exceeded the total amount of the insurance thereon; and we see no reason why the policy should be held invalid as to him. *Addis v. Addis* (Sup.) 14 N. Y. Supp. 657. is cited and relied upon by respondents. A careful examination has convinced us that the principle controlling the decision in that case has no application to the facts in this. But, independently of these considerations, the only parties who could be heard to assert the conditions were the companies themselves, and they had the undoubted right to waive the conditions if they saw fit. It cannot be assumed that they were not familiar with the conditions contained in policies of their own preparation; hence it must be assumed that with full knowledge of the conditions, and of all the facts, they elected to make payment, rather than contest the loss; and it does not belong to the respondents to assert conditions or raise defenses which were personal to the companies.

Still, again, we think that respondent Wal-

ter S. McCalley is precluded from urging this objection. As already noticed, he joined with the appellant in this case in bringing actions to enforce payment under the policies. The complaints in those actions were put in evidence in this cause, and are in the record. Each of them contains the allegation that Walter S. McCalley was the owner and in possession of the premises at the time of effecting the insurance. It does not belong to him to urge the objections which are here considered, and, if he has no right to do so, it would seem equally clear that his attorneys in that proceeding (the respondents Thomas & Dovell) cannot.

We think the court also erred in concluding that respondents Thomas & Dovell were not proper parties to this proceeding, and that, as to them, appellant's only remedy was an action at law. Their possession of the drafts was due to their employment as the attorneys of this appellant and the respondent McCalley, joint plaintiffs in the actions against the insurance companies; and, as the interest of the appellant in the insured premises greatly exceeded the total amount of insurance thereon, it follows that the appellant was entitled to the entire sum paid in satisfaction of the judgments in those actions. Upon receiving the proceeds of these judgments, it became their duty to account to the appellant therefor; and this was a continuing obligation, and inasmuch as it sufficiently appears from the record that, instead of so doing, they purposed to disburse such proceeds among the other respondents in the case, who clearly were not entitled to it, we think they were properly joined as defendants in the present case. Appellant was entitled to have the proceeds of the insurance which existed upon the mortgaged premises applied to the satisfaction of his mortgage, and for that purpose was entitled to claim the specific funds. He was not obliged to resort to an action at law, nor is it any sufficient objection to his recovery in the present cause that no demand was made of his attorneys prior to the commencement of this action. As already observed, their duty to account to him for the proceeds of the judgments was a continuing duty, and, it clearly appearing that they purposed to make other disposition of the funds, a demand would have been useless. We think it is the general rule that a demand is never necessary where it would be unavailing if made. In the present case it could only affect the question of cost, and where, as here, the respondents deny appellant's right to the funds, they cannot avail themselves of appellant's failure to make demand, in order to avoid liability either upon the merits or the minor question of costs. That portion of the decree appealed from will be reversed, and the cause remanded for the entry of a new decree in accordance with the views herein expressed.

SCOTT, C. J., and REAVIS, ANDERS, and DUNBAR, JJ., concur.

BRANDENSTEIN v. WAY.

(Supreme Court of Washington. July 8, 1897.)

APPEAL — STATEMENT OF FACTS — ATTACHMENT — GROUNDS — FELONY — AFFIDAVIT — AMENDMENT.

1. Code Proc. § 322, providing that no attachment shall be quashed for a defect in any of the proceedings that can be amended so as to show that a legal cause for attachment existed at the time it was issued, and that the court shall give reasonable time to perfect defective proceedings, does not apply to amendments sought to be made after the case has been tried, and an appeal has been taken; and hence a supplemental affidavit in attachment, first offered and filed after an appeal from an order sustaining the attachment, should not be incorporated into the statement of facts on such appeal.

2. Code Proc. § 289, allowing an attachment when the action is brought for damages for injuries arising from the commission of some felony, or for seduction, has reference to injuries to property as well as to the person.

3. Where goods were intrusted to defendant under his agreement with plaintiff to sell for plaintiff's use, and it was stipulated that title should remain in plaintiff, and that the proceeds of sales should belong to him, and that defendant should return them to plaintiff within three days after collecting them, the fact that defendant was entitled to a commission of 1 per cent. on sales did not put title to the proceeds jointly in him and plaintiff; and hence, where he converted the proceeds to his own use, he was guilty of larceny by embezzlement, under Pen. Code, § 55, declaring that any agent to whom money or other property shall be intrusted, who fraudulently converts same to his own use, or fails to account to the person intrusting it to him, is guilty of larceny, etc.

Appeal from superior court, King county; R. Osborn, Judge.

Action by M. J. Brandenstein, doing business as M. J. Brandenstein & Co., against Franklin T. Way, otherwise known as Frank T. Way. From an order overruling a motion to dissolve an attachment issued in aid of the action, defendant appeals. Affirmed.

McClure & Bass and J. T. Ronald, for appellant. George H. Preston and George Donworth, for respondent.

DUNBAR, J. Appellant interposes a motion to strike a portion of the statement of facts from the record, which motion, we think, must be sustained. An affidavit in attachment was filed in the action, and a motion was made by the defendant to dissolve the attachment on various grounds. This motion was also overruled, and thereupon the defendant gave notice of appeal to this court. Subsequently the respondent (plaintiff) filed a supplemental affidavit in aid of the attachment, which was incorporated by the court below as a part of the statement of facts. It is this supplemental affidavit which the appellant moves to strike from the statement. The respondent, in opposition to this motion, invokes section 322 of the Code of Procedure, which provides that: "This chapter shall be liberally construed, and the plaintiff at any time when objection is made thereto shall be permitted to amend any defect in the complaint, affidavit, bond, writ or other proceeding, and no attach-

ment shall be quashed or dismissed or the property attached released if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. * * * " It is evident to our mind that this provision in relation to the amendments is intended to apply to amendments during the trial, and not to amendments made or sought to be made after the case has been tried below, and an appeal taken to this court. If, upon the motion of the defendant to dissolve the attachment, the plaintiff had offered to amend his affidavit, or to furnish a supplemental affidavit, the statute would have been in point, and the court would have been authorized in allowing the amendment. But it is apparent from the record in this case that this court is now called upon to consider upon this appeal a matter which was not before the court at the time it passed upon the motion to discharge the attachment, and it was from the action of the court in refusing to discharge the attachment as the case then stood when the court made its order that the defendant appealed. This court must look upon the record as it then existed, and upon the facts then before the court, and not upon the facts which were afterwards presented to it. This was the view we took of this case when it was presented to this court in the shape of a mandamus to compel the lower court to certify to a proper statement of facts, but the writ in that case was refused, because we were of the opinion that the proper practice was to move to strike any portion of the record which was made subsequently to the appeal. But, outside of the amended or supplemental attachment, we are inclined to think that the original affidavit of attachment upon which the court acted was sufficient. If this attachment can be sustained, it must be sustained under subdivision 9 of section 289 of the Code of Procedure, which allows an attachment when the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female. It is contended by the appellant that the statute has reference to injuries to the person only, and not to property; and he insists that, as the seduction of a female is a felony, if the object of the statute had been to confer the right to issue the writ in all cases of commission of felony the addition of a cause for the seduction of females would be useless and senseless. But we hardly see how the addition of this cause of attachment would exclude injuries to property any more than injuries to persons. In fact, if the doctrine that the expression of one excludes the other were to be applied at all, it would exclude injuries to a person outside of the injury for the seduction of a female, and leave the statute to apply to injuries arising from the commission of felonies with relation to property. How-

ever that may be, the statute provides in broad terms that the writ shall issue when the damages for which the action is brought are for injuries arising from the commission of some felony, and, considering this unrestricted language, we do not feel that we would be justified in restricting its application to any particular kind of injury.

But it is contended further by the appellant that, conceding the application of this statute to a felony, the affidavit in this instance is not sufficient, in that it does not show that any felony has been committed. This action is based upon a contract which, in brief, was that the plaintiff and respondent constituted the defendant and appellant his agent for the transaction of certain business, viz. the sale of spices, sugars, etc., and the contract was as follows: "This agreement, made and entered into this eighth day of November, 1895, at the city and county of San Francisco, state of California, by and between the co-partnership firm of M. J. Brandenstein & Co., of said city and county, the party of the first part, and Frank T. Way, of the city of Seattle, state of Washington, the party of the second part, witnesseth: That for and in consideration of the mutual promises and undertakings of the parties hereto, as hereinafter set forth, it is agreed by and between them as follows, to wit: (1) The said party of the first part agrees to and hereby does employ the said party of the second part as its agent to sell for and on behalf of the said party of the first part such sugars, rice, taplocas, coffees, and spices as said party of the first part shall consign to the said party of the second part for said purpose of sale, and at such prices, and such prices only, as the said party of the first part shall lay down and determine. The said party of the first part shall ship said goods to the said party of the second part in such quantities and at such times as the said party of the first part shall itself determine. And the said party of the second part shall store said goods in the name of said party of the first part in such warehouse or warehouses as the said party of the first part shall designate. The said party of the second part may store said goods in his own warehouse, unless otherwise directed by the said party of the first part. Said party of the second part shall have the right to remove said goods from said warehouses as they are sold by him on behalf of the said party of the first part. It is understood that the title and all property rights to said goods so consigned as aforesaid by the said party of the first part to the said party of the second part shall remain in the said party of the first part until sold by the said party of the second part on behalf of the said party of the first part. And said party of the first part shall pay all charges of storage of said goods while in the warehouses, as stated, and, furthermore, shall itself insure said goods for its own benefit. (2) Said party of the second part shall make all sales of said goods so consigned as aforesaid in the

name of the said party of the first part, and shall have no right to sell or bill said goods in his own name, or in any other name than that of the party of the first part. The said party of the second part shall keep regular books of accounts of all sales so made, which books are to be subject to the inspection of the said party of the first part or its agent at any and all times. Furthermore, the said party of the second part shall render daily reports to the said party of the first part of all sales of goods so made by him on behalf of the said party of the first part. He shall, too, collect all accounts due on said sales, and shall make remittances at least every three days of all moneys so received by him on behalf of the said party of the first part. It is understood that said accounts, so to be kept by the said party of the second part on behalf of the said party of the first part shall in no way belong to the said party of the second part, but shall remain the property of the said party of the first part. And the said party of the second part undertakes only to use all reasonable skill and diligence and the best faith in the selection of purchasers for said goods, and shall not be held to guaranty the validity of said accounts at all events. (3) And in consideration of the services so to be rendered by the said party of the second part in the sale of said goods as aforesaid, the said party of the second part shall receive as compensation therefor a commission of one per cent. (1%) on all sales of said goods actually effected by him on behalf of the said party of the first part, which said commission he shall deduct from the remittances to be made by him on sales as hereinabove provided. (4) And it is further agreed by and between the parties hereto, that the above provisions shall apply to the commodity of matting to be consigned to the said party of the second part by the said party of the first part for the like purpose of sale, excepting and providing, however, as follows, to wit: The said party of the second part may sell said matting at such figures as he shall himself determine. He shall remit to the said party of the first part the prices at which said matting shall have been paid down, and billed to him by the said party of the first part upon any sale by him of said commodity to any purchaser, whether he shall have received payment on any such sale or not; providing, however, that, as above provided, said remittance need not be made oftener than every three days. As soon as the said party of the second part shall have made a full remittance on any account as aforesaid, said account on which said remittance shall have been made shall become the property of the said party of the second part. Furthermore, the said party of the second part shall be entitled to no other compensation for his services in the sale of said matting, except the difference between the prices at which said commodity shall have been laid down to him by the said party of the first part, and the prices at which the said

party of the second part shall have sold it. (5) It is understood that the said party of the second part shall have no right or authority whatever to sign any instrument on behalf of the said party of the first part in any way binding or affecting the said party of the first part, excepting, however, that the said party of the second part shall have the authority to sign receipts for all moneys received by him for and on behalf of the said party of the first part in the course of his said employment, and excepting, too, that he shall have the authority to sign orders for the removal of goods so consigned as aforesaid from the warehouses in which they are stored, for the purpose of sales actually effected on behalf of the said party of the first part as aforesaid. (6) This agreement shall continue only during the pleasure of the parties thereto, and shall be terminable forthwith at the instance of either upon notice to the other. In witness whereof we have hereunto set our hands this eighth day of November, 1895. M. J. Brandenstein & Co., by L. Marx, Atty. in Fact. Frank T. Way."

The contract is referred to in, and made a part of, the affidavit which alleges the agency, alleges that goods were furnished in accordance with the terms of the contract; that the defendant sold the goods, and received the proceeds of sales in money to the extent of several thousand dollars mentioned; that he withheld and converted the same to his own use. The concluding portion of the affidavit, which is too lengthy to set out in detail, is as follows: "That the damages for which said action is brought are for injuries arising from the commission of a felony, to wit, the crime of larceny by embezzlement, committed by said defendant in King county, state of Washington, as follows: That the said defendant, being then and there the agent of the said plaintiff, to whom the money and property aforesaid of said plaintiff was intrusted, did on, to wit, the 14th day of November, 1896, fraudulently convert the same to his (the said defendant's) own use, and has wholly failed to account therefor to said plaintiff, being the person so intrusting the same to him, the said defendant. And the said defendant has been guilty of a fraud as aforesaid in incurring the obligation aforesaid, for which said action is brought. * * * These allegations of the affidavit are made after a recital of the acts which it is alleged constitute the crime of embezzlement. It is claimed by the appellant that the affidavit simply shows a violation of a contract, and nothing more, and that, inasmuch as the defendant was entitled to a commission of 1 per cent. for selling, the title to the property was a joint title, and therefore the condition of the statute was not met, and the property must be the property of another. It is also insisted that the property was not the property of the parties to whom the defendant sold these goods after they paid money to the defendant, because he was authorized,

under his contract with the plaintiff, to sell the same, and receive payment for the same; and some cases are cited, under statutes which are somewhat similar to, but not exactly like, ours, in support of such holding. But we think that such a contention is a narrow one. It might be well to see exactly the provisions of the statutes in this respect. Section 55 of the Penal Code is as follows: "If any agent, clerk, officer, servant, or person, to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny," etc. Under the conditions of this agreement and the allegations of the affidavit, the defendant was intrusted with property, and under the allegations of the affidavit he converted the property to his own use, and failed to account for the same to the persons intrusting it to him; for it was especially provided in the agreement that the money which he received for the sales of the goods was to be the money to the plaintiff, and not the money of the defendant. It is true that the property appropriated was not the property of the parties to whom the defendant sold the goods, and a large portion of the appellant's argument is directed to that question; but it was the property of the plaintiff in this action, and fails as squarely within the statute as though it were the property of the parties purchaser. If A. says to B., "Take my horse, and sell it in the market for \$100, return the money to me within twelve hours after the sale is made, and I will allow you one per cent. for your services," and B. sells the horse, receives \$100, appropriates the same to his own use, and refuses to account to A. for the same, it seems to us that the crime of larceny is made out under the statute above referred to; and that is no plainer case than the one at bar. The property was intrusted to the defendant under his agreement with the plaintiff to sell for plaintiff's use. It was stipulated that the title to the property should remain in the plaintiff, that the proceeds of the sale should be the property of the plaintiff, and that defendant was to return the same to plaintiff within three days; and to hold that, because the defendant had a right to a commission of one dollar on every hundred obtained, the title to every dollar obtained was such a joint title as would protect the wrongdoer from the operations of this statute would be to defeat the intention of the law, and to permit criminals to go unwhipped of justice. We think the original affidavit was sufficient to warrant the issuance of the writ of attachment, and the judgment will be affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

BELLINGHAM BAY IMP. CO. v. FAIRHAVEN & N. W. RY. CO. et al.

(Supreme Court of Washington. July 15, 1897.)
LIMITATIONS—RAILROAD FORECLOSURE—PREFERRED CLAIMS—LACHES.

1. A claim for labor and materials advanced to a railroad from time to time on claimant's credit between January, 1892, and August, 1893, under an agreement to thereby furnish such labor and materials for its operating expenses, constitutes a single legal demand, and the bar of a three-year statute of limitations is not complete in June, 1895.

2. The equitable lien obtained upon the assets of a railroad company by furnishing the labor and material used for operating expenses is not barred for laches before the claim is barred by the statute of limitations.

3. He who advances labor and materials for the operating expenses of a railroad, which was necessary to keep it a "going concern," is entitled to be paid out of the earnings of a receivership, and even out of the corpus of the property, in preference to a mortgage executed prior to such advancements.

4. A demurrer to a claim for a preference of an account should be overruled where any item is entitled to a preference.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by the Atlantic Trust Company, as trustee, against the Fairhaven & New Whatcom Railway Company. From a judgment for Bellingham Bay Improvement Company, intervener, defendant and plaintiff appeal. Affirmed.

Kerr & McCord and Burke, Shepard & McGilvra, for appellants. Fairchild & Bruce, for respondent.

GORDON, J. Separate appeals have been taken by the Fairhaven & New Whatcom Railway Company and the Atlantic Trust Company as trustee from a judgment and decree of the superior court of Whatcom county, which awarded respondent, the Bellingham Bay Improvement Company, a judgment against the railway company, and decreed priority of such judgment over the mortgage claim of the trust company. The judgment and decree were rendered on an order overruling separate demurrers of the appellants to the amended cross complaint of the respondent as intervener. The appellants joined in the brief, and their separate demurrers were upon like grounds. From the record it appears that under date of February 1, 1892, the appellant railway company executed a mortgage to the appellant trust company to secure the payment of a series of first mortgage bonds amounting to \$300,000. The respondent, by its cross complaint in intervention, sought a judgment against the railway company, and to have its claim decreed superior to the mortgage lien. The claim upon which the respondent's right of action is founded is for labor and supplies and materials furnished the railway company between January, 1892, and August, 1893. In its complaint respondent alleges: That after the execution

and delivery of the mortgage the trust company permitted the railway company to continue in the operation and control of all of the property and assets embraced within the mortgage until the appointment of the receiver herein, viz. about February 1, 1896. That although interest coupons became due and payable every six months after the date of said mortgage, the trust company took no steps to enforce collection of such interest, or to enforce its mortgage, until about the 1st day of February, 1896. That on or about the 1st day of January, 1892, the railway company commenced to operate its railway system. That at that time it was without any available cash or money assets, all such cash and assets having been exhausted in construction, and the corporation had no reserve or money with which to pay its current expenses or to operate and carry on the business for which it had been created; all of which was well known to the trust company. That it applied to the respondent and its predecessor in interest, and obtained a line of credit, in consequence of which, and by means whereof, it obtained all the articles, supplies, materials, and labor mentioned in the account upon which respondent's action was based, and all of which labor, materials, and supplies were needful, necessary, and requisite for the operation of its road and the regular conduct of its business, and for the purpose of preserving its property. "That said several items were furnished under the agreement of the said railway company that it would pay for the same out of its earnings so soon and whenever such earnings would permit payment therefor; and by the accommodation of the parties—that is to say, by the forbearance of the said Bellingham Bay Improvement Company (respondent) to embarrass said railway company by litigation thereon—said claims, demands, and obligations * * * were carried by the said Bellingham Bay Improvement Company; and the said railway company never at any time became able to pay the same out of its receipts, but was so conducted, and its affairs so managed, that between the times of its beginning operations and the appointing of the receiver, its expenses were in excess of its receipts, and its debts greater than its ability to pay from its ordinary receipts. * * * That from the time of the execution of the said mortgage to the trustee aforesaid, and up to and on or about the 1st day of January, 1893, the said Fairhaven & New Whatcom Railway Company conducted its business at a loss, and its receipts were not sufficient to meet the actual operating expenses of said corporation; and said Fairhaven & New Whatcom Railway Company became indebted for its general operating expenses in a large amount, to wit, twelve thousand dollars (\$12,000.00), for the general operating purposes of said corporation. That since said date said road has been more than paying the operating expenses, and up to the time of the appointment of the receiver, as hereinbefore stated,

the excess of the receipts over the amount necessary and requisite to pay the general operating expenses of said road were used by the officers of said company in paying and discharging the bills and obligations contracted for operating expenses prior to the 1st day of January, 1893; and said indebtedness so contracted for the operating expenses has been reduced in a large sum, to wit, seven thousand dollars (\$7,000.00); and, if the said receiver had not been appointed, the general receipts of the said company would have been ample to have paid your intervener for all bills contracted and mentioned and described in Exhibit A, and would soon have been able to have been paid." That no portion of the account had been paid excepting the sum of \$112.54, paid on June 1, 1895.

1. The first ground of demurrer is that "the action of the said intervener for the relief therein sought has not been commenced within the time limited by law." As already noticed, the first items of the account were furnished in January, 1892, and the last in August, 1893. We think that by reason of the contract of the parties already noticed the different items composing the account constituted a single legal demand and cause of action at the time when the payment of \$112.54 was made on June 1, 1895, and the bar of the statute was not complete at the time when such payment was made, and thereafter respondent's action was prosecuted within the time allowed by the statute. There was, therefore, no error in overruling the demurrer upon that ground.

2. In support of its general demurrer appellant urges that, even if the claim is not barred by the statute of limitations, respondent has lost by laches any equity for preference over the mortgage debt. We think it is correctly stated that the length of delay in asserting one's rights which will amount to laches is not subject to fixed rule, but is largely dependent upon circumstances. The usual course of the company in the conduct of its affairs, its financial circumstances and ability to make payment, as well as the course of dealing between the parties, must be considered in determining to what extent credit for claims of this character may be permitted to run back. In *Hale v. Frost*, 99 U. S. 389, the supreme court of the United States gave priority to a claim for material furnished three years before the appointment of a receiver. In *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, the same court gave preference to a claim for supplies furnished more than 11 months prior to the appointment of a receiver; and in *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182, it is said: "There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver. There is no 'six months' rule.'" And the court further says that what length of time will bar them is not clear upon the authorities, "and depends largely upon the circumstances of each particular case." Upon

principle, it would seem but just that a party should, in the absence of special circumstances of controlling importance, be entitled to equitable relief for the full period in which, according to the statute, an action might be maintained at law to enforce the demand. If the lapse of three years is necessary, under the statute, to bar the debt, there appears to be no sufficient reason, generally speaking, why the equitable right should be barred within a shorter period.

3. The final contention of appellants is that the items of the respondent's claim are not such as to entitle it to a preference over the mortgage. In this connection they urge that there has been no diversion of the income of the road to the benefit of the mortgage security, and as to a part of the claim they further urge that it was for materials used in the construction, and not in the operation, of the road. We think that appellants are mistaken as to the character of the materials and supplies which they assume were furnished to be used in construction, rather than in the operation, of the road, and deem it unnecessary to pursue this phase of the objection further. In *Fosdick v. Schall*, 99 U. S. 235, the supreme court of the United States say: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." And in the later case of *Trust Co. v. Souther*, 107 U. S. 594, 2 Sup. Ct. 297, the same court, after quoting so much of the opinion in *Fosdick v. Schall* as is above set out, say: "To this we adhere, and, in our opinion, the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal, or interest, instead of current expenses. * * * Many other circumstances may make such an order reasonable, and this case furnishes a striking example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession, as they had the right to do, when the default had continued for six months. On the contrary, notwithstanding no payments of interest had been made, they allowed the company to operate the road and incur obligations therefor until December, 1877. This was evidently in the hope that their condition would be improved by the delay; for to effect the forbearance, they established an agency, and incurred expenses to an amount much larger than the \$3,000 reimbursed by the company. Prior to the appointment of the receiver, the gross earnings do not appear to have been enough to pay expenses, but afterwards they yielded a very considerable surplus. There

cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and, as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as a condition of granting their application for a receiver, that debts incurred by the company in thus protecting the security should be paid from the income of the receivership. If, in consequence of an increase of revenue, it could be done." And in *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140, the court say: "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien." From the still later case of *Burnham v. Bowen*, *supra*, we quote the following: "It is said, however, that as no part of the income, before the appointment of the receiver, was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. * * * So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership, and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick v. Schall* the 'current debt fund' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made." An examination of the account in connection with the allegations of the complaint shows that the entire claim of the respondent is for labor, materials, and supplies, all of which were in-

dispensable to the business of the road, conserving its property, preserving the franchise, and protecting the interests of the mortgage creditors and all others interested in the railway property. We think a fair construction of the pleading is sufficient to show that the debt was incurred as a part of the operating expenses of the road for supplies, etc., necessary to keep the road a "going concern," and that such debt is entitled to be paid out of the earnings of the receivership, and even the corpus of the property is chargeable with a priority of lien. We might further add that, if any item of the account is such as entitles respondent to a preferred claim, then the demurrer was properly overruled; and in this connection we notice that fuel was furnished by the respondent, amounting to \$167.91, the complainant alleging that said fuel "was furnished to enable the said corporation to generate heat and steam to supply the motive power for the said railway company, and if the same or other fuel to a like amount had not been obtained by it the said corporation would not have been able to have continued the operation of its said line of street railway." It would seem to require no argument to demonstrate that this was a preferential debt equitably entitling the respondent to a preferred lien. Our conclusion is that the demurrers were properly overruled, and the judgment and decree will be affirmed.

SCOTT, C. J., and ANDERS and REAVIS, JJ., concur.

STATE ex rel. MIDDLEBROOK et al. v. REID, Judge, et al.

(Supreme Court of Washington. May 27, 1897.)
APPLICATION FOR MANDAMUS—PEREMPTORY WRIT.

Where service of a temporary writ of mandamus is sustained, and no return is filed, a peremptory writ will issue.

Application by Middlebrook, Stoner & Co., a co-partnership, for a writ of mandamus against Frank T. Reid, as judge of the superior court of Kitsap county, and others. Peremptory writ issued.

Fred H. Peterson and S. S. Carlisle, for relator. Allen Weir, for respondent Kemp.

PER CURIAM. An alternative writ of mandamus was heretofore issued out of this court against the superior court of Kitsap county, on the petition of the relator, commanding him to reinstate an appeal from a court of the justice of the peace for Port Orchard precinct, in and for the state of Washington, in a case wherein N. R. Kemp was plaintiff, and Middlebrook, Stoner & Co. were defendants, or to show cause on the 21st day of May, 1897, why such writ should not be made permanent. Service of said temporary writ was duly made upon said court, and, no return thereto having been made, the peremptory writ applied for will be issued.

(17 Wash. 267)

STATE ex rel. **MIDDLEBROOK et al. v. REID**, Judge, et al.

(Supreme Court of Washington. June 28, 1897.)

LIABILITY FOR COSTS.

Where a writ of mandamus is granted to compel the court to reinstate an appeal improperly dismissed, the costs will be taxed against the real party in interest, where no misconduct on the part of the judge is shown.

Motion to set aside judgment for costs. Denied.

For former opinion, see 49 Pac. 516.

Fred H. Peterson and S. S. Carlisle, for relator. Allen Weir, for respondents.

PER CURIAM. This is a motion on the part of N. R. Kemp to set aside a judgment rendered against him for costs in granting a writ of mandate against the superior court of Kitsap county. The facts relating thereto are as follows: Said Kemp commenced an action before a justice of the peace against the firm of Middlebrook, Stoner & Co., and obtained a judgment against them; whereupon they appealed to the superior court aforesaid, and that court dismissed the appeal upon Kemp's motion. In the showing for an alternative writ it was made to appear that the court dismissed the appeal on the ground that it was from a default judgment, and that no appeal could lie therefrom. It was also made to appear that there had in fact been a trial upon the merits before the justice of the peace, and upon that showing an alternative writ was directed to issue. No return was made by the respondent thereto, but, at the hearing, Kemp appeared, and undertook to submit an individual return. By a mistake, the alternative writ had originally issued against the judge of said court, and also against said plaintiff Kemp; but, upon that being called to the attention of the court, Kemp's name was stricken, as the writ could nominally run only against the judge, although Kemp was the party in interest. The court would not entertain the return by Kemp, holding that it must be by the judge. No reason was shown why the judge had not made a return thereto; nor was any additional time asked for that purpose, as would likely have been done if the facts were not as shown by the relator, and a peremptory writ was directed to issue, with costs, against Kemp, on the ground of his being the party in interest.

It has been the uniform practice of the court to regard such applications as a proceeding in the original action, and to tax the costs against the real party in interest. By his action, he induced the lower court to render an unwarranted decision. The relator, on being successful, should recover his costs. The costs should not go against the judge except in case of some willful misconduct or dereliction of duty warranting it, and no such showing is made in this instance. Consequently, the costs should go against Kemp, he

being the one against whom the decision was in fact rendered; and, in the absence of any authority showing that we have no power to render such a judgment for costs, we will follow the practice heretofore adopted. Motion denied.

(17 Wash. 361)

SEAVEY v. CITY OF SEATTLE.

(Supreme Court of Washington. July 13, 1897.)

CITIES—PUBLIC IMPROVEMENTS—AWARD OF DAMAGES—ACTION—APPEAL.

1. A judgment on an award for damages for land taken for the purpose of widening a street, under Laws 1885-86, pp. 243, 270, which provides for assessing the entire expense of such improvement on the property benefited, was without sufficient support, where there was nothing to show whether such assessments had been collected by the city, nor whether plaintiff had ever called on the city officers to make such collection, or had resorted to any proceedings to compel them to thus proceed.

2. The fact that judgments had been entered on similar awards, in favor of other parties, did not estop the defendant city to question the right of plaintiff to a similar judgment.

3. That the assessment roll was not in the record on appeal was no ground for dismissing an appeal from a judgment on such award.

Appeal from superior court, King county; T. J. Humes, Judge.

Motion for a judgment by Abigail J. Seavey, on an award of damages, against the city of Seattle. From a judgment in plaintiff's favor, defendant appeals. Reversed.

John K. Brown and F. B. Tipton, for appellant. Blaine & DeVries, for respondent.

SCOTT, C. J. This is an appeal from a judgment rendered in favor of the plaintiff upon an award of damages made in September, 1889, for land which the city proposed to take in widening and improving the street on which it fronted. There was no showing in support of the motion for judgment, aside from the record of the proceedings, which included the ordinance passed for widening the street, condemning the necessary property therefor, and assessing the cost upon the property benefited, the report of the appraisers, a map of the property where the improvement was located, and the assessment roll required by the ordinance aforesaid, by which proceedings it appeared that the plaintiff's land sought to be condemned was appraised at \$2,500. No move seems to have been made in the matter after September, 1889, until the motion upon which the judgment was rendered was made, which was in November, 1896. The ordinance was drafted in pursuance of the provisions of section 101, as connected with section 11 of the 1886 charter of the city (Laws 1885-86, pp. 243, 270), which provided for assessing the entire expense of the improvement upon the property benefited.

We are of the opinion that the showing was insufficient to sustain the judgment. There was no attempt to show that the city had any money on hand which it had collected upon the

property assessed. In *Baker v. City of Seattle*, 2 Wash. St. 577, 27 Pac. 462, rights similar to the one involved here were before the court, and passed upon, under these identical charter provisions. It was held that the city could not be charged with the value of the property taken, at least until after it had been fully moved to prosecute the assessments, and had failed. There is nothing to show in this proceeding whether the assessments had been collected or not, nor whether the plaintiff in this case had ever called upon the city officers to proceed therewith, or had resorted to any proceedings to compel them to proceed. We have had a somewhat similar principle before us for consideration in the case of *German-American Sav. Bank v. City of Spokane* (recently decided) 49 Pac. 542, although the case there presented was not so strong in favor of the claimants, for that involved the rights of a voluntary contractor or his assignee for work in the improvement of a street, while this involves the right of a party whose land was taken by compulsory process for such purpose; and the case is certainly stronger in favor of the party now before us. But, as the point has been once decided by the court against the right of the plaintiff here to recover upon the facts shown, and as such decision is sustained by respectable authority, in the interest of a stable and settled administration of law, we prefer to abide by it, although it is an application or extension in a somewhat greater or more severe degree of the principle recognized in the case of *German-American Sav. Bank v. City of Spokane*, referred to. If the plaintiff was not content with the manner of payment provided and her right to compel its enforcement, she should have insisted upon payment before surrendering possession of her land, if she has surrendered it. To have entitled her to this judgment, there should have been a showing at least that she had resorted to some means to compel the city officers to collect the assessments, that they had failed to do so, and that the further right to prosecute the collection had become lost; or, in the alternative, there should have been a showing that the city had actually collected the money upon the assessments, and that there was a sufficient balance to satisfy her claim.

It is claimed by the plaintiff, and the record shows, that several judgments were entered upon similar awards in favor of other parties; and it is contended that, in consequence of having allowed that course in such instances, the city would be estopped from questioning the right of the plaintiff to a similar judgment; but we do not think that position is well taken. The fact that judgments upon insufficient foundations had been allowed in some instances, if they were, would be no ground upon which to base an estoppel in a similar case. The city could not be estopped in one case in consequence of the successful issue of others, where the city officers had failed to make use of available defenses thereto, if they did neglect to do so. But there is nothing here to show that at the time these other judgments

were rendered, which was several years ago, following closely upon the assessment proceedings, there was not money in the treasury collected from the assessments sufficient to meet them. The appellant contends that, after this lapse of time, the plaintiff was not entitled to proceed by motion in any event, and asserts that, as a matter of fact, the city never had taken possession of the property, and that it was precluded from making that showing in consequence of the form in which the plaintiff asked for relief. But we do not think that follows. The city had the right to interpose any valid defense it had to the granting of the motion. The matters could have been shown to the court by affidavits primarily on resisting the motion, and, if disputed, the court would no doubt have directed the framing of an issue thereon in some suitable manner for trial; and if, as a matter of fact, the improvement scheme had been abandoned in whole or in part, and the plaintiff's land had not been taken, that would have been a defense to her claim for its value.

The plaintiff objected to a consideration of the case here, and moved for a dismissal of the appeal, on the ground that the assessment roll was not in the record, and alleges that the same could not be found, but was lost in the lower court, and that, if it was here, it might sustain the plaintiff's right to recover. But we do not think it could be material here. Whether the assessment roll was valid or invalid, it could not help the plaintiff's case, taking it most strongly against the appellant, for the assessment roll certainly would not show that the city had any balance of moneys which it had collected upon the property assessed with which to satisfy the plaintiff's claim. Reversed.

ANDERS, GORDON, and REAVIS, JJ., concur.

(58 Kan. 402)

FARWELL v. LAIRD.

(Supreme Court of Kansas. July 10, 1897.)

MALICIOUS PROSECUTION — EVIDENCE — FINDINGS OF JUSTICE.

The findings of a justice of the peace, made upon the preliminary trial of a person charged with crime, that the complaint of the prosecuting witness against the accused was malicious, and without probable cause, cannot, in a suit for malicious prosecution, brought by the accused against the prosecuting witness, be received in evidence in support of the claim of lack of probable cause.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by R. R. Laird against J. V. Farwell. Judgment for plaintiff. Defendant brings error. Reversed.

Edwin White Moore, for plaintiff in error. Campbell & Dyer and Valentine, Godard & Valentine, for defendant in error.

DOSTER, C. J. This was a suit for malicious prosecution brought by the defendant in error against the plaintiff in error. A single question only needs to be specially noticed. On the trial of the case the court received in evidence, over defendant's objections, the findings made by the justice of the peace that the complaint of the prosecuting witness against the accused was malicious, and without probable cause, and instructed the jury as follows: "Now, in this connection, the court instructs the jury that if you find it to be a fact that the said R. R. Laird was arrested as aforesaid, upon a complaint as aforesaid, and was discharged as aforesaid, then, in that event, the court instructs the jury, under the evidence in this case, that there was no probable cause for such arrest." This ruling and this instruction were erroneous. In the case of *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. 328, it was held that: "On the trial of an action for malicious prosecution it is not error for the trial court to refuse to permit to be read in evidence that part of the verdict and judgment in the criminal case for the institution and the prosecution of which this action is brought that finds and adjudges that the complaint was malicious, and without probable cause; and that the name of the prosecuting witness was the name of the defendant in the action for malicious prosecution, and adjudges him to pay the costs." Counsel for the defendant in error attempts to distinguish the present case from the earlier one, and observes that the earlier case "was a trial before a jury, and not an examination. In that case, before the jury could convict, the guilt of the accused must be proved beyond a reasonable doubt, while in this case all the magistrate had to do was to find, not the guilt of the party, but whether there was probable cause to believe him guilty." True, the original case out of which *Sweeney v. Perney*, supra, grew, was a trial for misdemeanor, and not a preliminary examination on a charge of felony, but in that case it was not the verdict of acquittal based upon the rule of "reasonable doubt" which had been offered in evidence. What was offered in that case, as in this, was the accompanying finding of malice, and lack of probable cause. The two cases, therefore, in point of fact are identical. There is, as noticed in the case of *Sweeney v. Perney*, a conflict of authority upon the question whether the record of acquittal or discharge of a person accused of crime because of lack of probable cause to believe him guilty can be received in evidence in a subsequent suit by him for malicious prosecution in support of his claim of lack of probable cause. To our minds, however, the rule determinable of the question is plain, and of familiar application. It is that judgments are admissible against strangers only to prove their rendition and their legal effects, and not the facts upon which they rest. 2 Whart. Ev. § 823. The prosecuting witness was not a party to the criminal action instituted by him in the sense of being bound to the defendant by the record

of the proceedings. He and the defendant were strangers to that record, legally speaking. True, in the case *In re Ebenhack*, 17 Kan. 618, it was held that under the statute (section 18, c. 83, Gen. St. 1868) the prosecuting witness made himself so far a party to the case in which his complaint was filed, as that costs and imprisonment could be imposed upon him for a malicious prosecution; but, he was a party only as to the state, and in respect to a matter of concern between himself and it. He and the state were litigating the questions of malice and probable cause, to determine which should pay the costs of the proceeding. The statute made the question of malice and probable cause issues auxiliary and incidental to the main case, with the view to a conclusion upon the question of costs. This, however, does not make the prosecuting witness and the defendant parties to the record in the sense in which estoppels against them arise out of it.

The contention of plaintiff as to the lack of necessary averments in the petition upon a matter of agency is not well founded. The motion of the defendant in error to dismiss the petition in error because of defects in the certificate of settlement of the case made was presented upon a former occasion, and overruled. It is again overruled. For the error pointed out, the judgment is reversed, and a new trial ordered. All the justices concurring.

(58 Kan. 405)

COTTRELL et al. v. MANLOVE et al.

(Supreme Court of Kansas. July 10, 1897.)

CORPORATIONS—DISSOLUTION—LIABILITY OF STOCKHOLDERS—LIMITATIONS.

Under Gen. St. 1889, c. 23, § 44, a right of action accrues in favor of the creditors of a corporation, and against its stockholders, upon the occurrence of its dissolution. The liability of such stockholders under this section, and also under section 32 of the same chapter, is one created by statute, the period for the enforcement of which is three years; and the creditor cannot extend such period by proceeding, under said section 32, to obtain judgment against the dissolved corporation or its trustees, and execution against the stockholders, instead of proceeding by direct action against the latter.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by O. Manlove and one Harris against the Kansas Commercial Mutual Fire Insurance Company. Judgment for plaintiffs. From an order allowing execution against J. F. Cottrell and others, stockholders, the stockholders bring error. Reversed.

J. D. McCleverty, R. W. Blue, John S. Besson, and Sheldon & Sheldon, for plaintiffs in error. Snoddy & Snoddy, for defendants in error.

DOSTER, C. J. The Kansas Commercial Mutual Fire Insurance Company was a corporation, organized in 1882, under chapter 111 of the Laws of 1875. By chapter 132 of the Laws of 1885, the act under which the con-

pany did business was repealed, but companies incorporated under the earlier law were allowed until December 31, 1885, to reorganize in compliance with the later act. This company did not reorganize under the new law, but on December 1, 1885, at a meeting of its members or stockholders, it resolved to cease business and close up its affairs. On December 23, 1885, the board of directors, in pursuance to such resolution of the members, notified all policy holders that neither they nor the company would be liable for losses occurring after the 31st day of such month. Immediate steps were taken and continued, in the process of closing the company's business, including, among other things, the appointment of a receiver. The defendants in error Manlove & Harkness, holding one of the company's policies, met with a loss in July, 1886, during the period of liquidation of the company's affairs, and finally, after protracted litigation, on December 26, 1892, recovered judgment against it. April 26, 1893, execution was issued on this judgment, and thereafter returned unsatisfied. June 14, 1893, motions were made under the statute, for leave to issue execution against the members, as stockholders of the company, for the collection of the judgment against it, which motions were allowed, and from the orders allowing them this proceeding in error was taken.

Under the above state of facts, the statute of limitations is invoked by the stockholders, the plaintiffs in error, in bar of the creditors' proceeding. Two remedies against stockholders of a corporation are afforded by the statute to its creditors. They are contained in sections 32 and 44 of the chapter on "Corporations" (1 Gen. St. 1889):

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or a charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 44. If any corporation, created under this, or any general statute in this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered and execution satisfied, the defendant or defend-

ants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The remedies afforded by these two sections cannot be called "cumulative," and considered equally open to creditors. One relates to the exigency of corporate insolvency; the other to that of corporate dissolution. Under one the proceeding lies because the corporation is bankrupt, though not necessarily dissolved; under the other, because it is dissolved, though not necessarily bankrupt. The remedy of the section last quoted is open to the creditors of corporations immediately upon the dissolution of the corporation. Under its provisions, there is no occasion to await the recovery of a judgment against the company, but action may at once be brought against its stockholders.

The Commercial Mutual Fire Insurance Company was dissolved, by operation of law, on the 31st of December, 1885, through its failure to reorganize under chapter 132 of the Session Laws of that year. However, the statute, as it will be observed, affords the remedy in question "if a corporation be dissolved leaving debts unpaid"; and it may be said that it applies only to debts existing at the time of the dissolution, and hence not to that of the defendant in error, which did not come into existence until the occurrence of the loss some time after the dissolution. Indebtedness maturing after the dissolution, and growing out of a contingent liability existing at the time of such dissolution, is, in our judgment, within the intent of the act. The controlling factors in the problem which arises under this statute are the facts of indebtedness and corporate dissolution, and not the time of their occurrence. A right of action having accrued to the creditors against the stockholders, upon the dissolution of the corporation and the occurrence of the loss, the statute of limitations necessarily started to run upon the happening of these events. The liability of the stockholders being one created by statute, the period of limitation upon the right to enforce it was three years. If it were true that the remedy of judgment against the corporation, and execution thereafter against the stockholders, is cumulative, and likewise open to the creditor, the possession of such additional remedy could not extend the period of limitation. The right to pursue the stockholders under one of these statutes is in no wise different from the right to do so under the other. The remedy is no more efficacious under one than the other.

An election between mere statutory forms of procedure does not give a right to extend the statutory period of limitation for the commencement of such procedure. There are not two periods of limitation,—one for each form of action; there is but one period of limitation for both actions. Of course, it is not to be understood that the right of action accrues against stockholders, and that the statute starts to run in their favor in every case from the maturity of the debt against the corporation. The case before us is that of a dissolved corporation. In such case the statute gives an immediate right of action, and our holding is that the creditor cannot extend the limitation upon that right by neglecting to sue direct, and, in lieu of so doing, adopt the slower process of judgment against the corporation, and motion for execution against the stockholders. The right of action in this case accrued in 1886. The action was not instituted until 1893, a period of seven years. It cannot be maintained, and the judgment of the court below is reversed, with directions to proceed in accordance with this opinion. Other questions argued at length in the case need not be noticed. All the justices concurring.

(58 Kan. 414)

SECURITY INV. CO. et al. v. RICHMOND NAT. BANK et al.

(Supreme Court of Kansas. July 10, 1897.)

INSOLVENCY—ESTABLISHMENT OF CLAIMS—APPEAL—TERMINATION BY JUDGMENT—RES JUDICATA.

1. An insolvent company made an assignment for the benefit of creditors. It had assumed an indorser's liability on notes transferred to others, and which had been secured by mortgages. After the assignment an action was brought in another county to recover upon the notes against the makers and the indorser, and also to foreclose the mortgages. Before judgment was rendered in that action, notice was given by the assignee requiring all creditors to present their claims on a certain day, and in response to the notice the holders of the notes presented their claims, but the assignee refused to allow them. Appeals were taken from the decision of the assignee to the district court. Thereafter, and before the appeals were heard, judgments were rendered upon the notes in the foreclosure action against the assignee and the estate. *Held*, that the rendition of the judgments did not terminate the appeals, but, the pleadings having been amended so as to show that the claims had been merged in judgments, it was the duty of the court upon appeal to allow so much of the judgments as remained after crediting all payments made thereon, and also the amounts derived from the sale of mortgaged property. *Held*, further, that the claims should be classified, and the holders of the same should be first compelled to resort to the fund derived from the special liens, and only allowed dividends upon the amounts remaining unpaid after exhausting such fund.

2. The assignee having been a party in the foreclosure action, the judgment rendered therein against one of the claimants is a final adjudication as to the validity of the claim and the liability of the company.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Claims filed by the Richmond National Bank and others with W. T. Branch, assignee

of the Security Investment Company, insolvent, were disallowed by the assignee, and complainants appealed to the district court, and from a judgment allowing all claims but one the investment company and others bring error. Reversed.

D. M. Thorp, J. W. Tucker, and V. H. Branch, for plaintiffs in error. Clark A. Smith, for defendants in error.

JOHNSTON, J. The Security Investment Company, of Cawker City, Kan., made a number of loans to B. H. North, M. A. F. North, and J. H. North, taking promissory notes secured by mortgages on property in Jewell county. Before maturity, these notes were indorsed and transferred to several banks in different parts of the country. On February 7, 1891, the Security Investment Company made an assignment of all its property to W. T. Branch for the benefit of its creditors. Branch was subsequently elected as permanent assignee, and since that time has continued to act in that capacity. On August 4, 1891, the Richmond National Bank and 15 other banks, to which the North notes and mortgages had been assigned, filed claims before the assignee against the company upon its liability as indorser of the North notes. The claims were disallowed by the assignee, and from that decision each claimant took an appeal to the district court of Mitchell county. Prior to the presentation of these claims to the assignee for allowance, and in June, 1891, a foreclosure proceeding was begun against the Norths in Jewell county, in which all the banks above mentioned came in and set up their notes as well as claims to liens upon the mortgaged property. The Security Investment Company and the assignee were made parties, and judgment was asked against them upon the liability assumed by the company by its indorsement of the notes. A receiver was appointed by the district court of Jewell county to take possession and control of the mortgaged property during the pendency of the action. On June 23, 1892, a trial of the action was had in Jewell county, and judgment upon all the notes was rendered against the Norths, and also against the Security Investment Company and the assignee, except upon the note of the Lambertville National Bank. As to the Lambertville National Bank it was held that there was no proof of protest, and therefore judgment was given in favor of the Security Investment Company. The mortgages were foreclosed, and there was an order that the proceeds of the sale of property which had been sold by the receiver should be paid into the court, and applied to the discharge of the several judgments. At the January term of the district court of Mitchell county the appeals from the decision of the assignee came on for trial, and by agreement of all the parties the appeals were consolidated, and tried together as a single case, when the court allowed each of the appellants the amounts of the respective

judgments which had been rendered in their favor by the district court of Jewell county, and directed that the clerk of the court should certify the amounts so determined to the assignee of the Security Investment Company for participation and dividends in the assigned estate.

Several grounds are assigned for reversal, one of which is that the judgments rendered in the district court of Jewell county upon the notes are final and conclusive upon the parties, and that the district court of Mitchell county had no jurisdiction to proceed further with the appeals, or to make allowances based upon the judgments. It will be observed that when the claims were presented to the assignee the judgments had not been rendered. To secure the allowances, and protect their rights to a share of the assigned estate, it was necessary for the claimants to present their claims at the time and place designated by the assignee. Gen. St. 1889, par. 362. The fact that suits were then pending upon the same claims in another county would not warrant the claimants in ignoring the notice, nor excuse them from presenting their claims to the assignee. To obtain judgments against the Norths, and protect their rights in the mortgaged property, it was necessary for the claimants to proceed in the foreclosure action which had been begun in Jewell county. The judgments rendered in the latter county were a binding adjudication between the parties as to the validity of the claims and the right of recovery. But the fact that the judgments were rendered did not terminate the appeals nor preclude an allowance of the claims against the estate. While the notes were merged in judgments only, the form of the indebtedness was changed, and it was still necessary that the claims should be allowed and classified. New pleadings were filed in the district court, which showed that the claims had been reduced to judgments. On the part of the assignee it was alleged that the claims had been paid, and, further, that the property given as security for the payment of the notes, and which had been taken possession of at the instance of the claimants, was sufficient to fully pay all the claims. These matters having been alleged, it was competent to prove in the appeal cases that the claims had been reduced to judgments, and it was also the duty of the court to allow so much of the judgments as remained unpaid. If payments had been made, or the mortgaged property sold, the amounts received should have been credited upon the judgments, and the allowances correspondingly reduced. Judgment rendered in another jurisdiction must be presented to and classified by the assignee, and upon the appeals the court, sitting in the stead of the assignee, must determine the amounts then due, and also the rule of distribution. As the claimants held liens on property other than that assigned, they were not entitled to share equally in dividends with those who held no special se-

curity. "The assets of the estate should be distributed upon equitable principles, and it is a recognized rule of equity that where there are two funds to which a creditor can resort, and other creditors are limited to one of them, the former will be compelled to exhaust the fund upon which he has an exclusive lien, and will be permitted to resort to the other for the deficiency only." *Bank v. Branch*, 57 Kan. 27, 45 Pac. 88. There is good ground to complain of the failure of the court to credit the payments which had been made and the money received from the sale of mortgaged property upon the judgments. It sufficiently appears that considerable property came into the hands of the receiver, the proceeds of which should be credited on the judgments. There is also testimony tending to show that some of the mortgaged property was sold by the Norths, the proceeds of which were paid upon the mortgage debt. No credits appear to have been given for these payments, nor for the amounts realized from the sale of the property by the receiver. In the judgment entered in the foreclosure action the court specifically recognizes that there is a fund on hand derived from the sale of the mortgaged property, and it is therein provided that distribution among the judgment creditors will thereafter be made. Although that judgment was rendered in June, 1892, no credits have been given, and the court, instead of requiring them to exhaust the funds upon which they had an exclusive lien, directed the assignee to allow the full amounts of the claims, and authorized them to participate in dividends equally with those who held other direct claims. The Lambertville National Bank filed a cross petition in error, complaining of the refusal of the court to allow its claim. The judgment rendered in Jewell county against the bank and in favor of the assignee is a final adjudication of the liability of the Security Investment Company on account of the indorsement, and the court rightly refused an allowance of the bank's claim.

None of the other objections appear to us to require attention, but for the error mentioned the judgment will be reversed, and the cause remanded for further proceedings.

(58 Kan. 410)

STURTEVANT v. SARBACH.

(Supreme Court of Kansas. July 10, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT OF PREFERENCES—VALIDITY—GOOD FAITH OF GRANTER.

1. Mortgages made and preferences attempted by an assignor in connection with and as a part of a general assignment for the benefit of his creditors are invalid, but they will not necessarily destroy the validity of the deed of assignment, nor affect the pro rata distribution of the assigned estate among the creditors.

2. When the assignment and mortgage constitute a continuous and single transaction, the fact that the mortgagee may have acted in good faith, and without knowledge that an assignment was

in contemplation, will not validate the mortgage, nor exclude the property from the operation of the assignment.

(Syllabus by the Court.)

Error from district court, Jackson county; Louis A. Myers, Judge.

J. C. Sturtevant brings error from the disallowance of a claim by Louis Sarbach, assignee of W. B. Gleason. Affirmed.

Hayden & Hayden and James H. Lowell, for plaintiff in error. L. B. Kellogg and I. T. Price, for defendant in error.

JOHNSTON, J. This was an appeal from the decision of an assignee disallowing what was called a "preferred claim." On December 27, 1890, W. B. Gleason, a merchant in the city of Holton, made an assignment for the benefit of his creditors. After a permanent assignee had been chosen, J. C. Sturtevant presented for allowance a claim of about \$10,000, which was evidenced by a promissory note, and purported to be secured by a chattel mortgage upon the entire stock of goods which had been assigned, and was then in the possession of the assignee. Sturtevant asked that the claim be declared a first and preferred lien upon the goods, subject only to certain chattel mortgage liens of equal priority held by three other creditors, with whom Sturtevant had been connected. The claim was resisted by the general creditors and the assignee, upon the grounds that the claim was not a bona fide one, and that the note and mortgage were given to hinder and delay other creditors. The claim of preference was resisted, on the ground that the mortgages and deed of assignment were substantially executed at the same time, and constituted parts of a single transaction, and that therefore the mortgages were invalid. The trial of the appeal in the district court resulted in a verdict in favor of Sturtevant, allowing him the balance due on his promissory note, to wit, \$11,122.57. Special findings were made by the jury, to the effect that the note and chattel mortgage to Sturtevant, given with the other chattel mortgages to the creditors named, were all executed on the same day, and as part of the assignor's general plan to surrender his property to his creditors. There was also a finding to the effect that, when Sturtevant took his chattel mortgage, he knew that Gleason contemplated making an assignment for the benefit of his creditors.

In view of the findings that the general assignment and mortgages were prepared and executed about the same time, and substantially constituted a single transaction, some of the questions discussed by counsel have become immaterial. The claim that the debt of Sturtevant was fictitious has been negatived by the finding of the jury, and the rulings on that branch of the case require no further attention. The general assignment for the benefit of creditors is conceded to be valid, and, if the mortgages are a part of the same transaction, they are "already condemned." It is well settled that mortgages made and preferences attempt-

ed in connection with and as a part of a general assignment are invalid, and will not affect the pro rata distribution of the estate among the creditors in the manner provided by statute. *Banks v. Sands*, 47 Kan. 591, 28 Pac. 620; *Brigham v. Jones*, 48 Kan. 162, 30 Pac. 113; *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997; *Goodman v. Kendall*, 56 Kan. 439, 43 Pac. 687; *Marshall v. Van De Mark*, 57 Kan. 304, 46 Pac. 308.

It was the right and duty of the assignee, who was the representative of all the creditors, to protect the estate against illegal claims or attempted preferences, and, to that end, it was competent for him to contest the validity of the Sturtevant mortgage. *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084; *Walton v. Eby*, 53 Kan. 257, 36 Pac. 332. There is abundant testimony to show that the assignment and mortgages were in contemplation at the same time, and that the preparation of all commenced and proceeded together, and that all were executed and completed substantially at the same time. All were filed on the evening of December 27th. The mortgages, it is true, were first filed; but some preparation had been made for the assignment as early as December 26th, and the making of the assignment and chattel mortgages was simultaneously in progress during most of the 27th. It appears that an attempt was made to keep any knowledge of the purpose of Gleason to make an assignment, from Sturtevant, and it is contended that there is no testimony supporting the finding of the jury that Sturtevant had any knowledge of such purpose. In view of the relationship which existed between Gleason and Sturtevant, and of all the circumstances disclosed by the testimony, it is difficult to come to any other conclusion than that reached by the jury, that Sturtevant had knowledge of the contemplated assignment. If the mortgages and deed of assignment constitute a single transaction, it matters not what Sturtevant's knowledge of Gleason's purposes may have been. An assignment with a preference is not permissible under any circumstances, and in such cases mortgages made at the same time or any other attempted preference must be treated as a nullity, without regard to the knowledge or good faith of the creditor attempted to be preferred. His ignorance of the purpose of the assignor to make an assignment, or good faith in attempting to secure a preference, does not affect the assignment or change the rule of pro rata distribution for which the statute provides. His claim was valid, and, if a preference had been obtained prior to and independent of the assignment, it must have been upheld. It was substantially made at the same time and as a part of the same act, and therefore the mortgages are void and inoperative. The invalidity of the mortgages, however, does not affect the validity of the deed of assignment; and, it being valid, he is placed on a footing with all creditors, and may share in the assets with them.

Objection is made to what is termed "expert

testimony" concerning the length of time it would require to write out the schedule of liabilities of the assignor. As it appears from the evidence offered by plaintiff in error that work was begun upon the assignment, and the preparation of a schedule of liabilities commenced, long before the execution of the mortgages, the testimony objected to is unimportant, and no prejudice could have resulted from its admission.

Exception is taken to some of the rulings upon the instructions, but the finding of the jury as to the validity of the deed, and the conclusion we have reached with respect to the main question, render the objections immaterial. We perceive no error in the record, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(58 Kan. 419)

SOLOMON SOLAR SALT CO. v. BARBER.

(Supreme Court of Kansas. July 10, 1897.)

ACTION ON NOTE—SUPPLEMENTARY CONTRACT—CORPORATIONS—ULTRA VIRES TRANSACTION.

1. A promissory note, having a memorandum indorsed thereon that it is made in accordance with and subject to the terms of a certain letter, does not constitute the whole of the contract between the parties thereto. The letter referred to is an integral part of such contract, and its contents must be alleged and proved in order to a recovery upon the note.

2. A promissory note, executed in behalf of a manufacturing and trading corporation, by all of its directors, who are also all of its stockholders, in payment for the shares owned by one of such stockholders, purchased by and for the benefit of the others, cannot be repudiated by the corporation as an ultra vires transaction.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by M. W. Barber against the Solomon Solar Salt Company. Judgment for plaintiff. Defendant brings error. Reversed.

Bond & Osborne and Garver & Larimer, for plaintiff in error. Porterfield & Pence and Wilson & Wilson, for defendant in error.

DOSTER, C. J. This was an action brought by M. W. Barber, as owner, on a note, of which the following is a copy:

"\$3,000.00. Kansas City, Mo., Oct. 1st, 1892.

"Six months after date, we promise to pay to John R. Ranson, or order, at the National Bank of Kansas City, three thousand dollars, for value received, with interest from date at the rate of six per cent. per annum.

"Solomon Solar Salt Co.,

"By S. E. Baker, Prest.,

"John R. Ranson, Sec. & Treas.

"This note is made in accordance with and subject to the terms of a certain letter, dated Sept. 24, 1892, addressed to John R. Ranson by S. E. Baker.

"S. E. Baker.

"C. I. Pettibone."

Among other things, the answer denied, under oath, the execution of said note by the corporation, and also alleged that the note was given by the officers of said company in furtherance of a private deal between themselves in the stock of the company, and was therefore ultra vires and void.

The case was tried by the court, and special findings of fact and conclusions of law made as follows: "(1) That, at the dates hereinafter mentioned, the defendant was a corporation duly organized and existing under the laws of the state of Missouri, for the purpose of engaging in and conducting the business of manufacturing salt for profit, with a capital stock of 1,200 shares, of the par value of \$25 each. (2) That on the 1st day of October, 1892, said defendant had three directors, who were S. E. Baker, John R. Ranson, and E. E. Porterfield, and each of said directors owned one-third of the capital stock. Said Baker was president of said corporation, and said Ranson its secretary and treasurer. (3) That on the 1st day of October, 1892, said directors agreed among themselves that said John R. Ranson should sell his 400 shares of the capital stock of said defendant to the other two directors, and, as part payment therefor, that they should execute to him the promissory note of said corporation for the sum of \$3,000; and, in pursuance of said agreement, the said Baker, as president, and John R. Ranson, as secretary and treasurer, executed and delivered a promissory note of \$3,000, a copy of which is set forth in the plaintiff's petition, and, as the consideration of said note, said John R. Ranson transferred to said defendant his stock in said corporation. (4) That at the time said agreement and promissory note were made, as hereinbefore set forth, said S. E. Baker, John R. Ranson, and E. E. Porterfield were all present, and took part in, and agreed to, the making of said agreement and note. (5) That on the 6th day of March, 1893, said corporation paid to said John R. Ranson \$1,000 on said note. (6) That on or about the 20th day of May, 1893, said John R. Ranson was indebted to the plaintiff in this action in the sum of about \$2,500, and, to secure the payment of the same, transferred said note to plaintiff, who was at the commencement of this action, and now is, the owner of it." Conclusions of law: "(1) That said defendant executed the note in question, and is legally liable for its payment. (2) That said plaintiff is the owner of said note, and is entitled to recover thereon, from said defendant, the sum of \$2,201, with 6 per cent. interest thereon from this date."

No evidence was introduced to show that the directors of the company, as a board, ever authorized the execution of the note; neither was there any evidence offered to explain the memorandum written on the face of the note, nor to show what the conditions of its payment were. A demurrer to the evidence was overruled. The memorandum written on the face of the note in this case made the letter

referred to therein an integral part of the plaintiff's cause of action, and his failure to show what terms and conditions it placed on the note was fatal to his right of recovery. Memoranda such as this must be read as part of the note. 1 Daniel, Neg. Inst. §§ 149-156; Tied. Com. Paper, 41a. Two or more instruments executed at the same time, and relating to the same subject-matter, or executed at different times, and containing pertinent references to each other, constitute an entire contract, and must be construed together. *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. 894. In this case the plaintiff rested upon the note alone. The court could know nothing about the terms and conditions which the letter attached to its payment. In order to maintain his action, the plaintiff should have introduced the whole of his contract in evidence, and should have shown by its different parts that he was entitled to recover. The court therefore erred in overruling the demurrer to the plaintiff's evidence, and, because of this, its judgment must be reversed.

Inasmuch as the question of power of the corporation to execute the note in question, in the manner and upon the consideration explained in the findings of fact, will still be in the case upon its return to the court below for a new trial, it is proper to say that there is nothing in the defense of *ultra vires*, upon which the plaintiff in error relied in part. Every person connected with the company in the capacity of an officer and stockholder was a party to the transaction in which the note was given. One stockholder, and director as well, sold his stock to the other directors and stockholders, one of whom, as president of the company, with the knowledge and at the instance of the other stockholders and directors, executed the company's obligation for the stock sold. The company cannot now repudiate its contract. It is estopped from doing so. It is true the note in question is nonnegotiable, and though held and sued upon by an indorsee, who was constructively charged with knowledge of everything relating to its execution and the consideration given for it, yet it is nevertheless the company's obligation, executed upon what it admitted to be a valuable consideration; and it is now estopped from pleading its lack of authority in the premises. What the rights of dissentient stockholders might be in such case we do not and need not consider, nor need we consider what the corporation, the legal entity itself, might do in behalf of dissenting stockholders. In this case there is neither officer nor owner to now dissent from that to which he had not previously given assent. The corporation in this case is a mere manufacturing and trading corporation, chartered for purposes of private gain alone, and is in the performance of no public service, such as railway and water companies are. Therefore what is herein decided is not to be understood as relating to the latter class of corporations, nor yet as distinguishing between the two classes in respect to the law

of such transactions as are under consideration. We determine nothing beyond what is before us for decision. It is true that stockholders have no part in the management of the company's business. They cannot, as such, enter into contracts with third persons. Such contracts are to be executed by the directors in their behalf. Cook, Stock, Stockh. & Corp. Law, § 709. In this case, however, there is a personal identity between stockholders and directors, and the contract entered into by them is assimilated to, if it does not become the same as, one executed by private individuals. If the transaction in question is to be viewed in the light of the fiction of corporate entity possessed by the individuals engaging in it, it can be nothing more than a gift of the corporate property by the corporate owners, which we think, without question, may be made. However, for the error before pointed out, the case is reversed, with instructions to award a new trial. All the justices concurring.

(58 Kan. 431)

USHER v. HOLLISTER.

(Supreme Court of Kansas. July 10, 1897.)

VENDOR AND PURCHASER—RE-ENTRY FOR NON-PAYMENT OF PRICE—EJECTMENT.

Where a contract to sell and convey land is made, a large part of the purchase price paid in cash, and promissory notes executed for the remainder, but the nonpayment of such notes, at maturity or otherwise, is not made a ground of forfeiture or rescission of the contract, and the purchaser takes possession of the land, and makes substantial improvements thereon, and meanwhile it increases in value, and such possession is retained for nearly 20 years, and never agreed to be surrendered, but the purchase money notes were never paid, and their collection is now barred by the statute of limitations, *held*, that the vendor cannot, during the nonoccupancy of such land by the vendee, lawfully re-enter possession, and hold it, merely because of the nonpayment of the notes; and, further *held*, that, in the event he does so re-enter, ejectment by the vendee will lie to recover possession.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Ejectment by Simpson Hollister against Linton J. Usher. From a judgment for plaintiff, defendant brings error. Affirmed.

Bishop & Mitchell and N. H. Loomis, for plaintiff in error. D. S. Alford and W. W. Neilson, for defendant in error.

DOSTER, C. J. This was an action of ejectment, brought by defendant in error against plaintiff in error. The land in dispute originally belonged to the Leavenworth, Pawnee & Western Railroad Company, subsequently changed in name to the Union Pacific Railway Company. February 23, 1863, the railroad company executed a contract of sale of the land to E. H. Van Deusen and B. F. Hopper for the consideration of \$245 cash and four promissory notes of \$122 each, payable in one, two, three, and four years, respectively, with

interest at 6 per cent. per annum. The only clause of the contract necessary to be quoted reads as follows: "Now the consideration of this obligation is such that, if the said E. H. Van Deusen and B. F. Hopper shall pay the said notes, and the interest thereon, as herein specified and set forth, then the said railroad company will without delay execute to them, the said E. H. Van Deusen and B. F. Hopper, their heirs and assigns, a general warranty deed for the above-described tract of land; otherwise it shall be null and void, and of no effect." The vendees took immediate possession, and in August following Van Deusen conveyed his interest in the land to his co-owner, Hopper. Improvements of considerable extent and value were made upon the land, and Hopper continued in possession until 1870, when he conveyed the land to one Samuel K. Huson. The purchase-money notes, then amounting, with interest, to about \$700, had not been paid, and part of the consideration for the sale of the land was the assumption of the notes by the vendee. These notes are not yet paid, and it would appear that their collection has long since been barred by the statute of limitations. Huson died in 1875. Neither he nor his heirs were ever personally in the occupancy of the land, but they were in possession of it through tenants from 1870 until 1881. About this time Judge Devereaux, trustee of the railroad company's land, reminded the widow, Mrs. Huson, that the purchase-money notes had not been paid, and that he would have to take possession of the land. Mrs. Huson told him they could not pay then, but might do so sometime. The Husons never surrendered possession to Judge Devereaux, or agreed to his assumption of possession. It appears, however, that the tenant of the Husons, a man named White, paid rent to Devereaux for the years 1880 and 1881, but the court below found that "the widow and heirs of Samuel K. Huson never surrendered possession of said lands, and said Devereaux, as trustee, never took possession, except by receiving certain rents, as hereinbefore stated, from the tenant of said Huson estate." In 1880 a portion of the land was sold for delinquent taxes, and in 1881 the remainder was likewise sold. Tax deeds were issued on these sales in 1884 and 1885 to the late Judge John P. Usher, who took possession of the land through a tenant named Valentine Jones. In 1887 the Husons conveyed the land to Simpson Hollister, the defendant in error. Hollister thereupon commenced ejectment against Usher and his tenant. This action reached this court for final adjudication, and was decided in favor of the plaintiff, Hollister. *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115. Judge Usher had died in the meantime, leaving a widow and three sons. The sons, pending the final determination of the suit, conveyed their interest in the land to their mother, who thus succeeded to all of Judge Usher's interest in it. About the time of the decision of the case in this court, one of the sons—S. C. Usher—went upon the land, and demanded possession

of it from Jones, the tenant. Mr. Jones, under the supposition that S. C. Usher represented his mother, and that it was his duty to surrender possession to him, abandoned the premises. Thereupon S. C. Usher turned the possession of the land over to his brother Linton J. Usher, the plaintiff in error. Linton J. Usher claims the land under a quitclaim deed executed to him July 29, 1890, by Judge T. A. Hurd, trustee of the railroad company's lands, and successor of Judge Devereaux, now deceased. Whether he received this deed before or after he conveyed to his mother his interest in the land as an heir of his father, Judge Usher, does not appear, nor do the covenants or conditions of the conveyance to his mother, or its character as a quitclaim or warranty deed, appear. If the conveyance from Judge Hurd preceded Linton J. Usher's conveyance to his mother, and if such conveyance to his mother was general in its terms, without exceptions or conditions, or was one of general warranty, his right of defense to this case might be materially affected. We will assume, however, that there is nothing in the conveyance to his mother to embarrass his right of defense to the ejectment suit brought against him. The foregoing synopsis of facts is all that is material to an understanding of the case. Judgment was given for the plaintiff, Hollister, from which the defendant, Usher, prosecutes error to this court.

The basis of the plaintiff's contention is the equitable title acquired through the contract of sale by the railroad company to Van Deusen and Hopper, and the possession taken and held thereunder. The defense to such action is bottomed upon the theory of the forfeiture of such contract by reason of the non-payment of the purchase-money notes, and a consequent right in the railroad company, through its trustee, to re-enter upon and convey the land. The plaintiff in error seeks to strengthen his position by a claim that Judge Devereaux, as trustee of the land, regained its possession, or that the Husons, the intermediate vendees, surrendered such possession to him. This position, however, is untenable. There is nothing in the testimony which shows such to be the case, while, on the contrary, the court finds, as before quoted, that the Husons never surrendered possession, and that Judge Devereaux never took possession, except by procuring the tenant of the Husons to pay rent to him a couple of years. It will be observed that the punctual payment of the purchase-money notes was not made of the essence of the contract to convey, nor of the right to continue in possession. The vendees were put in possession by the vendor, and they remained in possession for nearly 20 years, without question by the railroad company or its trustees. Valuable improvements appear to have been made upon the land, though at what cost is not clearly disclosed. No specific demand of possession was ever made upon any of the vendees, nor was any specific declaration of forfeiture of the

contract of sale ever made. Judge Devereaux only reminded the Husons of the unpaid purchase money, and informed them that he would have to take the land back if they did not pay. Linton J. Usher has no greater rights than the railroad company or its trustees have. Under such circumstances, can he, standing in the place of the vendor, treat the contract of sale as at an end, re-enter the land, and resist an action for possession? We think not. The general theory of the law in this state is that, in the case of agreements to convey land, where a substantial portion of the purchase price has been paid, where time of payment of the remainder is not made of the essence of the contract, and where the purchaser has been put into possession, the contract is to be regarded as an equitable mortgage in the hands of the vendor. In equity the land belongs to the vendee, with the legal title remaining in the vendor as security for the unpaid purchase money. In such case two remedies are open to the vendor,—one, foreclosure of his contract of sale as a mortgage; the other, an action to rescind the contract, and recover possession, in which latter action the equities existing between the parties may be ascertained and adjudged. The case is quite similar in point of fact to that of *Courtney v. Woodworth*, 9 Kan. 443, and falls fully within the principles upon which that case was determined. It was there held that: "Where a party sells land, executes to the purchaser a title bond therefor, receives a part of the purchase money, takes several promissory notes for the deferred installments of the purchase money, puts the purchaser in possession (time not being of the essence of the contract, by the terms of the bond itself), he cannot, nor can his grantee who purchases with knowledge of the facts, maintain ejectment for said land merely because the party claiming under the title bond for want of funds fails to pay the balance of the purchase money." Where a purchaser holding under a title bond fails or refuses to pay the purchase money when due, and fails to pay the same for a long time thereafter, and after being frequently requested to pay the same, the vendor may, where the equities are sufficient, seek relief by an action to rescind the contract and recover possession, or he may treat the bond as an equitable mortgage, and bring his action to foreclose the equities of the purchaser, and for the sale of the premises to satisfy the unpaid purchase money. A person may not enter into an agreement to convey land, put his vendee in possession under such contract, receive a large portion of the purchase money, and give time for the payment of the remainder, attach no conditions of punctuality of payment to the transaction, nor otherwise reserve a right of forfeiture or rescission, tolerate the possession of such vendee for a score of years, the while the land is being improved and growing in value, and then, by taking the law into his own hands, as it

were, re-enter possession, and resist ejectment by his vendee upon the sole ground of the nonpayment of the balance of the purchase money, even though an action for the collection of such purchase money has become barred by the statute of limitations. What might be the rights of the defendant in error were he suing for specific performance,—suing to compel the execution of a deed, for instance, or otherwise endeavoring to obtain something which his vendor, the railroad company, had not already given him,—we need not inquire. We have no such case before us. The defendant in error (the plaintiff below) is suing for nothing but the possession of the land; suing to regain what his vendor before that time had conferred upon him. In our judgment, he may maintain the action, and the neglect of the railroad company to compel the payment of the purchase-money notes until they have become barred by the statute of limitations will constitute no defense. Such seems to be determinable as a provision of statutory law. See Civ. Code, § 25. We do not understand that the court below adjudged title to the land to be in the defendant in error. We do not so adjudge it. We simply affirm his right to the possession of such land, and express no opinion as to the rights of the parties in respect to any other matters between them. The judgment of the court below is affirmed. All the justices concurring.

(58 Kan. 438)

ERNST et al. v. FOSTER et al.

FOSTER et al. v. OUSLER et al.

(Supreme Court of Kansas. July 10, 1897.)

WILLS—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION.

1. A will is to be construed, not alone by its language, but by the condition of the testator's family and estate, and the judicial expositor should put himself as far as possible in the position of the testator, and take into consideration the circumstances surrounding him when the will was executed.

2. After certain specific bequests, the will in question contained the following provision: "To my beloved wife, Ellen H. Foster, all the residue of my real and personal property, to have and to use and to dispose of during her natural life, and after her death to be divided equally among my three youngest heirs, namely, Almeda Elizabeth Foster, James Munroe Foster, and Martha Jane Foster." Held, that the provision gave a life estate to the widow, with the added power to dispose of the fee, and the property undisposed of by the widow would, at her death, descend to the three heirs.

3. It is a general rule that a will should be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the general purpose of the testator, as gathered from the entire instrument.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Error from district court, Jackson county; Louis A. Myers, Judge.

Action by James M. Foster and others

against William Ernst and others. Judgment for plaintiffs, and defendants bring error. Action by James M. Foster and others against C. A. Ousler and others. Judgment for defendants, and plaintiffs bring error. The proceedings were submitted together, and the judgment in the first case was reversed, and in the second case was affirmed.

In August, 1864, Aaron Foster, who was the owner of land situated in Jackson, Shawnee, and Lyon counties, died testate, at his home, in Jackson county. He left, surviving him, his widow, Ellen H. Foster, and the following named children: Aaron Bluford Foster, Silas Jackson Foster, Newton Jasper Foster, Milton Smith Foster, Mary C. Ecton, Almada Elizabeth Foster, James Munroe Foster, and Martha Jane Foster, the last three named being minors. He had previously executed a will, which was in the words and figures following, to wit: "In the name of God, Amen. I, Aaron Foster, of the county of Jackson and state of Kansas, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, and publish, and declare this to be my last will and testament, that is to say: First. After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To my sons Aaron Bluford Foster, Silas Jackson Foster, and Newton Jasper Foster, and my daughter Mary C. Ecton, I give five dollars each. The reason why I do not will the above-named heirs more than five dollars each is that they have had their full share of my property. To my son Milton Smith Foster the following described quarter section of land, situated in Lyon county, Kansas, and known and described as follows, to wit: 'The southwest quarter of section five, in township eighteen, of range eleven.' To my beloved wife, Ellen H. Foster, all the residue of my real and personal property, to have and to use and to dispose of during her natural life, and after her death to be divided equally among my three youngest heirs, namely, Almada Elizabeth Foster, James Munroe Foster, and Martha Jane Foster. In witness whereof, I have hereunto subscribed my name and affixed my seal, the 22nd day of June, 1864, in the year of our Lord one thousand eight hundred and sixty-four. [Seal.] Aaron Foster." The will was duly probated, and the widow elected to take under its provisions. At the time of Aaron Foster's death, the three minor children were aged, respectively, 14, 10, and 6 years. The eldest of these, Almada Elizabeth, married H. O. Lamb, and she died in 1876, leaving her husband surviving her. Martha Jane was married to H. A. Freeland. The widow and the minor children resided upon the home land in Jackson county until 1869, when they removed to Shawnee county. In 1872 the widow conveyed 80 acres of the 160 acres of Shawnee county land to Almada Elizabeth; in 1873 she conveyed 120 acres of the land in Jackson county to James M. Fos-

ter; and in March, 1879, she conveyed the remaining 80 acres of the Shawnee county land to Martha Jane. In July, 1869, she conveyed the land in Lyon county to Charles N. Lamb and Watson M. Lamb, from whom, by a connected chain of conveyances, the Ernsts claim ownership. In 1873 and 1874, James Munroe Foster conveyed the 120 acres received from his mother to several parties, while he was, respectively, 19 and 20 years of age. The remaining 40 acres of the quarter section in Jackson county were conveyed by Ellen H. Foster to Thomas Taylor in 1874. The personal estate consisted of some stock and farming implements, and there is testimony that the average annual income from both real and personal property was about \$100. The heirs named in the will who were minors, in October, 1893, brought an action in the district court of Lyon county against the Ernsts; and, upon a second trial of the same, judgment was given in favor of the plaintiffs. The Foster heirs brought a like action in the district court of Jackson county against Ousler and others, to whom the Jackson county land had been conveyed; but that court placed a different interpretation upon the will, and gave judgment in favor of the defendants. The proceedings in each case have been brought here for review, and were submitted together upon the same arguments.

Chas. B. Graves, I. E. Lambert, and H. D. Dickson, for plaintiffs in error W. Ernst and others. H. C. Root and L. B. Kellogg, for James M. Foster and others. James H. Lowell, for defendants in error C. A. Ousler and others.

JOHNSTON, J. (after stating the facts). The determination of both cases depends upon the construction to be placed upon the will of Aaron Foster, deceased. On the part of his heirs it is claimed that the widow took only a life estate, and the conveyances made by her transferred no more than her life interest. On the other side it is claimed that the widow took a life estate, with power to dispose of the fee, and the remainder to be divided equally among the three youngest heirs. The clause upon which a doubt has arisen is as follows: "To my beloved wife, Ellen H. Foster, all the residue of my real and personal property, to have and to use and to dispose of during her natural life, and after her death to be divided equally among my three youngest heirs, namely, Almada Elizabeth Foster, James Munroe Foster, and Martha Jane Foster." It will be observed that he had made provision for all of his children who had reached majority except one, and to him he bequeathed a quarter section of land. The wife and three minor children remained to be provided for. He gave and bequeathed to his wife all the residue of his property to have and to use, but with power to dispose of the same during her lifetime, and the remainder to be divided equally among the three youngest children.

The purpose of the testator, when ascertained, must control in the interpretation of this will. It is to be construed, not alone by its language, but by the condition of the testator's family and estate; and the court is to put itself, as far as possible, in the position of the testator, by taking into consideration the circumstances surrounding him at the time of its execution. The language of the devise was that only a life estate was given to the widow, but added to that estate in express terms is the power of disposition. Looking at the condition of the testator's family and the character of the estate at the time the will was made, it is not difficult to understand why the power of disposal was conferred. There were three quarter sections of land, but the lands in Shawnee and Lyon counties were unimproved and practically unproductive. The home farm in Jackson county was improved to some extent, and there was some personal property; but the total annual income at that time, as the testimony tends to show, did not exceed \$100. There was thrown upon the widow the burden of paying funeral expenses, the cost of settlement of the estate, and to feed, clothe, and educate the three minor children. To preserve the estate, it was necessary that she should pay the taxes upon the unimproved lands, as well as that which was productive; and it is clear that the annual income of \$100 would not go far in the discharge of these obligations. Where were the means for such purposes to be obtained by her? Clearly, the testator must have contemplated that these duties would be performed and expenses paid by his widow, and, as the annual income from the estate was far from sufficient, he evidently intended that the widow should dispose of so much of the property as would enable her to carry out his purposes. He seems to have proceeded upon the theory that she was equally interested with him in the welfare of the children, and he trusted her to care for them, and to manage and dispose of the property in such a manner as would inure to their greatest advantage. That she faithfully carried out the purposes of the testator appears from the record. About the time that the Lyon county land was sold, houses were built and improvements made by her on the Shawnee county land; and without trying to use and hold the land during her lifetime, as she might have done, she gave and transferred the same to her two daughters. Although not expressly stated, it is to be inferred that the money derived from the sale of the land was used in improving that which was given to her daughters. She gave the greater part of the home farm to James Munroe Foster, and, although he sold the same for full consideration, he is now, after more than 20 years, and after many transfers of the land, seeking to recover it back, and to retain the money which he received as well. The widow appears to have given all her estate to the children long before her death, which occurred in 1888. She was without means

when she died, and in fact the expenses of burial were in part borne by the public.

Viewed in the light of existing conditions and surrounding circumstances, the intent of the testator is plainly indicated. Aside from that, it may be said that, looking at the language of the will, the power of disposition is as broadly and plainly given to the widow as the reversion is given to the heirs. The words giving this power cannot be disregarded. It is a general rule that a will should be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the general purpose of the testator, as gathered from the entire instrument. Then, again, it will be observed that the disposition of real and personal property was the same. Both are placed in the same class, and like power is given to the widow with respect to the disposition of each. Doubtless, more than the mere use of the personal property was intended to be given, and the real estate being devised in the same way illustrates to some extent the meaning of the testator. We agree with the contention of the heirs that the power of disposal given in the will did not enlarge the estate taken by the widow to a fee. There was devised to her a life estate, and added to that was the separate and distinct gift of the disposal of the fee. This gave her authority to convey the fee, and the part undisposed of would descend to the children in accordance with the will. As tending to support this view, we cite *Wiley v. Gregory*, 135 Ind. 647, 35 N. E. 507; *Jenkins v. Compton*, 123 Ind. 117, 23 N. E. 1091; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945; *Wooster v. Cooper*, 53 N. J. Eq. 684, 33 Atl. 1050; *Benz v. Fabian* (N. J. Ch.) 35 Atl. 760; *Proctor's Estate* (Iowa) 63 N. W. 671; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186.

It follows that the judgment of the district court of Lyon county, No. 10,014, will be reversed, and the cause remanded, with direction to enter judgment in favor of the plaintiffs in error. The judgment of the district court of Jackson county, No. 10,115, will be affirmed. All the justices concurring.

(15 Utah 188)

BLISH et al. v. McCORNICK et al.

(Supreme Court of Utah. July 23, 1897.)

REPLEVIN — DELIVERY — CONTINUED CHANGE OF POSSESSION — FRAUD — CONCLUSIONS OF LAW.

1. In an action of replevin for the recovery of 104 cattle described, a finding of fact by the court that the plaintiffs were not at any time the owners of the cattle sued for (describing them) is not inconsistent with another finding that defendants levied upon 102 head of cattle described, the two descriptions not being exactly the same.

2. In an action of replevin, where the issue is the ownership of personal property, plaintiffs cannot raise upon appeal the question of priorities between partnership creditors and individual creditors; this question not having been raised by the pleadings, nor in the trial.

3. Where plaintiffs, by their questions upon the trial, treated the defendant as a deputy United States marshal, and he alleged in his answer, and

the record contains, process served and returned by said defendant as such deputy United States marshal, and the question is not raised on the trial of the case, a finding of fact that defendant is such officer will be treated upon appeal as sustained by the evidence.

4. What amounts to a delivery within a reasonable time, and an actual and continued change of possession, under section 2837 of the Compiled Laws of 1888, which provides that every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud, as against creditors of the vendor or assignor, or subsequent purchasers in good faith, are generally facts which depend largely upon the kind and nature of the property, the situation of the parties, and the circumstances peculiar to each case.

5. When plaintiffs claim to own certain cattle by virtue of a bill of sale from the husbands, respectively, of two of them, and sons-in-law of the other, W. A. S. and E. S. S., co-partners, of all their cattle upon the ranges, the number and value of which cattle are unknown, the consideration of the sale being a credit of \$1,500 by each of the three plaintiffs upon each of three certain promissory notes, which were renewed notes of others given six years before, with mortgage security, which was permitted to be sold without applying its proceeds upon the indebtedness, and there is testimony that said grantors did not actually deliver any of the cattle sold to the plaintiffs, and that the grantors, 5 days before the bill of sale to plaintiffs, bargained and sold to S. & T. all the three and four year old steers they could gather and deliver in 15 days' time, and that, after the bill of sale of all their cattle to plaintiffs, said grantors conducted a drive or roundup with men engaged by them, and delivered to S. & T., under said bargain and sale, over 50 steers, and received in checks the pay therefor in full, except the sum of \$140 paid to one of the plaintiffs, and turned upon the range 90 more cattle gathered, without delivering same to plaintiffs or their agent, and making no change in the marks or brands upon the cattle, and doing nothing with the cattle to indicate that a change of possession or ownership had taken place, *held*, that a general finding of fact by the court that there was no delivery under the sale to plaintiffs will not be set aside as unsupported by the evidence.

6. Where a decree is entered in which it is recited that findings of fact and conclusions of law have been filed, and in the findings, after setting forth the facts under seven subdivisions, there is added the following: "Upon the conclusions of law and the foregoing facts, the court finds that the plaintiffs have no cause of action herein against the defendants, and the defendants are entitled to a judgment against the plaintiffs for the costs of this action, taxed at \$—,"—*held*, that the same is sufficient as a conclusion of law. (Syllabus by the Court.)

Appeal from district court, Second district; G. W. Barch, Judge.

Action by Helen S. Blish and others against W. S. McCornick and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action of replevin commenced March 16, 1895, in the district court of the Second judicial district of the territory of Utah, in Beaver county. The complaint alleges the ownership in the plaintiffs of 104 head of cattle described, of the value of \$2,000, and the unlawful conversion and detention of the same by the defendants, to the plaintiffs' damage in

the sum of \$8,000. The defendant McCornick filed a separate answer, denying the allegations of the complaint, and for further defense alleged that in December, 1893, he was doing a general banking business, and loaned to W. A. and E. S. Sawyer \$5,235.23, evidenced by their promissory note, upon the representation by them that they desired said money to buy cattle and live stock with which to replenish their herd of cattle ranging and grazing in Beaver county, Utah; that on the 14th day of January, 1895, a judgment was duly given and entered in favor of said McCornick on said note for \$5,235.23 and interest, that an execution was duly issued to the defendant Nat M. Brigham, United States marshal within and for Utah territory, and was thereafter placed in the hands of defendant R. R. Tanner, the duly appointed, qualified, and acting deputy United States marshal in and for Utah territory, and that a levy was made in pursuance thereof upon certain cattle described, and alleged to be at the time of the levy the property of said W. A. and E. S. Sawyer, and purchased by them with the money so loaned them by defendant McCornick. An answer substantially the same was filed by the defendants Nat M. Brigham and R. R. Tanner. Plaintiff Inez V. Sawyer is the wife of E. S. Sawyer, plaintiff Blanch H. Sawyer is the wife of W. A. Sawyer, and plaintiff Helen S. Blish is the mother of Inez V. Sawyer and Blanch H. Sawyer. Plaintiffs claim to be the owners of the cattle sued for by virtue of an alleged sale and transfer from the said W. A. Sawyer and E. S. Sawyer, co-partners, on the 5th day of November, 1894, for the consideration of a credit of \$1,500 on each of three promissory notes given by said Sawyer Bros. on September 19, 1893, to plaintiffs, in the following amounts: Helen S. Blish, \$2,650; Blanch H. Sawyer, \$9,554.60; and Inez V. Sawyer, \$8,917.08,—all bearing interest at 6 per cent., and secured by mortgages of even date on all the cattle of Sawyer Bros., which mortgages had expired by limitation before the levy upon the cattle by the defendants. The case was tried to the court, with findings for the defendants, and a judgment against the plaintiffs,—no cause of action. A motion for a new trial was made and overruled, and plaintiffs appeal from the judgment and order.

J. D. Pardee and Presley Denny, for appellants. C. O. Whittemore and H. C. Edwards, for respondents.

HART, District Judge (after stating the facts). Appellants urge as one of their objections to the decision that a fatal variance and contradiction exist between the first and sixth findings and between the second and part of the seventh findings of fact. The first finding is, substantially, that the plaintiffs were not at any time or at all the owners or entitled to the possession of the property mentioned and described in plaintiffs' complaint, consisting of 1 two year old bull, 7 two year old steers, 11

cows, 4 calves, 1 yearling heifer, 76 three and four year old steers, 2 cows, and 2 three year old steers, all branded round-top A on right and left ribs and left hips. The part of the sixth finding material to be stated is that the defendant R. R. Tanner, under an execution on the McCornick judgment against W. A. and E. S. Sawyer, levied upon and took into his possession the following described property, to wit: 46 three year old steers, 39 two year old steers, 1 black bull, 12 cows, 4 calves, branded with round-top A on left ribs and same on left hip. It will be noticed that there is a difference both in the numbers and kinds of the animals enumerated and described in these findings. The last description corresponds with the cattle admitted by the answers to have been levied upon, except there are 16 more in the enumeration given in the answers. Plaintiffs are found never to have been the owners of the cattle sued for. The answers do not allege—neither does the court find—that the animals levied upon ever belonged to plaintiffs. Appellants urge that as the second finding is that the property described in the complaint was at the times mentioned the property of W. A. and E. S. Sawyer, partners doing business as Sawyer Bros., while the seventh finding is that the property levied upon was at the time in question the property of W. A. and E. S. Sawyer, the conclusion must be that the cattle sued for is a different herd from those levied upon,—the former being partnership property; the latter, individual property. If there were two distinct herds, it would not strengthen plaintiffs' case. It is immaterial, under the issues in this case and the facts found, whether the defendants levied upon all or no part of the cattle plaintiffs claim. It is sufficient either that the defendants did not take possession of any of the cattle sued for, or that the cattle taken by defendants did not belong to plaintiffs. Both findings, instead of being contradictory, simply make a stronger case against the plaintiffs.

Appellants seek to raise upon appeal the question of priorities between partnership creditors and individual creditors to partnership property. Of course, the well-established rule is that partnership creditors are entitled to payment out of partnership property in preference to creditors of the individuals composing the firm; in other words, that partnership assets are a trust fund for the payment of partnership debts, and that the rights of the partners and their personal creditors are subject to the rights of firm creditors. But this question is not raised by plaintiffs in their pleadings. They sue in replevin, and claim to own the property sued for. A trial is had upon this issue, and they are found not to be the owners. Then upon appeal they seek to raise the question that the defendants, who levied upon and sold property under an execution upon a judgment against the individuals composing the firm, are not entitled to the firm property as against the plaintiffs, who claim to be firm creditors. If

this question had been raised in a proper way, under pleadings to this effect, defendants might have desired to allege and offer proof that their debt, while in name against the individuals, was in fact a firm debt incurred for the benefit of the firm, and the proceeds used by the firm. There is evidence in the record that the McCornick note and judgment was in reality a firm debt. *Turner v. Jaycox*, 40 N. Y. 470; *Woolen Co. v. Julliard*, 75 N. Y. 540.

The plaintiffs object that there is no evidence to support the fifth finding, to the effect that the defendant R. R. Tanner was during the times mentioned a duly appointed, qualified, and acting deputy United States marshal for the territory of Utah. Plaintiffs by their questions during the trial treated the defendant as such deputy marshal, and the evidence contains the return of summons, and also certificate of sale of the property upon execution, in which he signed as said deputy marshal. The question was not raised by counsel in the trial of the case.

Exception is taken to nearly all the facts found, on the ground of the insufficiency of the evidence to support the same. This exception is taken to the finding that the claim of the plaintiffs to the stock described in their complaint "is based upon an attempted transfer of said stock by W. A. and E. S. Sawyer to said plaintiffs, but no delivery of said stock was made to said plaintiffs, and no title to the said stock passed to plaintiffs under said attempted transfer, and the plaintiffs had no ownership or interest whatever in said cattle at the time they were levied upon by the defendant Tanner as aforesaid." We are not called upon in this case to say, as a matter of law, whether certain uncontroverted facts are sufficient to constitute a delivery and change of possession under section 2837 of the Compiled Laws of Utah of 1888, which provides, in part, that "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same shall be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or assignor, or subsequent purchasers in good faith." What constitutes a delivery within a reasonable time, and an actual and continued change of possession, are generally facts which depend largely upon the kind and nature of the property, the situation of the parties, and the circumstances peculiar to each case. The particular facts as to the attempted sale, delivery, and possession are not made a part of the findings in this case. There is testimony that Sawyer Bros. procured the money represented by the McCornick judgment upon the representation that they desired to purchase young stock to replenish their herd as the older ones were sold from time to time, and that nothing was said by

them at the time of giving the note to McCornick about their cattle being mortgaged to their wives and mother-in-law; that the mortgage of September 19, 1883, upon which the credits were given as consideration for the purchase price of the cattle, were renewal mortgages of others given by Sawyer Bros. to plaintiffs upon cattle in Wyoming in 1887, which cattle Sawyer Bros. were permitted to dispose of without paying the mortgage debts; that on October 30, 1894, five days before the bill of sale was given to the plaintiffs, Sawyer Bros. bargained and sold to one Saunders & Tisdale what three and four year old steers they could gather and deliver by November 15, 1894; that at the time of the giving of the bill of sale to plaintiffs the stock purporting to be sold were running upon the range in Beaver county and vicinity, and it was not known how many cattle were owned by Sawyer Bros., and there was no delivery, unless one was made of cattle in unknown numbers scattered upon the ranges without the same being gathered; that Sawyer Bros., assisted by some men engaged by themselves, and one other man engaged by Mr. Pardee, attorney and agent of the plaintiffs, and a son of plaintiff Mrs. Blish, made a roundup of some 150 head of the Sawyer Bros. cattle, and delivered over 50 head to Saunders & Tisdale, under the contract with them of October 30th; that Saunders & Tisdale paid in checks to Sawyer Bros. the purchase price of the steers, \$1,015, less the sum of \$140 paid to Blanch H. Sawyer; that the balance of the cattle gathered and not delivered to Saunders & Tisdale were turned into the Adamsville field, but no delivery of the same was made to plaintiffs or to Mr. Pardee, who was not present at the time. Neither was any changes made in the marks or brands of these cattle, nor anything done with or to the cattle to indicate that any change of possession or ownership had taken place. There is no fixed rule that will govern all cases as to what is necessary to constitute such a delivery and change of possession as is required by our statute. The particular facts and circumstances must govern each case. After a careful examination of the whole record, we cannot say that there is not legal evidence to sustain the finding that there was no delivery under the attempted sale and transfer; and, further, we cannot say that any other finding material to the issues and judgment is not supported by legal evidence.

Appellants insist that there are no conclusions of law found by the court, and that, therefore, the judgment should be reversed. The closing paragraph of the findings, after setting forth the facts under seven subdivisions, is as follows: "Upon the conclusions of law and the foregoing facts, the court finds that the plaintiffs have no cause of action herein against the defendants, and the defendants are entitled to a judgment against the plaintiffs for the costs of this action, taxed at ——— dollars." Besides this, a formal

decree was rendered in which it is recited that "the court having found and filed its findings of fact and conclusions of law, from which it appears," etc. The paragraph first above quoted was no doubt intended as conclusions of law, and whether we disregard, and consider as stricken out, the words, "the conclusions of law and," or read the paragraph as intended to read, "as conclusions of law from the foregoing facts, the court finds," etc., we think the same should be treated as a conclusion of law. *Jones v. Clark*, 42 Cal. 180; *Butler v. Beech*, 55 Cal. 28; *Murphy v. Snyder* (Cal.) 8 Pac. 2.

Numerous errors of law in the admission and rejection of testimony are assigned by appellants, but we fail to discover any error in the record. Some objections are made by respondents to the consideration of this appeal, but, as we hold that the judgment should be affirmed, it is not necessary to discuss other questions. The judgment of the trial court is affirmed.

ZANE, C. J., concurs.

MINER, J. I concur in the judgment.

(15 Utah 477)

STATE ex rel. BACHE v. RICHARDS, State Auditor (GRIFFITH, Intervener).

(Supreme Court of Utah. June 2, 1897.)

MANDAMUS — TERRITORIAL STATISTICIAN — STATE INDEBTEDNESS — SALARY.

1. Services rendered during 1895, under *Sess. Laws 1892, p. 47*, creating the bureau of statistics, became an obligation of the state, under subdivision 3 of article 3 of the constitution.

2. Each occupant of the office of territorial statistician for the year 1895 is entitled to such a proportion of the salary allowed for the office as the time of service of each bears to the entire year, and each one is entitled to a writ of mandate to compel the issuance of a warrant for the amount due him.

(Syllabus by the Court.)

Application by the state, on the relation of Joseph P. Bache, against Morgan Richards, Jr., state auditor. H. W. Griffith intervenes. Writ granted.

Dey & Street, for relator. A. C. Bishop and Benner X. Smith, Atty. Gen., for the State. Geo. L. Nye, for intervener.

BARTCH, J. This is an original application to this court for a peremptory writ of mandamus, against the state auditor, to compel him to audit the relator's claim for a salary of \$1,000, as territorial statistician for the year 1895, and to issue a warrant therefor in favor of the relator. After the application was filed, H. W. Griffith, by leave of court, filed a petition in intervention, wherein he claimed that during a portion of that year he held the office of statistician, and discharged its duties, and was therefore entitled to a certain portion of the salary. The relator demurred to the petition of intervention, but the demurrer was overruled. The state, represented by the attorney general, admitted that

the duties of the office were performed, and that it owed the sum of \$1,000 to whomsoever might be adjudged the lawful claimant, but, on account of the conflicting claims, the auditor had refused to issue the warrants demanded. Thereupon a referee was appointed to take such testimony as might be offered, and report his findings to this court; and we are now called upon to determine the case upon the report of the referee, and the law applicable thereto.

The office of territorial statistician was created by the act of 1892, entitled "An act creating a bureau of statistics," section 1 of which reads: "That a bureau of statistics is hereby created, and the statistical year is hereby designated as follows: The year 1895, and triennially thereafter. That the territorial librarian is hereby made the territorial statistician, and shall receive a salary of \$1,000 for each statistical year." Sess. Laws 1892, p. 47. This section fixed the salary of that officer for the year 1895 definitely at the sum of \$1,000, and as it was not paid at the end of that year, after the services were performed, it became a debt incurred by the authority of the territorial legislature. Under subdivision 3 of article 3 of the constitution, all such debts and liabilities were assumed by the state when the transition from a territorial to a state form of government was consummated, and must be paid to the rightful claimants. Such claimants in this case must be determined from the evidence and findings of facts reported by the referee.

It is not deemed necessary, however, to refer to the evidence and findings in detail, because it is quite apparent therefrom that Joseph P. Bache, the relator, was the lawful occupant of that office from January 1st to September 30th of the year 1895, and that on the last-named date he vacated the same. He was therefore entitled to such a proportion of the salary as nine months bear to the year, or nine-twelfths thereof, which equals \$750. It is likewise apparent that H. W. Griffith, the intervener, was the lawful occupant of the office from September 30th to November 6th of that year, and is therefore entitled to the emoluments of the office for the time he was such occupant, and the amount thereof for such time is \$100. Neither of the parties have shown any right to the remaining portion of the salary, and we therefore refrain from making any disposition of it. We are of the opinion that Joseph P. Bache, the relator, is entitled to a warrant from the auditor for the sum of \$750, and that H. W. Griffith is entitled to a warrant for the sum of \$100, and that each of the claimants is entitled to a writ of mandate to compel the issuance of a warrant for the sum so found due him. Let the writs issue accordingly. The costs in this case may be taxed against the relator and intervener in proportion to the amount which each one has recovered.

ZANE, C. J., and MINER, J., concur.

(18 Utah 496)

COIT et al. v. FREED et al.

(Supreme Court of Utah. June 24, 1897.)

CORPORATION—BOARD OF DIRECTORS—INJUNCTION
—SCOPE—BREACH.

1. C. and others, stockholders of a mining company, brought suit against certain officers of the corporation to restrain them from selling its treasury stock, alleging that the officers had entered into a fraudulent conspiracy to sell the same to obtain control of the corporation. Pending an order to show cause why a temporary injunction should not issue until the final disposition of the case, the court granted an order restraining the defendants from performing any of the acts threatened by them to be performed and complained of in the complaint. There was no allegation respecting the sale of the stock under judicial process. While the restraining order was pending, one F. brought an action at law against the corporation, and, after obtaining judgment, bought the treasury stock at execution sale. Thereafter, upon demand therefor, the proper officers issued the stock to him. Afterwards, at a meeting of the stockholders for the election of directors, F. and his transerees voted the stock for the defendants, who were then declared elected. The defendants thereupon qualified as directors, and the plaintiffs did likewise. In an action to determine which was the lawful board, *held*, that the officers committed no breach of the restraining order by issuing the treasury stock, and that the defendants constituted the lawful board of directors of the corporation.

2. In determining whether an actual breach of an injunction has been perpetrated, its terms must be considered, and when the writ does not specifically restrain the parties enjoined from the commission of definite acts, but only in a general way enjoins them from the performance of acts complained of in the complaint, it must satisfactorily appear, in order to constitute a breach of the injunction, that the acts performed were included within its scope.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Quo warranto by Joshua Coit and others against Charles M. Freed and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action in the nature of quo warranto, brought under the statute to determine whether the appellants or respondents constitute the lawful board of directors of the Sheep Rock Mining & Milling Company. The material facts are substantially as follows: The Sheep Rock Mining & Milling Company is a Utah corporation, and its capital stock consists of 52,500 shares, of which 16,186 constituted treasury stock, which had been issued to the stockholders, and by them returned to the treasury. The defendants Tom Ferguson and William Campbell were respectively vice president and secretary of the corporation from its organization, in 1893, until after the annual meeting of the stockholders held in September, 1895. On January 30, 1895, the plaintiff William T. Wyman and others commenced an action in the district court against Ferguson, Campbell, and others to restrain them from committing certain acts in relation to the treasury stock, and in their complaint alleged that the defendants therein, who were directors of the corporation, had entered into a fraudulent conspiracy for the purpose of ob-

taining control of the company by electing E. G. Brown as director, by presenting and having allowed fictitious claims against the company, and by requesting a voluntary assessment to be paid by the shareholders, with which to pay those fictitious claims, and that in case certain nonresident stockholders refused to pay such assessment, their purpose was to sell the treasury stock to pay those claims. It was further alleged in the complaint that the "defendants Tom Ferguson and William Campbell claim and pretend to be a majority of the executive committee of the said company, and to have offered and will offer the said treasury stock for sale, and will cause the same to be bought in by some one in collusion with them," at a greatly inadequate price, and "will use the same for the purpose of enabling the said Ferguson and Campbell to control the action of the corporation at future meetings of the shareholders." The prayer was for a perpetual injunction to prohibit the defendants Ferguson and Campbell from carrying out their conspiracy, and to enjoin E. G. Brown from acting as a director, and for a temporary injunction pending the final hearing. Upon filing the complaint and a bond, the court issued an order requiring the defendants to show cause why a temporary injunction should not be issued, restraining "Ferguson and Campbell, and each of them, from selling or disposing of or offering for sale" the treasury stock, and, pending the hearing of this order, enjoined them from performing any of the acts threatened by them, and complained of in the complaint. The temporary restraining order was served on Ferguson and Campbell, and while it was in force Duncan J. Frew, who was not a party to the injunction suit, but knew of the restraining order, and had been attorney for the company in an action at law in a justice's court on a claim against the company, owned by him, obtained a judgment in due and regular form against the company, and caused execution to be issued thereon. The execution was levied on the treasury stock, and the stock was sold in regular manner thereunder, by a proper officer, to Frew, and a certificate of sale issued to him. Frew then presented his certificate of sale to Ferguson and Campbell, and demanded the stock, which was thereupon issued and delivered to him by them. At the annual meeting of the stockholders held in September, 1895, Ferguson, being chairman in the absence of the president, Frew and his transferees, against the protest of the plaintiffs, voted this stock for the defendants herein as directors of the company, who, thus receiving a majority of the votes cast, were declared elected as such directors for the ensuing year. Outside of the treasury stock, the plaintiffs received a large majority of the votes cast. The defendants then qualified, and acted as directors of the company, and the plaintiffs also qualified as such directors, and demanded the offices before bringing this suit, but the defendants refused to surrender them.

Under these facts the court found that the stock in question was not issued in violation of either the spirit or letter of the restraining order, and entered judgment dismissing the complaint herein.

Frank Pierce, for appellants. Moyle, Zane & Costigan, for respondents.

BARTCH, J. (after stating the facts). The controlling question in this case is whether the restraining order issued by the court, in the case of Wyman et al. against Ferguson et al., was violated in any of the proceedings which culminated in the issuance and delivery of the treasury stock to Duncan J. Frew, and Frew's title thereto rendered void, so that he and his transferees could not lawfully vote it at the annual meeting in 1895 for the election of directors. If that stock was illegally voted, then the defendants have no right to act as directors of the company. The command of the restraining order, so far as material to this decision, is "that said defendants, and each of them, their agents, servants, and employés, be, and they are each of them hereby, enjoined and restrained from performing any of the acts threatened by them to be performed and complained of in said complaint, pending the further hearing of this order." This, in a general way, as will be observed, prohibits each and all of the defendants in that suit, and their agents and servants, from doing any of the acts threatened to be performed by them, and complained of in the complaint. There are no specifically threatened acts mentioned in the order, but only such as are complained of, and in determining whether an actual breach has been perpetrated the terms of the injunction itself must be considered, and where the writ does not specifically restrain the parties enjoined from the commission of definite acts, but only in a general way enjoins them from the performance of acts complained of, which, it is claimed, will produce certain results, it must satisfactorily appear, in order to constitute a breach of the injunction, that the acts performed were included within its scope. High, Inj. § 1433. In the case at bar the question, therefore, arises, what acts are complained of in the complaint to which the order refers, which the defendants, or either of them, threatened to perform? And upon a determination of this, the further question will necessarily be presented, were the acts performed by Frew and others, which resulted in his obtaining the stock in question, within the terms or spirit of the injunction? To determine these questions reference must be had to the complaint which was made the basis of the restraining order. An examination thereof shows that it charges the defendants therein with having "entered into a fraudulent and wrongful conspiracy for the purpose of injuring these plaintiffs," and all other shareholders, and for the "purpose of obtaining to themselves the entire control of said company"; and then alleges in detail certain acts and things which the defendants would perform, among others that de-

defendants Ferguson and Campbell claimed to be a majority of the executive committee, and would sell the treasury stock to pay fictitious claims, for the purpose of obtaining control of the company, in furtherance of that conspiracy. The allegations as to these acts and things, however, appear to be mere suppositions as to what the defendants would do, and not averments of what they had threatened to do. Nor does the evidence show that the defendants threatened to do what it is alleged they would do. It is clear that the gravamen of that action was the conspiracy attempted to be set up in the complaint, and the restraining order was directed, as its terms plainly indicate, to the acts which might be performed to carry out the alleged conspiracy. Whether it was sufficiently definite for that purpose, it is not necessary to decide. It is apparent, however, that it enjoined the commission of no act on the part of the defendants, even as to the treasury stock, which was not complained of. Nor did it prohibit the bringing of any action at law against the company by any person which might involve such stock. Nor was there any allegation in the complaint that any of the defendants had threatened to issue and deliver the stock, or would deliver the same, as a part of the alleged plot to obtain control of the company. Under these circumstances the defendants Ferguson and Campbell committed no breach of the injunction if they delivered the stock in question in obedience to the demand of a person who had the lawful right and title thereto. On this point it is shown that Frew was not a defendant or party to the action for the injunction; that he had a valid claim against the company, and brought suit at law thereon in a court of competent jurisdiction, obtained judgment therefor, caused an execution to be issued thereon, which was levied on the stock; and that thereafter the stock was sold by a proper officer, under the execution, in a regular manner, and purchased by Frew. The officer delivered to him a certificate of sale which he presented to Ferguson and Campbell, as vice president and secretary, respectively, of the company, and they issued and delivered the stock to him. It is admitted by counsel for the appellants that the restraining order did not prohibit the obtaining of the judgment against the company, but it is insisted that its officers could not issue and deliver the stock without first having obtained permission from the court which issued the injunction. We have seen, however, that the only acts restrained were such as might be committed in furtherance of the conspiracy charged, and therefore the issuance and delivery of the stock upon demand to one who had the lawful right thereto constituted no breach of the injunction, and was neither in violation of its spirit nor terms. Frew thus having lawfully obtained the stock in question, he and his transferees had the right, after the same was properly transferred on the books of the company, to vote it at the annual meeting for the election of directors; and the defendants in the case at

bar, having received a majority of the legal votes cast, and qualified, constituted the rightful board of directors. We find no reversible error in the record. The judgment is affirmed.

MINER, J., and CHERRY, District Judge. concur.

CHANDLER et al. v. SHEEP ROCK MINING & MILLING CO. et al.

(Supreme Court of Utah. June 26, 1897.)

CORPORATION — BOARD OF DIRECTORS — CAPITAL STOCK — ASSESSMENT — INJUNCTION.

1. For a decision of the question as to who constitutes the lawful board of directors of the defendant corporation, reference is made to the case of *Coit v. Freed* (decided at the present term) 49 Pac. 533.

2. Where an assessment on the capital stock of a corporation has been made by a board of directors de jure, and there is no question as to any irregularity in the levy, or any want of authority on the part of the lawful board to make it, the assessment will be held valid, and an injunction to restrain its collection denied.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by John W. Chandler and others against the Sheep Rock Mining & Milling Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Frank Pierce, for appellants. Moyle, Zane & Costigan, for respondents.

BARTON, J. This was a proceeding to obtain an injunction against the defendants to restrain them from collecting a certain assessment which had been levied upon the capital stock of the defendant company on February 23, 1896, and from selling the stock of the plaintiffs to satisfy the assessment. The grounds on which the suit was based are that the assessment was levied by a board of directors illegally elected to office, and that another action was pending to determine whether those persons who made the assessment constituted the lawful board of directors of the company. In the action so pending the trial court determined that the board in question was legally constituted, and then, in the trial of this cause, found that the assessment was lawful, and dismissed the action, and the plaintiffs appealed.

The appellants contend that the assessment in controversy herein is invalid, and that its collection should be enjoined, because, as they claim, it was made by a usurping board of directors. The question whether the directors who levied the assessment constituted the lawful board of the defendant company was presented in the case of *Coit v. Freed* (decided at the present term) 49 Pac. 533. That is the action above referred to as pending when this suit was brought. We there held that they constituted the lawful board, and for our opinion on this point we refer to that case. The assessment, therefore, having been made by a board de jure, and there being no question

raised as to any irregularity in the levy, or any want of authority on the part of a lawful board to make the levy, it must be held valid. Hence the court was justified in denying the injunction and dismissing the action. We perceive no error in the record. The judgment is affirmed.

MINER J., and CHERRY, District Judge, concur.

(15 Utah, 436)

MILES et al. v. SHEEP ROCK MINING & MILLING CO. et al.

(Supreme Court of Utah. July 1, 1897.)

CORPORATION—CAPITAL STOCK—ASSESSMENT—INJUNCTION.

1. For a decision of the question as to who constitutes the lawful board of directors of the defendant corporation reference is made to the case of Coit v. Freed (decided at the present term) 49 Pac. 533, and for a decision of the question whether a certain assessment made by that board was valid reference may be had to the case of Chandler v. Milling Co. (also decided at this term) 49 Pac. 535.

2. No subsequent assessment can be levied on the capital stock of a corporation under section 2376, Comp. Laws Utah, 1888, until the power of the corporation has been exercised to collect any previous one which remains unpaid, unless the collection of such previous assessment has been prohibited by injunction, so that it can be of no avail to the corporation.

3. Where the collection of an assessment on such stock is enjoined merely by a restraining order issued pending an order to show cause why a temporary injunction should not issue until a final determination of the suit, it does not affect the validity of the assessment, but simply suspends the power to collect it until the day for the hearing of the order to show cause; and if upon the day so fixed there is no appearance of parties, and no continuance of the hearing or of the motion for the injunction, such restraint upon the collection of the assessment is at an end.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by C. W. Miles and others against the Sheep Rock Mining & Milling Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Frank Pierce, for appellants. Moyle, Zane & Costigan, for respondents.

BARTCH, J. In this case, as appears from the complaint, application was made for the appointment of a receiver to take charge of and manage the business of the defendant Sheep Rock Mining & Milling Company, and for an injunction to restrain the directors of the corporation, who are defendants herein, from proceeding to collect an assessment which they levied upon its capital stock on November 20, 1896, and for a temporary restraining order pending an order to show cause. Upon the filing of the complaint and proper undertaking the court issued a temporary restraining order, as prayed for, and at the trial of the cause granted an injunction perpetually enjoining the directors of the corporation from collecting such assessment.

This action of the court has been attacked by appeal, but there has been no question raised as to the disposition of the application for the appointment of a receiver. It appears from the record that the former board, on February 28, 1896, levied an assessment on the capital stock of the corporation. That assessment was paid by some of the stockholders, and others brought suit to enjoin its collection, and obtained a temporary restraining order, pending an order to show cause, on a certain day, why a temporary injunction should not issue, until the final determination of that suit. Afterwards another board of directors was elected, and it, on November 20, 1896, attempted, by resolution, to rescind the assessment of February 28th, and levied the assessment in controversy herein. It is insisted for the appellants that the former assessment was invalid on the ground that it was made by a usurping board of directors. The question of the legality of the board which made that assessment was presented in the case of Coit v. Freed (decided at the present term) 49 Pac. 533, and we there held that the board was lawfully constituted; and in Chandler v. Milling Co. (also decided at the present term) 49 Pac. 535, we held that the former assessment was valid. The decisive question to be considered in this case, therefore, is whether a new assessment can be levied on the capital stock of a private corporation in this state before the powers of the corporation are exhausted for the collection of an outstanding assessment, when its collection has been restrained temporarily in another suit pending an order to show cause why a temporary injunction should not issue. Counsel for the appellants contend that the restraining order issued to enjoin the collection of the assessment of February 28, 1896, was in full force on November 20, 1896, when the last one was made, and that it was as effectual, under our statute, to prohibit the collection of the former assessment, as a perpetual injunction, and that, therefore, the last one was properly levied, and was valid, even though the former was not properly rescinded. Section 2376, Comp. Laws Utah, 1888, provides: "No assessment shall be levied upon a portion of a previous one remains unpaid, unless: 1. The power of the corporation has been exercised in accordance with the provisions of this chapter for the purpose of collecting such previous assessment. 2. The collection of such previous assessment has been enjoined." Under these provisions, no subsequent assessment can be levied until the power of the corporation has been exercised to collect any previous one which remains unpaid, unless the collection of such previous assessment has been enjoined. This doubtless means that when its collection has been prohibited by injunction, so that the assessment can be of no avail to the corporation, then another assessment may be levied, and in such event it requires no action of the board to rescind the former one. Where, however, a restraining

order is issued pending an order to show cause why a temporary injunction should not issue until the final determination of the suit, it does not affect the validity of the assessment, but simply suspends the power to collect it, until the date fixed for the hearing on the order to show cause. If upon the date so fixed there is no appearance of the parties, and no continuance of the hearing of the motion for the injunction, the restraining order falls with the motion, and the restraint upon the collection of the assessment is at an end. Under such circumstances it requires no order of court to dissolve the restraining order. Its life ceases with that of the motion, for such an order is not intended as an injunction pendente lite, and is not an injunction within the meaning of the provision of the statute above quoted. *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 Pac. 651; *Hicks v. Michael*, 15 Cal. 107. In this case it appears from the record that the restraining order in question was issued on January 30, 1895, and the order to show cause was made returnable on March 2d of the same year, and, while it is insisted for the appellants that such order was still in force on November 20, 1896, when the last assessment was levied, there is nothing in the record to show how, or by what action or authority, it was continued in force. In the absence of any such showing, we must assume that the order remained in force only until the time fixed for the hearing of the order to show cause. Such being the case, there was no restraint on the board of directors to prohibit them from exercising the power of the corporation to collect the assessment of February 28, 1896, and therefore the assessment which the board levied on November 20th of that year, while a portion of the former one remained uncollected, was null and void. The attempt to rescind the former assessment cannot avail the appellants, because, under the circumstances disclosed by the record, the directors had no authority to release a portion of the stockholders from the payment of an assessment after others had paid the amount levied on their stock. To uphold such action under such circumstances would be to countenance a breach of trust on the part of the directors of a corporation. The injunction in this case was properly granted. The judgment is affirmed.

MINER, J., and CHERRY, District Judge, concur.

HULL v. VINING et al.

(Supreme Court of Washington. July 13, 1897.)
VACATING JUDGMENT—EXCUSABLE NEGLIGENCE—DISCRETION—ASSUMPTION OF MORTGAGE—FRAUD.

1. Where a deficiency judgment in foreclosure was entered against defendant, who had a meritorious defense, which he failed to interpose because he was led by plaintiff's attorney to suppose that no personal judgment would be entered against him, he was entitled to have it vacated

with leave to answer on the ground of "excusable neglect," under 2 Hill's Ann. St. § 221.

2. Under 2 Hill's Ann. St. § 221, providing that the court may, on affidavit showing good cause, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, though the application for relief is addressed to the discretion of the court, it must, in a plain case, grant relief.

3. Where it was agreed that the purchaser of mortgaged premises should not assume the mortgage, and the grantor prepared a deed without assumption clause, which the grantee approved, but before execution the grantor inserted such clause, and the grantee accepted the deed in reliance on his former examination without reading it, and did not discover the fraud for two years, when the grantor had removed from the state, the facts constituted a defense to a suit to hold him personally liable for payment of the mortgage.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Suit to foreclose a mortgage by Aurelius B. Hull against Ralph T. Vining and others. From a deficiency judgment against defendant Truman W. Enos, and from an order denying his motion to vacate the same, he appeals. Reversed.

Stiles & Stevens, for appellant. Murry & Scott, for respondent.

GORDON, J. The respondent brought suit in the superior court of Pierce county to foreclose a mortgage upon certain real property therein situated, given to secure a note executed by Ralph T. Vining and wife, for the sum of \$3,500 and interest. In the foreclosure suit the appellant, Truman W. Enos, was made a party defendant under the allegation that he had purchased the mortgaged property subsequent to the execution of the mortgage "for a good and valuable consideration, a part of which was the assumption of said mortgage, which mortgage debt said defendant Truman W. Enos agreed to pay, and said agreement was incorporated in and made a part of the deed of purchase." On October 15, 1896, the default of appellant was entered, and on the same day a decree of foreclosure and sale was also entered for the sum of \$4,321.27 exclusive of costs. On November 16, 1896, the mortgaged premises were sold for the sum of \$3,500, the respondent becoming the purchaser. On November 24, 1896, a deficiency judgment was entered against appellant for the sum of \$858.96. About December 1, 1896, the appellant, upon notice, moved the lower court to vacate and set aside the default and judgment, and for leave to answer in the action. This motion was based upon files in the foreclosure suit and his own affidavit. In the affidavit it is stated that the summons and complaint was served upon him on August 7, 1896. Referring to that portion of the deed above set out alleging appellant's assumption of the mortgage debt he states in the affidavit that he never assumed or agreed to pay the mortgage debt, or any part thereof. "And it was thereupon expressly understood and agreed between said Vining and this affiant

that the deed from said Vining to this affiant should be a warranty deed, except that Vining would not warrant against plaintiff's said mortgage, and one other subsequent mortgage for the sum of \$1,000, which sum was a lien upon said premises, but that the said deed should show by its terms that it was made subject to said two mortgages; and it was further expressly agreed between said Vining and this affiant that this affiant would not assume, and that the deed of said Vining to this affiant should not contain any words whereby this affiant would appear to assume, the payment of said mortgages, or either of them, or any part thereof. That thereupon, and about August 29, 1892, said Vining caused to be prepared, ready for signature and acknowledgment, a proper warranty deed for said premises in accordance with the agreement theretofore made between said Vining and this affiant, and said Vining on said last-mentioned day submitted said deed to this affiant for his approval, and thereupon this affiant approved the same, and agreed to accept it when executed and acknowledged by said Vining and his said wife, and returned it to said Vining for execution and acknowledgment. That thereupon said Vining and his said wife, on said 30th day of August, 1892, executed and acknowledged said deed, and delivered said deed to this affiant, and affiant thereafter, and on the 8th day of September, 1892, caused the same to be recorded. That after the time when said Vining took said deed for the purpose of executing and acknowledging it, after having exhibited it to this affiant for his approval, and before the time when said Vining delivered said deed to this affiant, said Vining, without the knowledge or assent of this affiant, and in violation of the terms of the agreement for the sale of said premises then existing between himself and this affiant, and surreptitiously, and for the purpose of defrauding this affiant, caused the words, 'which said mortgage the grantee herein assumes and agrees to pay,' to be written and interlined in said deed next after the words, 'and due Oct. 19, 1892,' and said Vining caused said words to be so skillfully written and interlined in said deed that this affiant, who believed that said Vining would execute and deliver said deed to him in the form proposed to and approved by him, as aforesaid, was deceived and misled, and did not read over the body of said deed when the same was delivered to him, and received and accepted said deed supposing and believing that it was the deed proposed to him for his approval, and in the same form, and none other. That this affiant did not discover the fact that said words had been written and interlined in said deed until about the 6th day of April, 1895, when the said Vining and wife had removed from the state of Washington, and become residents of the state of California, where they now reside.

That this affiant would not have accepted said deed from said Vining, and would not have become the purchaser of said premises at all, had he known that said deed contained said written in and interlined words, and had he not relied upon said Vining, and believed that he would execute and deliver said deed in the form approved by this affiant as hereinbefore stated." In connection with the application to vacate and set aside the default and judgment, appellant tendered and exhibited an answer to the complaint of foreclosure embracing substantially the matter set forth in the affidavit. In his affidavit appellant states as a reason why he had not interposed the defense timely that he had had frequent conversations with one of the attorneys for the respondent, in which conversations he had informed said attorney "of all the facts and circumstances connected with affiant's purchase of said mortgaged premises," and that by reason of such facts he was not bound to pay the mortgage debt, and also that he would not pay the same, "and would defend any action which plaintiff might bring against him on said alleged assumption by him of said debt"; that thereupon he requested the attorney not to make him a party to the foreclosure suit, but that just before commencing the action the attorney stated to him that it would be necessary, "in order to clear the record title of said mortgaged premises, that affiant be made a party to said action, but that, although he would be made such party, he would be protected against personal liability therein"; that it was thereupon agreed between them that the affiant should not appear in the action, or file any answer therein, and that no judgment for any deficiency should be taken against him; that he relied upon said agreement made by said attorney, and did not, solely for that reason, appear in said action, or file any answer, or in any manner defend the same; that, but for such statement and agreement of said attorney, he should have appeared in said action, and would have defended the same, and would have filed his answer therein in substance the same as the proposed answer which he presented to the court in connection with the application.

In opposition to appellant's affidavit, respondent produced the affidavit of his attorney, in which the attorney stated that "he never had any conversation with the defendant Enos relative to how the said Enos came to assume and agree to pay said mortgage debt, nor how the assumption clause came to be made a part of the deed of purchase from the said defendants, Vining, to the said Enos, nor anything concerning said transaction." And, further, "that the conversation had by him with the defendant Enos relating to said mortgage debt was in regard to the payment of the interest due thereon, and the payment of city and county taxes for the years 1892, 1893, 1894, and 1895, which the said Enos allowed to become delinquent"; that after several

promises on the part of said Enos to pay said taxes and interest he "finally absolutely refused to do so, but said that he would like to correspond direct with the mortgagee relative to a settlement of the whole matter without a suit," and asked affiant to delay foreclosure proceedings until he could so write the mortgagee, who is now the plaintiff in this action; also that he never at any time had agreed not to take a personal judgment against the defendant Enos, nor was there any agreement or understanding of any kind whatsoever relative to affiant's so doing, or relative to appellant's not appearing in said action, or filing any answer therein, and that there was nothing whatsoever said in relation thereto. The court having deried appellant's motion to vacate the judgment, he has appealed from such order and from the deficiency judgment.

Respondent urges that appellant has mistaken his remedy, and that the procedure to vacate the judgment should have been by petition agreeably to title 14 of 2 HILL's Ann. St., and not by motion and affidavit under section 221. He insists that the ground upon which the present application is urged is "fraud practiced by the successful party in obtaining the judgment," and not the "mistake, inadvertence, surprise, or excusable neglect" of the moving party. It appears that a similar objection was interposed in the lower court, but the record does not disclose that it was specifically ruled upon, and we are unable to say whether the application to vacate was denied upon the supposition that it was without jurisdiction, or because the court was not satisfied with the showing upon the merits. But, in any event, it is respondent's right to be heard upon the objection in this court. It might often be difficult to say whether, upon a given showing, the case was one of "fraud practiced by the successful party," or whether the judgment was the result of the "excusable neglect" of the defendant. Considering the nature of the relief sought, and the object to be attained, the court ought not to indulge in any refined distinctions which might in many cases amount to a denial of justice, and, indeed, we think that not infrequently either method of procedure would be permissible. In the present case, however, we think it not unfair to suppose that, without any intention to mislead, deceive, or practice fraud upon the appellant, the learned counsel for the respondent may, in his conversations with appellant,—and it appears there were several of them,—have led the appellant to suppose that no personal judgment would be taken against him in the action. We are not disposed to think that it was a part of the purpose of learned counsel to mislead appellant, and yet we are convinced that such was the effect. We more readily incline to that view from the fact that the application to vacate discloses a meritorious defense, and was seasonably made. It followed as soon as it was ascertained that the mortgaged property had sold for an amount insufficient to pay the debt. We are unable

to discover, from the circumstances of the case, how appellant could have expected to gain any advantage by allowing a judgment to be entered against him before coming forward with his defense. On the contrary, his whole course comports with the theory that he did not anticipate the entry of a judgment. In this view the case is clearly not one where judgment has been entered as a result of "fraud practiced by the successful party," but rather where it has resulted from the "excusable neglect" of the moving party, and the record presents a proper case for relief under section 221, supra. *Woodward v. Backus*, 20 Cal. 138; *Huart v. Goyeneche*, 56 Cal. 429.

Respondent's counsel further urges that upon the merits the application was addressed to the sound discretion of the trial court. This must be conceded, but the discretion to be exercised in such cases is a legal, and not an arbitrary, discretion. The supreme court of California, speaking through Mr. Justice Sanderson, in *Bailey v. Taaffe*, 29 Cal. 424, well said: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." In the present case, if the facts alleged in the answer exhibited at the hearing of this application are true, they constitute, in our judgment, a valid, legal defense to any personal claim of the mortgagee against the appellant. It is also true that, unless an opportunity is afforded the appellant to assert it in the foreclosure proceedings, the defense is lost to him forever. If it were a mere matter of counterclaim, where the facts authorized an independent cause of action, or entitled the party to some other adequate remedy, we should hesitate before granting an application of this character. But here it is apparent that, if his application is denied, appellant will be forever barred from asserting or claiming any legal benefit of the facts alleged in the answer to exist. And in this connection we note that the right to a personal judgment against appellant is not because of any contract entered into between himself and the mortgagee, nor is it based upon any consideration moving from the mortgagee to the appellant. While this does not afford a legal objection to respondent's claim for a personal judgment, based upon the assumption clause of the deed to appellant, it is, however, a circumstance which we think may rightly be considered in disposing of an application which, in its nature, is addressed to the equitable consideration of the court. The rule in cases of this character seems to be, and of right ought to be, that "where there is a showing, not manifestly in-

sufficient, the court should be liberal in the exercise of its discretion in furtherance of justice." Hayne, New Trials & App. § 347, and cases there cited. In the present case it seems clear from the record that the appellant has a meritorious defense to the claim for personal judgment against him. It is also certain that his application to open the default was seasonably made, and that the granting of it will work no grievous hardship to the respondent. We think, therefore, that the duty of the lower court was plain, and that the application should have been granted. To the end that justice may be done, the order and judgment appealed from will be reversed, and the cause remanded, with direction to the lower court to permit the answer of appellant to be filed.

SCOTT, C. J., and REAVIS, ANDERS, and DUNBAR, JJ., concur.

DIXON v. BAUSMAN.¹

(Supreme Court of Washington. July 8, 1897.)

INTERROGATORIES TO JURY—CONCLUSIVENESS OF ANSWERS—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

1. Where defendant submitted interrogatories to the jury, he could not question the correctness of their answers on the ground that there was testimony on the points submitted sufficient to sustain the judgment.

2. Where an employé, while standing on a box on the top of a construction car, was thrown down and injured by the breaking of a trolley wire which he was tightening with a block and tackle, of the rotten condition of which he was ignorant, and the apparatus used by him was furnished by his employer, and commonly used for the purpose, he was not guilty of contributory negligence as matter of law, though he could have tightened the wire by standing on the car, and increased the risk by standing on the box.

Appeal from superior court, King county; O. Jacobs, Judge.

Action by Samuel Dixon against Frederick Bausman, as receiver of the Rainier Power & Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. John E. Humphries, William E. Humphrey, E. P. Edsen, and Rensberg & Atkinson, for respondent.

DUNBAR, J. This is a case of personal injury sustained by the plaintiff, while in the employ of the defendant, by the breaking of a trolley wire which he was attempting to draw into position by means of a block and tackle. The span wire, which stretched from poles on the side of the street to the trolley wire, had become unfastened from the trolley wire at a curve, in consequence of which the trolley wire had sagged, while the span wire had fallen upon the ground. It was in pulling the trolley wire out to its proper place so that the span wire might meet and be fastened to it that the plaintiff was injured by the break. There is

no question that the injury was inflicted, and that it was severe enough to warrant the amount of judgment obtained, testimony showing conclusively that the plaintiff, by reason of the accident, had permanently lost the use of his lower limbs, and that he sustained numerous other injuries. There is no error alleged in the instructions of the judge, the admission of testimony, the refusal to admit testimony, or anything of that kind, but the real assignment of error is the refusal of the court to grant a new trial on the ground of insufficiency of the evidence to justify the verdict. There are really but two questions in this case for discussion: First, was there such a defect in the wire as the master would be responsible for? And, second, was the respondent guilty of contributory negligence? Many authorities are cited by the respondent, and some few by the appellant, to maintain their respective positions, but we think the summary of the law announced by the appellant may be accepted as the law governing a case of this kind, viz.: First, that the master, on the one hand, is not an insurer of his servant; second, the master, on the other hand, owes his servant a reasonably safe place to work in, and reasonably safe appliances to work with; third, the servant, for his part, owes it to his master to take no unnecessary risks at work; fourth, the servant assumes the risks ordinarily incident to his occupation; fifth, the servant injured by a defective appliance must show that the master either knew of the defect or ought to have known of it beforehand. We think this is a fair statement of the law, and on the principles herein enunciated, applied to the testimony in this case, the right of the respondent to recover damages must depend. It is evident from the testimony in this case that the pounding out of kinks in the trolley wire at the point where the accident happened had weakened the wire, and was the cause of the same breaking. This the jury found in answer to special interrogatories, and there is evidence beyond question to sustain the findings. We think there is also evidence that the knowledge of these defects was brought home to the managers of the company. It is stoutly contended by the appellant that this knowledge was not traced to the company; but, outside of the evidence in the case, which we have before said we think was sufficient for the jury to pass upon, the defendant submitted certain interrogatories to the jury, among which was interrogatory No. 14, viz.: "Did plaintiff Dixon's employer know of any such kinks at that place?" to which the answer was, "Yes." Again, the same question is answered in the same way in interrogatory No. 18. These interrogatories were propounded, as we have said, by the defendant, and he cannot now question the correctness of the answers made by the jury thereto. If the establishment of these points were material to the judgment, and there was no testimony upon these points which would be sufficient to sustain the judgment, then it was the duty of the defendant

¹ Rehearing pending.

(appellant) to have moved the court for default, but, having submitted these questions to the jury, they must have been submitted upon the supposition that there was testimony upon the subject, and the defendant is bound by the answer. The same thing might be said of the alleged rotten condition of the wire, but, outside of the finding in this case, there was direct and positive testimony sufficient for the jury to act upon in the deposition of witness Newell (page 146 of the record), who testified that the wire from Lake Union to the car barn clear down town either was rotten or of bad construction. The jury also found that the business of keeping the trolley and span wires in repair on this line of railway was not intrusted to Dixon by his employer up to the time of his injuries; that it was not a part of the duties of Dixon in the employment of the railway company or its receiver to do work repairing the trolley wire or span wire along the line of the railway; but that he was specially ordered or requested to do the particular repairing where he received his injuries by Superintendent Denny. These, it may be said, were also interrogatories which were propounded by the defense, and the finding of the jury on such interrogatories is final.

We have examined this testimony with considerable care, and have considered that the only close question in the case is the alleged contributory negligence of respondent. It seems that in repairing this wire he ran a construction car along the track to the place where the wire was broken, and, not being able to reach the wire and fasten it from the top of the car, he placed a box upon the top of the car, and it was from this position that he fell when the wire parted and struck him, and it is contended by the appellant that he unnecessarily increased his peril by using this method of fastening the wire; that, had he remained on the ground, the wire would not have struck him; and several interrogatories tending to sustain this theory of the case were propounded to the jury, and it is contended that the answers to these interrogatories preclude a judgment in this case, viz. the jury found in answer to Interrogatory No. 11 that he could have tightened the trolley wire sufficiently for the task upon which he was then employed by standing upon the top of the car at the time, and not upon the box; and that, in the event of the breaking of the trolley wire when he was standing on the box, he would, in all likelihood, be thrown from the top of the box to the street. Interrogatory No. 17 was as follows: "Could plaintiff, Dixon, have done this work more safely by standing on the street, and not on the car or box, while drawing the trolley wire back from the curve by the block and tackle?" to which the answer was, "Yes, but could not complete his work." The jury also found that the respondent did not know of the rotten condition of the wire, or that any kinks had been hammered out in the wire, and that

he did not know of the faulty condition of the wire in any respect. Interrogatory No. 10, which was propounded by the defendant, was as follows: "Was plaintiff, Dixon, in tightening the wire by use of block and tackle, to stand upon a box or top of car from which he was thrown, in the exercise of ordinary care?" to which the jury answered, "Yes." And, outside of the fact that we before indicated,—that the defendant would be bound by the answer of the jury on interrogatories propounded by him,—we think the whole testimony in this case shows that the answer was warranted. This was the apparatus which was furnished by the company for mending wires, the use of which it sanctioned, and which was commonly employed; and unless we should be able to find that, as a matter of law, regardless of the opinion of the jury, the manner of placing the strain upon this wire constituted negligence, we would be bound to affirm this case. The witness Alexander testified, in substance, that there was no place where a party could stand with perfect safety while mending this wire, and that, while it might be more safe to stand below, yet he could not stand below and complete the work; that he could stand below and draw it into place, but could not stand below and make the tie; and it was doubtless in contemplation of such testimony as this that the jury answered Interrogatory No. 17 to the effect that he could more safely do the work by standing on the street, but that he could not complete the work from such position. The testimony of John Burroughs (on page 21, statement of facts) is to the same effect, viz. that it was not the usual way to do the work to stand on the ground, and that it could not be done in that way, but that the workman had to be up where he could take in the slack. The testimony of the respondent was to the same effect, and further stated that it was necessary because the top of the passenger car would not be high enough to reach the trolley wire and to work on. Of course, there is conflicting testimony in many of the points at issue in this case, but the only duty of this court is to ascertain if there was sufficient testimony introduced by the respondent to sustain the judgment, or to warrant the findings or verdict of the jury, and, outside of the special findings on the subject of contributory negligence, under all the testimony in this case, we are unable to say that the acts of the respondent constituted contributory negligence, and that, as we before said, being the only question which we deem important, there is nothing left for this court to do but to affirm the judgment. The fact that this is an action against the receiver, and will constitute the respondent a preferred creditor, does not change the law of responsibility of either the appellant or respondent. Affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

(17 Wash. 315)

GERMAN-AMERICAN SAV. BANK OF BURLINGTON, IOWA, v. CITY OF SPOKANE.¹

(Supreme Court of Washington. July 9, 1897.)

CITIES—GENERAL INDEBTEDNESS—PUBLIC IMPROVEMENTS—GENERAL FUND—MANDAMUS TO CITY OFFICERS—ENFORCEMENT OF ASSESSMENT.

1. A city cannot contract a general liability when it has reached the limit of its indebtedness.

2. Where a city has no power to contract for certain improvements to be paid for out of the general fund, it cannot be made liable for failure to provide a special fund out of which payment was to be made.

3. A contract for certain improvements provided that the city would at once levy an assessment on the property to be benefited, and to complete and pay the same to the contractor, and prosecute the levy and application of the assessment without delay. *Held*, that warrant holders under such contract could bring mandamus against the city officers to compel them to proceed to collect the assessment.

4. Though mandamus will lie to enforce an assessment to create a fund out of which certain warrants are to be paid, a bill in equity will also lie to enforce and protect the rights of the parties.

5. The city is not liable to an action by the holders of warrants issued to the contractor making the improvements under such contract, where it was within the power of the officers of the city, of its own motion or moved thereto by interested parties, to cause the costs of the improvements to be collected, so as to make possible the payment of the warrants out of the special fund on which they were drawn.

6. Where a contract for public improvements provided for an assessment to pay the warrants drawn in favor of the contractor, the city council had no right to thereafter provide for the payment of the assessments in installments extending over a period of years.

Dunbar, J., dissenting.

Appeal from superior court, Spokane county; L. H. Prather, Judge.

Action by the German-American Savings Bank of Burlington, Iowa, against the city of Spokane. Judgment for plaintiff. Defendant appeals. Reversed.

Plummer & Thayer, for appellant. Kennan & Belden, for respondent.

SCOTT, C. J. Plaintiff brought this action to recover the amount due on certain street-grade warrants originally issued to one Massey, and payable out of the Victoria street grade fund, and, having obtained a general judgment against the city therefor, the city has appealed. The foundation of the plaintiff's right of action, as presented in the briefs, was the delay and negligence on the part of the city's officers in providing the fund. The court also found, and that issue seems to have been presented in the pleadings, that the right to enforce collection of the special assessments was lost. The appellant (defendant) contests this finding, but, as the respondent does not seem to rely on it, we will not look into the evidence thereon at this time. It may become material, however, in the ultimate disposition of the case, and will be referred to later.

Questions relating to the character and enforcement of such liens have been before the

court upon a number of former occasions, and our decisions thereon have in an instance or two been inconsistent and conflicting. It is a matter of common knowledge that most of the cities and towns here are heavily burdened with debt aside from these warrants, and, furthermore, that there is a large amount of this class of paper outstanding, and the question of the general liability of such municipalities, therefore, is of the utmost importance. Consequently, the gravest responsibility rests upon the court to settle and determine, as far as possible, the principles governing such liability, if it exists, with certainty and precision, as the questions are presented. Owing to the paramount importance of the subject, and the various decisions thereon heretofore rendered, nearly all of which are in some measure involved in this and one or two other street-warrant cases submitted and now before us for our consideration, we have deemed it advisable at this time to review to some extent some of the cases we have heretofore decided relating thereto, and also some cases from other states on the subject, for the purpose of definitely settling, if possible, a few principles. The matter may also call for a short notice of some other kindred questions discussed in those cases not necessarily involved in this one.

In *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462, the court held that such warrants, payable out of a particular fund, could not be considered as a general municipal liability with reference to the constitutional limitation on the amount of indebtedness a city could contract. There was no thought at that time that they ever could become such a liability here. In *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080, the court held that, where a city had reached its constitutional limit of indebtedness, it had no power to render itself liable for the cost of street improvements contracted for subsequent thereto, although the city failed to levy an assessment, and provide a special fund to pay for such improvements, as it had contracted to do. The principle was also recognized that where there was a lack of statutory authority to construct such improvements by a general tax, or from the general funds of the city, or where there was a failure to acquire jurisdiction of the subject-matter, there could be no general liability established against the city in any way. The city of Seattle had power to construct such improvement under its charter by a general tax. The city of Spokane has that power (*Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266); and it seems to be generally, though not universally, true of the various towns and cities of the state. It was also said in *Soule v. City of Seattle* that an action brought to establish a general liability against the city, where there had been a failure to provide the special fund, was not in the nature of an action *ex delicto*, but was for a breach of the original contract, or upon an implied agreement on the part of the city to

¹ Rehearing pending.

pay in case of a failure to provide the special fund, where there was no express provision in the contract holding the city generally liable. We will next refer to the case of *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266, where a judgment had been rendered in favor of the city, upon a demurrer interposed to the complaint, and the cause was reversed here, the court holding that the delay upon the part of the city to provide the special fund, as alleged, was sufficient to establish a general liability. There was no contention that the city had lost its right to proceed with the assessments. Thereafter, in *Thomas & Co. v. City of Olympia*, 12 Wash. 465, 41 Pac. 191, the court discussed and distinguished the cases of *Soule v. City of Seattle* and *Stephens v. City of Spokane*, supra, and held that where, in the case of a contract for street improvements to be paid out of a particular fund, the city had undertaken in good faith to collect the assessment, but had been unable to do so, owing to decisions of the courts, and was proceeding to make a new assessment, it could not be held liable for the cost of the improvements out of its general fund, and that where the contract provided, as in that case, that the contractor would look only to the special fund, he had no right at all to proceed against the city generally for the negligence of its officers. When the case of *Stephens v. City of Spokane* was again before this court (14 Wash. 298, 44 Pac. 541, and 45 Pac. 31), where the city had appealed from a judgment rendered against it upon the trial, the court held that delay in providing the fund was not sufficient to enable the plaintiff to recover of the city, but that it must appear that there was a loss of power to further prosecute the assessment, and that the city could not bind itself to create the fund within a certain time. Whatever inconsistency, if any, there may have been between these two cases, is immaterial here. In *McEwan v. City of Spokane* (Wash.) 47 Pac. 433, the court held that where the city had contracted to provide the fund in the shortest possible time under its charter and ordinances, and had failed to do so, and had unreasonably delayed enforcing the assessments, it was liable generally, and that the city, and not the contractors, must look after the assessment, and enforce its collection. The right to recover was placed on the ground of delay alone. There was no contention that the statute of limitations had run against all of the special assessments, but the right to recover was sustained as to all of the warrants, regardless of such question. In *Bank of British Columbia v. City of Port Townsend* (Wash.) 47 Pac. 896, while it was in effect held that an action would lie against the city where there was a failure to provide the fund, there was no discussion of that question. The case was disposed of on a demurrer to the complaint. Although the complaint alleged that the right to prosecute the assessments was lost, no importance was attached to it. In fact, the mooted questions were other than

that, as the opinion shows, and it was held that the complaint stated a cause of action. It was also held that, unless the contract was authorized by an ordinance, there could be no recovery. The most of these decisions were by a majority of the court only. The case of *McEwan v. City of Spokane* is in straight conflict with the decision rendered in *Stephens v. City of Spokane*, when it was last before the court, although there was no direct expressed intent to overrule it, and the same is true, but not in so great a degree perhaps, of the case of *Bank of British Columbia v. City of Port Townsend*.

We will first note some of the propositions upon which there is no conflict in the decisions, and which we think may safely be regarded as settled here. One is that there can be no general liability contracted or established when the municipality has reached the limit of its indebtedness. *Baker v. City of Seattle*, supra; *Soule v. City of Seattle*, supra; *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888. The first two cases held that indebtedness of that character was not a general indebtedness, and that the constitutional limitation did not apply. If such claims can subsequently become general liabilities against municipalities, serious complications are likely to arise, for in some instances the debt limit would undoubtedly be reached before all of such claims are provided for, and there might be some question as to which of them should be entitled to priority. If the contract in terms purported to bind the city generally, and was lawfully entered into, the question should be determined with reference to the financial condition when such contract was made (*West v. City of Chehalis*, 12 Wash. 369, 41 Pac. 171); and the priority of the respective times of execution would be controlling in determining the question as between the various contracts where only a part of them could be made a general charge within the debt limit. Where the contract contained no such provision or no binding provision in that respect, and the right is founded on a breach of the contract in failing to provide the fund, a different question arises, and it must be decided with reference to the time either when the delinquency arose or when it should be judicially determined. Unless the latter time governs, there might be some question as to when the responsibility for the unreasonable delay becomes fixed, especially considering the fact that the city could not bind itself to provide the fund in a certain time, or in the shortest possible time, as has been sometimes attempted. *Stephens v. City of Spokane*, 14 Wash. 298, 44 Pac. 541, and 45 Pac. 31.

Another proposition determined is that, where there was no power to construct the improvements in the first instance out of the general fund, the city cannot be made liable for a failure to provide the special fund. *Findley v. Hull*, 13 Wash. 236, 43 Pac. 28. In a number of the foregoing cases, one, an

sometimes two, members of the court dissented, or did not concur in the opinion, the grounds of disagreement generally not being stated, and, of course, they are not particularly important, but it may be well to observe that it was occasionally upon some point not discussed in the opinion, such as a different construction of the facts, or as to the application of the principle discussed to the case, which the nonconcurring members though would require a different holding. There may have been no disagreement as to the law announced in the opinion.

The next question we will consider is as to whether an unreasonable delay in collecting the special fund is sufficient to sustain a general recovery. The provision involved in this case is as follows: "The city of Spokane Falls further agrees that it will proceed at once to levy a special tax or assessment upon the property fronting upon the street to be improved as aforesaid, for the payment of the sum aforesaid, and to complete the same, and pay the sum aforesaid as herein provided; and the city expressly covenants and agrees that it will prosecute the business of levying and collecting said special tax or assessment without any delay whatever in any part of the proceedings, and within the shortest time possible under its charter and ordinances relating thereto." There was no clause in the contract in terms binding the city generally to pay, and we have held that the city could not bind itself to provide the fund in a specified time. *Stephens v. City of Spokane*, 14 Wash. 208, 44 Pac. 541, and 45 Pac. 31. So, this clause did not add very much strength to the contract, for, in the absence of it, the city officers could doubtless be compelled to proceed diligently in collecting the fund. We have held also that the warrant holders could mandamus the city officers to proceed to collect the assessment. *Soule v. City of Seattle*, supra, citing *Himmelman v. Cofran*, 36 Cal. 411, which was a proceeding by mandamus. See, also, *State v. City of Ballard* (Wash.) 47 Pac. 970, which was a mandamus proceeding, where the relator was successful in obtaining a judgment against the city officers to proceed. Other authorities sustaining this proposition are *Reock v. Mayor*, etc., 33 N. J. Law, 129, *Wren v. City of Indianapolis*, 96 Ind. 206, and *Elliott, Roads & S. p. 437*; and more might be cited. There are some authorities against this proposition, one being *Match Co. v. Powers*, 51 Mich. 145, 16 N. W. 314, where it was held that mandamus is not adapted to cases calling for continuous action, but only to enforce a particular act. But if the remedy by mandamus proves inadequate or ineffective, or if, for any other reason, the proceedings could not be effectively enforced through the regular channels, we approve the doctrine laid down in *Soule v. City of Seattle*, supra, that the courts could make and enforce the assessment. There is no

reason why an action in equity could not be effectual to enforce and protect the rights of all parties. Such a right has been recognized and enforced, notwithstanding the fact that mandamus would lie. *City of Louisville v. Hyatt*, 5 B. Mon. 199. Probably a city taxpayer outside of the particular assessment district could mandamus the city officers to proceed to collect the special assessments in order to prevent the expense of the improvement from becoming a general charge against the city to his injury, but, as between such taxpayer and the warrant holder, justice would require that the burden should be placed on the latter, for he is a party directly and primarily interested. Such outside taxpayer would have no voice in the proceedings originally, unless, perhaps, where the contract in terms bound the city generally. He would have no right to remonstrate against the improvement, as is usually given to the taxpayers in the district, and would not be heard to contest or resist the contemplated action. In most instances where the liability of the city has been sustained, it has been on the ground that the city officers were the agents of the entire city, and that the city was liable for a failure upon their part to collect the fund. The decisions, however, have not been uniform in this respect, for in some cases it has been held that the city officers in such instances are not the agents of the entire city, but simply the agents of the particular district, for the purpose of carrying into effect a special improvement concerning the district.

An investigation of the decisions elsewhere upon the subject of such claims shows them to be in hopeless conflict. They are complicated also by the varying conditions of the respective contracts. In some instances the city had power to construct the improvement by a general tax. In others the power was limited to an assessment upon the property benefited. Some of the contracts contained a guaranty that the city would provide the fund. In some cases the rights of the contractors were expressly limited by the contract to the special assessment, there being a provision that they would in no event look to the city for payment, and there is a conflict in the decisions here also, for in some cases, notwithstanding such a provision, it has been held that the city was liable generally where the fund had not been provided through the fault or negligence of the city officers. In New York the doctrine of a general municipal liability in such cases is recognized. The latest case from that state to which our attention has been called is *Reilly v. City of Albany*, 112 N. Y. 30, 19 N. E. 508. In that case the city was held liable on such a contract for an unreasonable delay in collecting the special assessments. There are a number of New York decisions upon this subject, and we shall not undertake to review them all, but will call attention to a few of them where some new features are

involved. In *Cumming v. Mayor, etc.*, 11 Paige, 596, the same ruling was had. It was said that the local tax is a fund which has been provided by the legislature to reimburse the corporation for the expenses of an improvement which it has either paid or become liable to pay. And if the corporation, voluntarily or by compulsion, pays such expenses out of its general funds, any citizen who pays taxes may apply to the proper tribunal to compel the corporation to cause the general fund to be reimbursed by an assessment and collection of the expense of such improvement from the owners of the property benefited, or out of the property itself, as authorized and directed by the charter." There may have been some conflict in the New York cases; at least, they are not clearly reconcilable. In the earlier case of *Lake v. Trustees*, 4 Denio, 520, it seems to have been held that there was no such liability, and it was intimated that there might be an action on the case against the city officers personally for a failure to perform their duties. Also, see *Tone v. Mayor, etc.*, 70 N. Y. 157; *New York & B. S. M. & L. Co. v. City of Brooklyn*, 17 N. Y. 580; and *McCullough v. Mayor, etc.*, 23 Wend. 458,—to the same effect apparently. But the later cases of *Reilly v. City of Albany*, *supra*, and *McCormack v. City of Brooklyn*, 108 N. Y. 49, 14 N. E. 808, held that there was such a liability, and the decisions of that state may fairly be said to support the doctrine. In *Kansas* the doctrine has been sustained. In *City of Atchison v. Byrnes*, 22 Kan. 65, the city was held generally liable, citing *City of Leavenworth v. Mills*, 6 Kan. 288, and *City of Wyandotte v. Zeitz*, 21 Kan. 640. See, also, *City of Atchison v. Leu* (Kan. Sup.) 29 Pac. 467. The force of these decisions, however, as authority here, is much weakened by the holding that the contractor had no other remedy than to sue the city generally. The right to mandamus the board to enforce making the assessment was not recognized or discussed. The cases took the view also that the city was bound in the first instance, and that the provision for assessing the property benefited was intended to reimburse the general fund. In *City of Leavenworth v. Rankin*, 2 Kan. 357, it was held that the mode prescribed to create a general liability must be pursued, and the rule with regard to strict construction of the powers of municipal officers and agents was recognized. It seems that the prescribed mode had been pursued in the other cases. In *Oregon* the doctrine has been sustained. In *Portland L. & M. Co. v. City of East Portland*, 18 Or. 21, 22 Pac. 536, a general liability was recognized, and the case seemed to proceed on the ground also that the right upon the part of the city to collect the special assessment was lost or inoperative. In the opinion of Lord, J., it is stated that it might be necessary to get additional legislation to that end. In that case the opinion of Strahan, J., holds that the method of charging the city might be different from that required under

the charter for contracting a general obligation, but in that state the decisions have gone to an extreme in sustaining such a liability. In *North Pac. L. & M. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4, the city was held liable, although it could not have contracted a direct general liability in the first instance. In *Commercial Nat. Bank v. City of Portland (Or.)* 33 Pac. 532, it was held that a stipulation providing that the contractor should look only to the particular fund would not relieve the city from a general liability in the case of negligence in failing to provide the fund. In *Little v. City of Portland (Or.)* 37 Pac. 911, it was held by that court that the liability for negligently failing to raise such a fund was one arising *ex delicto*, and that the city was liable, regardless of its debt limit. Upon that theory the holdings of the court could be sustained. But, in our opinion, the authorities elsewhere do not support the proposition that such an action sounds in tort. At least, that is the general view taken, and we have followed it. Consequently, the decisions of that state could not be regarded as bearing strongly here upon the doctrine of a general liability. In *Illinois* the doctrine of a general liability has been indorsed, and to the extreme limit also in an instance or two. In *Maher v. Chicago*, 38 Ill. 266, it was held that a city could be estopped where it proceeded in disregard of its own ordinances; also that, notwithstanding an express provision in the contract to look only to the special fund, the city would be liable generally in case of an unreasonable delay. In the later case of *Chicago v. People*, 48 Ill. 416, it was held, in a mandamus proceeding to compel payment, that the contractor was bound by such a stipulation, it appearing that the city was then in good faith proceeding with the collection of the assessment. And *Maher v. Chicago*, *supra*, was distinguished on the ground that there a special assessment could not be levied for want of power, and the court said it would hold differently in the case before it if the city were acting in bad faith, such as would be indicated by an unreasonable delay, or if there were defects in the special assessment proceedings which the city could not cure. In *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263, the city was held liable for want of fidelity, or for the negligence of those who were authorized to act for it; and it was held that such liability was not within the limitation in regard to the creation of indebtedness. This case involved a building contract. But in *Gaddis v. Richland Co.*, 92 Ill. 119, which was a railroad bond case, in discussing the acts of public officers, it was held that they must follow the mode prescribed by law in order to create an indebtedness, and the doctrine of strict construction was recognized. These last two cases would seem to be inconsistent in so far as the debt limit, at least, is concerned, with the *Sexton* case. In *Morgan v. Dubuque*, 28 Iowa, 575, it was held that the city was liable for such improvements where there was a fail-

ure for an unreasonable time to collect the assessments. There was a stipulation in the contract for payment when the assessments were collected. There was no discussion of the question in the opinion. In *Bucroft v. City of Council Bluffs*, 63 Iowa, 646, 19 N. W. 807, which involved a grading contract, where the contractor had agreed to take for his pay assessment certificates upon owners of abutting property, and there was no power to assess such owners therefor, it was held that the city was liable for the contract price. The city had power to construct such improvements out of its general fund, and it was held that the assumption of power to make the assessment was sufficient to bind the city. See, also, *Scofield v. City of Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *Polk Co. Sav. Bank v. State*, 69 Iowa, 24, 28 N. W. 416. The decisions in that state support the general liability doctrine. The same is also true of the state of Kentucky, according to the following decisions before us: In *City of Louisville v. Hyatt*, 5 B. Mon. 199, which was an action in equity to enforce such assessments against the property owners, and also to recover payment of the city, where the contract provided that the contractors would look to the lot owners for payment, it was held, the assessment being void, that the contractors could recover of the city, the city having power to construct such improvements out of its general fund. See, also, *Kearney v. City of Covington*, 1 Metc. (Ky.) 339. It was said in that case, although not necessary to its decision, that the city would be liable even if it had no power to construct such improvements out of its general fund. In *Allen v. City of Janesville*, 35 Wis. 403, where the assessment was void, and could not be cured, the city was held liable. It was said that no limitation on the general power to make a binding contract by the city had been disregarded. See, also, *Eilert v. City of Oshkosh*, 14 Wis. 637.

It may be said that the decisions in New York, Illinois, Iowa, Kentucky, and Wisconsin fairly support the doctrine of a general liability here, but some of them are weakened by their decisions in other cases holding to a strict construction with reference to the acts of municipal officers, the same principle being involved. In California the doctrine of such a liability has been partially recognized, but upon a different ground. In *Argenti v. San Francisco*, 16 Cal. 256, the city had collected a portion of the assessment, which had been transferred to its general fund. It was held that the city was primarily liable. In the opinion of Field, J., it was held that the mode for contracting a general liability had been pursued; that it was necessary to follow the mode, and that the city must proceed by an ordinance where one was required; also, that an estoppel would not arise upon the ground that the whole city had been benefited. Field, J., said, in part: "But I place my concurrence in the judgment heretofore rendered in this case upon the validity of the contracts with

the city, which were completed by the acceptance of the proposals of the contractors, and the primary liability of the city for the work performed thereunder. I have been thus explicit because I do not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets. A municipal corporation can only act in the cases and in the mode prescribed by its charter; and, for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon implied contracts, has no application to cases of this character." In *McCracken v. San Francisco*, 16 Cal. 591, it was held that there could be no ratification where there was no original power to make the contract, and that, where the power could only be exercised in a particular manner, the ratification must pursue the same mode, the doctrine of strict construction being recognized. See, also, *McCoy v. Briant*, 53 Cal. 247, on the question of limited powers and manner of proceeding, and *Zottman v. San Francisco*, 20 Cal. 97, for comments on former California cases. These decisions cannot be said to support a general liability here. On the contrary, they support the propositions that the prescribed mode of contracting must be pursued, and that the liability cannot arise by estoppel, and in no event could a liability in excess of the power to contract be created. The same is true, we think, of Texas, Ohio, and Michigan, in so far as we are enlightened by the decisions before us. In *City of Bryan v. Page*, 51 Tex. 532, which was an action to recover for services as an attorney, it was held that, where the city had the power to employ by ordinance, its officers could not employ in the absence of one; that the city was not bound on the implied contract, and was not estopped in consequence of having had the benefit of the services. In *Creighton v. Toledo*, 18 Ohio St. 447, where the contractor was empowered to collect the assessments, and where some of the property sold thereunder did not bring enough to meet the amount of the assessments thereon, it was held that, where there was an express contract, none could be implied, and, the mode of payment having been stipulated, the contractor was bound by it, notwithstanding there was a deficiency, and that there could be no implied guaranty upon the part of the city that the amount should be sufficient. In *Goodrich v. Detroit*, 12 Mich. 279, which involved a paving contract which had been performed by a contractor who was to be paid out of the special fund, and where the special assessments therefor had been collected by the city collector, but which he had not paid over to the city treasurer, and was thought to have misappropriated, a suit being pending upon his bond therefor, it was held that, as the contract provided for payment when the assessments were collected by the city collector and paid over to the treasurer, the contractor could not recover of the city on the facts shown,

although the city had agreed to collect the assessments with reasonable care and dispatch. It was shown that the suit against the collector was brought in November, 1861, a demurrer was interposed in January, 1862, and no further steps had been taken in the prosecution of the action when the contractor sued the city, in May, 1863. It was held that the charge of negligence was not sustained by the facts shown, but it does not clearly appear what the court would have held if it had thought negligence was established by the agreed case. The city had no power to construct such improvements out of its general fund. The above cases from the last-mentioned four states are not referred to as being directly and strongly against the doctrine of a general liability here in all its phases, but as being against some of the grounds on which a liability is urged in other states, and as tending against it generally, and in harmony with our holdings upon like principles in many instances. *Saxton v. St. Joseph*, 60 Mo. 153, which is the latest adjudication in that state called to our attention, is against the doctrine squarely, and in effect overruled an earlier case, viz. *Fisher v. City of St. Louis*, 44 Mo. 482, taking a different view. It was held also that a charge of negligence was not sustained by a showing of defective proceedings by the council. In New Jersey the decisions seem to conflict as to the principle involved. In *Reock v. Mayor, etc.*, 33 N. J. Law, 129, which was an action by a property owner to recover damages for the alteration of a grade in improving a street where such damages were to be paid by an assessment upon the property benefited by the improvement, and where the council had neglected to make the assessment, it was held that the plaintiff could not recover. In the later case of *Knapp v. Mayor, etc.*, 38 N. J. Law, 371, which was an action upon improvement certificates issued to a contractor for improving a street where the city had neglected to collect the assessments on property benefited, a contrary principle is recognized, and the right to recover was sustained, regardless of whether the city could collect the amounts. But in a still later case, viz. *Paret v. Mayor, etc.*, 40 N. J. Law, 333, the principle adopted in *Reock v. Mayor* was reaffirmed, the court saying: "The rule attempted to be vindicated in this case is plainly this: that, by a certain course of law, a city can be made liable by a suit for the expenses incurred in taking land for a public improvement, and the burthen imposed upon the city at large, although the charter prescribed the mode of having such expenses assessed, and provides for their payment by the owners of the particular lands specially benefited. It is obvious that this is an endeavor to subvert the legislative scheme, which is to have the damages ascertained in an appointed manner, and paid by a certain class of persons. This, it has been repeatedly decided in this state, cannot be done." Here, in fact, a much stronger case was presented

in favor of the claimant than the last one referred to, for, instead of a voluntary contractor, the court was dealing with the rights of a man whose land was taken from him by compulsory process for the purposes of the improvement. But neither of the former cases was referred to, and this is the latest case from that state called to our attention. In Indiana the nonliability doctrine is strongly sustained by a line of decisions. The latest before us is that of *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, where it is held that, in making and collecting such assessments, the city authorities do not act as the general agents of the city, but as special agents of the district; also, that issuing bonds or certificates which show upon their face that they are issued in the course of constructing a street improvement, and are payable out of a special fund to be derived from assessments upon the property bordering on the street, is very far from creating a debt against the city; that assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received a pecuniary benefit which the citizens do not share in common; that the municipality as such is not benefited by the improvement, and there is hence, under the law in question, neither a legal nor a moral obligation on the city at large to pay for it. See, also, *Board v. Fullen*, 111 Ind. 410, 12 N. E. 298; *Wren v. City of Indianapolis*, 96 Ind. 206; *Town of Tipton v. Jones*, 77 Ind. 307; *City of New Albany v. Sweney*, 13 Ind. 245; *Johnson v. Indianapolis*, 16 Ind. 227; *City of Greencastle v. Allen*, 43 Ind. 347. In the last-mentioned case it was held, where the engineer refused to make an assessment, and the council refused to issue precepts, upon a proper application, against the property holders, that a suit could not be maintained against the town, and that the contractors' remedy was by mandamus, citing many authorities.

We have held in harmony with these and other authorities upon the subject coming from states where the nonliability doctrine is recognized, upon many points. For instance, in the capitol building case (*Allen v. Grimes*, 9 Wash. 424, 37 Pac. 662), it was held that, even though the state could be sued, no cause of action could be stated against it by a warrant holder, and that such holder was limited to a right to require the officers to perform their duties; that the obligations to be issued there would create no liability against the state in any manner, but only against the fund, and it never was supposed for a moment that if anything should happen to the land grant, or if any contingency should arise whereby enough money should not be forthcoming to pay the warrants, the state would be liable. It would be hard to point out a difference between the equities of that kind of a contract and an ordinary street improve-

ment contract. Both are payable out of a particular fund. In each the respective officers might fail to perform their duties. The same is true of *Winston v. City of Spokane*, supra, where we held that the obligations there in question, payable out of the water-system fund, did not constitute a city indebtedness. This case was reaffirmed in *Kenyon v. City of Spokane* (Wash.) 48 Pac. 783. The holding in *Findley v. Hull*, supra, that there could be no recovery against the city, is not in harmony with the decisions of most of the states sustaining the general liability doctrine, but lines up with many of those on the other side of the question. The same is true of the case of *Tacoma Light & Water Co. v. City of Tacoma*, 13 Wash. 115, 42 Pac. 533, holding to a strict construction of the powers of municipal officers. Others might be cited holding also against the doctrine of estoppel as applied to their acts. Our decisions we believe to have been consistent on that line, except as to some of these street improvement cases. Such representatives were not originally, nor now generally, looked upon as paternal boards or officers, with general powers and responsibilities in any way affecting the citizen, but only as authorized to bind their constituents in certain specified ways. The other view is an innovation, and dangerous in principle.

The supreme court of the United States has held strongly to the strict construction theory as applied to municipalities and municipal officers. In a late case, that of *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, it was held that power conferred upon a municipal corporation to borrow money did not authorize it to issue municipal bonds therefor, and, although the bonds which had been issued thereunder were in the hands of an innocent purchaser for value, it was held that there could be no recovery. Many cases were cited and commented on, and some earlier ones overruled. In *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, while the case is not exactly in point with the one before us, in that a particular board of city officers, instead of the general council, had been designated by the legislature for the carrying on of the improvement, it was held that there was no general liability upon the part of the city to make good the contract. While some importance was attached to the point mentioned, yet the argument proceeds against the right to recover of the municipality at all in such cases. In some respects the contract there in question was stronger against the city than the ordinary street improvement contract, especially that part with reference to funding the indebtedness in bonds of the city. The court, in its opinion, quoted from *Cooley on Taxation* (page 416), stating, in substance, that general taxes are exacted in return for general benefits, but that special assessments are made upon the ground of special benefits to a limited portion of the community; that

they are supposed to suffer no pecuniary loss thereby, their property being enhanced in value to an amount equal to the expenditure; and that "this is the idea that underlies all these levies." That being true, there is no basis for making them a public charge in such instances. Of course, it is generally put upon the ground of the negligence and agency of the city officers, but it is not well grounded. The court said there that, although the board was derelict in its duty, the city could properly say to the warrant holder, "Your remedy was by mandamus to compel prompt and efficient action by that board," and quoted approvingly from Judge Dillon as follows: "Why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment, and proceed in the collection thereof with the requisite diligence?" And the court says: "On what principle of right and justice can he [the warrant holder] ignore this remedy, and charge the municipality, and burden all the taxpayers of the city?" It states also that the mere fact of noncollection did not prove dereliction of duty. If there had been dereliction of duty, the court inquired what would be the measure of liability, as there was no guaranty of payment in the contract. The whole trend of this case is strongly against holding municipalities generally liable on such contracts. In concluding its majority opinion, the court said: "It is equally the duty of this court, as of all others, to see to it that no burden is cast upon taxpayers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality; and, when a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor." Although the court made use of the expression "without dereliction or wrong on the part of the city," here, in discussing the case, it nowhere appeared what the court would hold in case of such dereliction, nor what the court would deem dereliction on the part of the city. We do not take that expression as an intimation of any particular strength that such liability could be sustained, in the opinion of the court, on the ground of neglect of the city officers, for the whole trend of the argument is against it, as well as the authorities quoted. Nor is the case of *Hitchcock v. Galveston*, 96 U. S. 341, in conflict with the foregoing, for in that case the general bonds of the city were issued not limited to the assessment fund, and the resort to lot owners upon the assessment was for the reimbursement of the city.

In 1 Dill. Mun. Corp. (4th Ed.), at section 459, it is said: "So, where the corporation orders local street improvements to be made,

for which the abutters are the parties ultimately liable, and which, by the charter, must be made in a prescribed mode, if made without any contract or a valid one, the doctrine of implied liability does not apply in favor of the contractor, unless, indeed, the corporation has collected the amount from the adjoining owners, and has it in its treasury." And at section 482 it is said: "It has been several times decided that where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited, a failure of the corporation, though it is only the agent of the owners to be assessed, to discharge its duty, by making the necessary assessment, or its unreasonable delay in collecting and paying over the money, gives the contractor a right to recover his compensation in an action against the corporation. The cases on the point are conflicting. The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment." But why should a judgment be allowed at all against the municipality, as the contractor or warrant holder has a right to proceed against the officers, or the property perhaps, and enforce the assessment? Why subject the city to the primary liability? The property in some instances might not bring enough to reimburse the city, if that is to be the controlling idea. In *Elliott, Roads & S.*, at pages 436 and 437, it is said: "The doctrine that a breach of duty will render the public corporation liable to pay for an improvement which has conferred a special benefit upon a property owner has a very slender support in principle, if, indeed, it has any support at all, unless it is limited to cases where the public corporation secures and misappropriates the money collected on the assessment. It is not just to compel the citizens generally to pay for a special benefit, and this is done by taking money out of the corporate treasury to pay a local assessment. Public corporations are instrumentalities of government, and their officers are public officers, with defined and limited authority; and the contractor ought to satisfy himself that the assessment can be collected from those who are benefited, and this he can do by looking into the law, and examining public records, which are open to inspection. The officers who fail in their duty are not the corporation, for that is composed of the citizens of the locality, and the corporate officers are as much the representatives of the citizens specially benefited as of any of the others. If these officers fail to do their duty, they can be coerced by mandate, and to this remedy the contractor should be confined, for it is far more just and reasonable to impose upon him the duty of watching the proceedings than it is to impose it upon the citizens generally, who, having no special interest in the proceedings, have a right to presume that the officers have done their

duty. It is for those especially interested to secure obedience to law, and not for those who are citizens having no particular or special interest in the proceedings. Those only who are lacking in vigilance and diligence should suffer, and not those resting under no duty demanding diligence, and occupying no position requiring vigilance. If the money taken out of the corporate treasury to pay for the improvement came from the derelict officers alone, there would be much justice in holding the public corporation liable for their default. It does not, however, come from them, but from the citizens, who constitute the governmental corporation. It is just enough to make the officers do their duty, but it is an unjustifiable burden to impose upon all the citizens the payment of money for an improvement which specially benefits specific property."

For the reasons hereinbefore stated, we have given the case before us extended attention. The question goes much beyond the interests at stake here, and hardships are bound to result, however the principles are settled. On the one hand, we have the rights of the general city taxpayer to consider. He may have paid like assessments with reference to his own property, and it is certainly a hardship to call upon him to make good a failure on the part of some other property holder to pay such an assessment, especially where the threatened burden is so excessive, in view of the high rule of property valuations prevailing in assessing for tax levies, and the liberal public debt limits allowed. In some instances it would come near the confiscation of his property. It is not a satisfactory answer to such a man to say that he must be bound by the negligence of men elected to act in a governmental capacity over a town wherein he may be residing, for it leaves him small chance of escape. Under the present civilized conditions, he is compelled to live in the society of his fellow men, and to subject himself to some form of government, and it is a hard matter to take his property away from him when he has had no direct voice in the proceedings. On the other hand, the warrant holders have parted with value for these obligations, either in performing the work where the warrants are held by the original parties, or in the amount paid for purchasing them in the case of subsequent holders. As a matter of justice, they are entitled to payment, and we have their interests to consider. Of course, if they should fail in collecting the amounts equitably due them, such failure will not be the first in the history of government, but it is desirable to make such instances as few as possible. After all that can be said and done, however, as a matter of right and law, where one of two parties must suffer, the loss should fall upon the one who has had the best opportunity to protect himself, and is the most at fault. It is apparent that if,

by delay upon the part of the council to provide a special fund, the claim can become a general charge against the city, it would be directly to the interest of the warrant holder to have the proceedings delayed, in order that he might obtain the greater security, and avoid the possibility of loss through a failure of the property, or any of it, to bring the amount assessed against it, and such instances are not unheard of. It must also be borne in mind that he was a voluntary contractor, and was not put in the helpless condition of the general taxpayer outside of the district. While, perhaps, such general taxpayer might have compelled the city officers to act after the work was done, and the danger of loss to him imminent, the contractor or warrant holder had this same right, and the courts have all the time been open to him. By force of the contract, such officers should be held to be more directly his agents or representatives than the agents of the general taxpayers for the purposes of the assessment, if they were such taxpayers' agents at all in the premises. By the contract, the contractor has, in effect, adopted the machinery provided for raising his money through the acts of such officers.

From our investigation of the cases and text-books, we are of the opinion that the decided weight of authority is against allowing a recovery of the city upon such matters at all, in the absence of an express lawful contract to that effect, or in cases where the money has been collected on the assessments, and is in the city treasury. However, it is not necessary to go that far in this case, at least at this time. But we desire to reaffirm the doctrine laid down in *Stephens v. City of Spokane*, 14 Wash. 298, 44 Pac. 541, and 45 Pac. 31, that there can be no recovery of the city at all while the assessment plan can be enforced in any way; and the case of *McEwan v. City of Spokane* is in that respect overruled. No case has been presented to us so far involving the right to recover of the city where the power to enforce the assessments has been lost by lapse of time, in consequence of the negligence of the city officers or otherwise, and where it has been a mooted point, and discussed and decided, unless it is in the case of *Baker v. City of Seattle*, *supra*, which will be further noticed. The case of *Bank of British Columbia v. City of Port Townsend* has before been sufficiently explained. Expressions bearing on this question may be found in a number of the opinions. For instance, in *Stephens v. City of Spokane*, 14 Wash. 298, 44 Pac. 541, and 45 Pac. 31, in referring to *Soule v. City of Seattle*, it was said, in effect, that the city could not be liable unless it had failed to take any steps for the collection of the special fund upon which the warrants were drawn, or

had been guilty of such negligence in what it had attempted to do that the right to cause such fund to be created had been lost; and similar expressions may likely be found in other cases, which, of course, indicate that there might be a liability in such event, but go no further than an intimation. In *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462, however, somewhat the same principle seems to have been involved and decided. Like that in *Paret v. Mayor*, etc., 40 N. J. Law, 333, referred to, it was much stronger on the facts in favor of the claimants, and yet the holding was against them. It was said there, in substance, in discussing the principle, that, if the city officers failed to make the collection, it was for the unpaid claimants to compel them to proceed, and that the negligence of such officers did not place their claims in the category of the city's general indebtedness; that the claimants must look to the source provided by law for their reimbursement; that the duty laid upon the city was not the payment of the awards, but the levy and collection of the assessments. But it was intimated that the city might be liable where its officers had been fully moved to proceed, and had failed in such instances. In view of this and the subsequent expressions noticed in later decisions, we desire to regard the express point above mentioned as not definitely settled or passed upon here, except in so far as sustaining the complaint in the *Port Townsend Case*, alluded to, may have incidentally held it as the law of that case, but which case, under the circumstances given, should not have force beyond that. As the lower court in this case found that the right to proceed in enforcing the assessments was lost, and as the respondent may have attached no importance to this finding in briefing and arguing the case, in view of our holding in the *McEwan Case*, we feel in duty bound, considering the conflict in the cases alluded to, to allow the respondent to present it in a petition for a rehearing, if it is involved here. By taking that course, the rights of the parties can be fully considered, and, doubtless, counsel on the respective sides can further enlighten us. The great importance of the question to their clients and the public will certainly be a sufficient incentive. Then, if there is to be such an ultimate liability established, on what ground is it to be placed? Must there have been negligence on the part of the city officers in failing to provide the fund? If so, what is to constitute such negligence? Or must the right to recover be limited to cases where a general liability was expressly contracted, in harmony with the charter provisions on that subject? Or is a mere failure for any reason to provide the fund sufficient to sustain a recovery, and the city thus placed in the position of a guarantor

or insurer of the success of the assessment scheme?

One further question requires some notice. It appears that the city council undertook to provide for payment of the assessments in installments extending over a period of years. If these assessments were in substance the property of the warrant holders, it is evident that the council had no right to postpone their payment as against them, and they at all times had the right to compel the city officers to proceed diligently to collect such assessments, notwithstanding the attempt to postpone payment. The city could not thus interfere with their rights in the premises. In *re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153. As this case now stands, the judgment will be reversed, and the cause remanded, with instructions to dismiss it; but no judgment will be entered until the time for filing a petition for a rehearing has expired, nor, of course, until the petition, if filed, is disposed of.

ANDERS, GORDON, and REAVIS, JJ., concur.

DUNBAR, J. I dissent. While I have not read the most of the cases cited in the majority opinion, I am satisfied they did not involve a contract like the contract upon which this action is based. But why, say the majority, should a judgment be allowed at all against the municipality, as the contractor has a right to proceed against the officers, and enforce the assessment? Why subject the city to the primary liability? I answer, for the very best of reasons, viz. because it contracted to assume the primary liability, and the citation from the contract in the opinion shows this conclusively. It expressly covenants that it will prosecute the business of collecting this assessment without delay. It was upon this provision of the contract that the contractor, no doubt, relied. Why should the city not be compelled to respect its contracts? The essence of the whole controversy is this: A contract has been made, plain and specific in its terms. That contract has been violated by the appellant, to the injury of the respondent; and I think it a most excellent idea to compel the performance of a contract by a city, the same as by a private individual. The only other question is, did the city have the authority to make such a contract? I think it did. The city councilmen are the agents and trustees of the taxpayers of the city, and not of the parties with whom they are contracting; and the improvements of streets, while they may be paid by local assessment, are matters which affect the interest of the whole city, and every taxpayer in the city, and are matters falling especially within the general jurisdiction of the city council. The judgment should be affirmed.

(17 Wash. 344)

BOWMAN v. CITY OF COLFAX.

(Supreme Court of Washington. July 9, 1897.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DUTY TO COLLECT—LIMITATION OF ACTIONS—EXTENSION OF PERIOD—VALIDITY—ACCRUAL OF CAUSE.

1. Where a special assessment is invalid, and hence unenforceable, there accrues thereon to the city no cause of action against which the statute of limitations can run.

2. If the statute commences to run against the city's right to compel property benefited by an improvement to pay the cost thereof from the time a cause of action could have been perfected by the exercise of reasonable diligence, the time during which the city was in good faith proceeding with an invalid assessment should be excluded, and the statute would not commence to run until the expiration of that time.

3. A cause of action under Laws 1893, p. 228, providing for reassessments where the original assessments have been declared invalid, did not accrue immediately when that act took effect, since some time was required to perfect a reassessment thereunder, and, before the two-years statute against the city's right to compel the property benefited by the improvement to pay the cost thereof had expired, Laws 1895, p. 270, extending the period of limitation in such cases to ten years, took effect, and continued the right in force.

4. Laws 1895, p. 270, extending the period of limitation for the enforcement of reassessments for local improvement to ten years, was within the power of the legislature in applying to demands growing out of existing improvements under prior laws in cases where the bar of the previous statute was not complete.

Dunbar, J., dissenting.

Appeal from superior court, Whitman county; William McDonald, Judge.

Action by Frank M. Bowman against the city of Colfax. From a judgment for plaintiff, defendant appeals. Reversed.

Appellant contended, in part, that even were it conceded that the old statute of limitations of two years commenced to run against the right of appellant to compel the property benefited by the improvement to pay for the cost thereof from July 30, 1892 (the date of the defective assessment), yet the reassessment law of 1893 went into effect before two years from the said date of July 30, 1892, and that law gave appellant a new right, against which the statute of limitations would not run until that right was ripened into a cause of action, or until that right could have been perfected into a cause of action by the exercise of reasonable diligence; and it was impossible for appellant to have perfected a cause of action under such reassessment law, much less than three months after that law went into effect, however diligent appellant may have been, and any cause of action accruing under said reassessment law after 12 days after it went into effect would be affected by the new statute of limitations of 1895.

E. M. Warner, for appellant. Trimble & Pattison, for respondent.

SCOTT, C. J. Plaintiff brought this action to recover the amount due on certain warrants

originally issued to one Clark for the improvement of a street in the defendant city. On August 12, 1891, said city passed an ordinance providing for a general scheme of street improvements, by assessing the cost thereof upon the property specially benefited, with a further provision that the city council might expend moneys from the general fund for a portion of the amount corresponding with the benefit it should deem the improvement to be to the city at large, and also for street crossings. In pursuance of this ordinance, a resolution was adopted for the improvement of the street, for which these warrants were issued. On November 25, 1891, a contract was entered into between the city and said Clark therefor, which only in terms provided for payment for the work from the fund to be created by an assessment upon the property fronting on the street where it was improved. The work was performed under the contract, and on July 30, 1892, it was accepted by the city council; and on that date the council assessed the property within the particular district for the cost of the improvement. These facts are taken from the complaint, which also contained an allegation that the assessment scheme had failed, and that the time for enforcing the assessments had expired under the statute of limitations. An answer was filed thereto upon the part of the city, alleging that the assessment in question was found to be incapable of enforcement by virtue of certain supreme court decisions on the questions involved, and that on May 11, 1896, the city had made a new assessment on the property benefited, which it was enforcing at the time this action was commenced. A demurrer was interposed to this answer, and sustained by the court, and the defendant declining to plead further, judgment was rendered for the plaintiff, whereupon this appeal was taken. One question presented regarding the right of the plaintiff to recover on the ground of an unreasonable delay on the part of the city council in enforcing the assessment has been disposed of contrary to the defendant's contentions herein, by the decision rendered in *German-American Sav. Bank v. City of Spokane* (recently filed) 40 Pac. 542. It remains first to be considered whether the right to enforce the assessment scheme had become lost by lapse of time. If so, a further question as to the liability of the city by reason of it must be decided.

In *Spokane v. Stevens*, 12 Wash. 667, 42 Pac. 123, we held that actions for the foreclosure of such liens must be commenced within two years after the cause of action accrued, and a re-examination of the question does not lead us to doubt the soundness of that holding. This was the statute in force at the time these improvements were undertaken, but it does not appear from the answer at what time the causes of action on the first attempted assessment accrued, if they could have been held to have accrued thereunder at all. The pro-

ceeding being invalid, the city could not well be said to have had a cause of action on that assessment, nor until it had made a valid assessment which could be enforced. *State v. City of Ballard* (Wash.) 47 Pac. 970. See, also, *City of Seattle v. O'Connell* (Wash.) 48 Pac. 412. It has been held by some courts that the statute would be regarded as commencing to run from the time a cause of action could have been perfected by the exercise of reasonable diligence, and such rule seems to be a just and sound one. 13 Am. & Eng. Enc. Law, p. 726, and cases there cited. But, if that rule is adopted, the time that the city was in good faith proceeding with the invalid assessment scheme should be excluded. The statute should not be deemed to have commenced running until the expiration of that time, and the reassessment might be made within two years from then. There is nothing in the answer to show that the statute had run under that theory, for it does not appear at what time it was found that the original assessment scheme was defective, and would have to be abandoned; only that on May 11, 1896, the city commenced the new assessment aforesaid, which it was prosecuting when this action was begun. The statute of limitations is not such a meritorious defense that either the law or the facts should be strained in aid of it, and there is also another view urged upon our attention by counsel for appellant, which seems to be well taken, and that is with reference to the act of 1893 (Laws 1893, p. 226), providing for a reassessment. A cause of action under this statute could not be deemed to have accrued immediately when the act took effect, for it is self-evident that some time would have been required to perfect a reassessment thereunder, and, by allowing the shortest possible time therefor, two years would not have expired before the law of 1895 (Laws 1895, p. 270) was passed, extending the statute of limitations in such cases to 10 years. That act applied to existing causes of action, and would plainly include the matter here in controversy. Therefore, if there had been no attempt to reassess, the law of 1895 became operative before a bar could arise under the act of 1893, and the right would be continued in force. Consequently, at no time could the bar of the statute of limitations have been successfully invoked by the property owners. It was certainly within the power of the legislature to extend the time within which such causes of action might be commenced, and to make it operative as to demands growing out of existing improvements under the prior laws. In all cases where the bar was not complete, the legislature might extend the right indefinitely, as it would only be a question of governmental policy for the legislature to determine, and, having extended it in this instance, the city would still have the right to proceed with the assessments, and the warrant holders to com-

pel the enforcement of the assessment scheme. Therefore the demurrer to the answer could not be sustained on the ground that the statute had run, and that the city was liable where the assessment remedy was lost. That question is not in this case. It is more likely that it was in fact sustained upon the other ground, viz. that the city had not shown reasonable diligence in the premises, and had thereby rendered itself liable generally for the claims, as that is the question most strongly urged. But that question, as stated, has been disposed of in the case referred to. Reversed.

ANDERS, GORDON, and REAVIS, JJ., concur. DUNBAR, J., dissents.

CITY OF SEATTLE v. DE WOLFE et al.
(Supreme Court of Washington. July 10, 1897.)

LIMITATIONS—REVIVAL OF CAUSE ALREADY BARRED.

Laws 1895, p. 270, prescribing a ten-years limitation as to actions for the enforcement of street assessments, did not revive a cause of action completely barred by the two-years statute of limitations (2 Hill's Ann. Code, § 120).

Appeal from superior court, King county; J. W. Langley, Judge.

Action by the city of Seattle against Fred S. De Wolfe and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

John W. Pratt, C. A. Riddle, and John K. Brown, for appellant. R. B. Albertson, Bausman, Kelleher & Emory, and Struve, Allen, Hughes & McMicken, for respondents.

SCOTT, C. J. This was an action to foreclose a lien for a street assessment. The assessment had been levied under section 10 of the 1886 charter of the city of Seattle (Laws 1885-86, p. 243), and became delinquent on the 11th day of August, 1889. A demurrer was interposed to the complaint, on the ground that the cause of action was barred by the statute of limitations, which was sustained by the court, and judgment rendered for the defendants. The city has appealed.

There was no allegation in the complaint that any steps had been taken to enforce the assessment prior to the commencement of this action, in October last. The appellant first questions the holding of this court in *Spokane v. Stevens*, 12 Wash. 667, 42 Pac. 123, that the two-years statute of limitations applied in such cases. We have had occasion to re-examine that decision prior to this action, in *Bowman v. City of Colfax* (recently decided) 49 Pac. 551, and have reaffirmed it, and are convinced of its soundness. The appellant further contends that the act of March 20, 1895 (Laws 1895, p. 270), prescribing a ten-years limitation as to such actions, had the effect of reviving this cause of action, conceding that the two-years statute did apply theretofore. We are of the opinion that it was the intention of

the legislature to make that act apply to existing causes of action, and that it would apply to and continue all those where the bar of the former statute had not become complete, but that it was beyond the power of the legislature to revive such a cause of action as this, where the bar was complete. *Packscher v. Fuller*, 6 Wash. 534, 33 Pac. 875, and authorities cited; *Cooley, Const. Lim.* (5th Ed.) p. 449; *Busw. Lim.* § 14. Nor do we think the case of *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, is against that proposition as applied to these actions, if that case were to be followed, as that only applied to ordinary personal actions.

In this connection the appellant also contends that the city had a right to enforce this assessment by a personal action, in consequence of a provision in said section that "such assessments may be collected and such liens may be enforced by actions at law or suit in equity, either in the name of the city of Seattle or of the officer or any contractor or contractors," etc., and that the two-years limitation statute should, at most, only be held to apply to the personal action. But that section contains the further provision that "in any such action or suit, if it shall appear to the court on the trial thereof that the work has been done or material furnished in making improvements authorized by the council, for which under the provisions of this act special assessments may be levied, the court shall decree against the premises, and in favor of the city or other proper party plaintiff," etc.; and it is apparent that the clear intention of the act was to limit the right of recovery to the property upon which the assessment was made. We very much doubt whether a personal action could have been maintained, even though the section had attempted to authorize it, for the underlying idea sustaining such assessments is that the property has been benefited by the improvement. *German-American Sav. Bank v. City of Spokane* (recently decided) 49 Pac. 542. It is upon that ground that the owner of the property is required to pay, and the idea that there could be a personal recovery independent of the property for a deficiency, or in the first instance, is utterly inconsistent therewith, and we are inclined to think that such a provision would be unconstitutional. See, also, *City of Seattle v. Yeaser*, 1 Wash. Ter. 571, and authorities cited.

Upon that same line the appellant has also contended that if there was a right to a personal action, even though that were barred under the two-years statute, the lien would still survive; and authorities are cited upon that proposition, which, however, we will not examine, as we have come to the conclusion that there was no right to a personal action under the provisions of the charter. Furthermore, even if there was, the action to foreclose the lien would have been barred, under our holding in *Spokane v. Stevens*, for that was a foreclosure case. The plaintiff having

had a right in this case to proceed against the property only, and that right having been barred by the statute, we are clearly of the opinion that it was not in the power of the legislature to revive the right. There would be no safety in any other rule. After the bar of the statute became complete, the real estate in this improvement district, or a good deal of it, may have changed hands, and now be owned by innocent purchasers, for value. Certainly, there could be no revivor of the lien as against them. Affirmed.

ANDERS, REAVIS, and GORDON, JJ.,
concur.

STATE ex rel. CUTTING, Superintendent of
Public Instruction, v. WESTERFIELD,
State Treasurer. (No. 1,500.)

(Supreme Court of Nevada. July 19, 1897.)

GENERAL SCHOOL FUND — SUPERINTENDENT OF
PUBLIC INSTRUCTION—APPROPRIATION
FOR SALARY.

St. 1897, p. 82, making the salary of the superintendent of public instruction payable out of the general school fund, is not violative of Const. art. 11, § 3, providing that the interest received from the investment of the state school fund shall be distributed among the several counties for the benefit of the schools; there being no restriction on the disposition of that portion of the fund derived from taxation, as provided for by section 6, and the superintendent being immediately connected with the common schools.

Original application on the relation of H. C. Cutting, superintendent of public instruction, for a writ of mandamus to compel W. J. Westerfield, state treasurer, to pay a certain warrant. Granted.

J. R. Judge, Atty. Gen., for relator. Wm. Woodburn and A. J. McGowan, for respondent.

BONNIFIELD, J. The relator applies to the court for writ of mandamus to compel the respondent, as state treasurer, to pay a certain warrant drawn in his favor by the state controller, for \$83.33, as his salary for the month of January, 1897. In 1881 the act of the legislature fixing the salary of the superintendent made it payable out of the general school fund. In 1891 the legislature reduced his salary, but made it payable out of said fund. Every appropriation made by the legislature for payment of his salary from 1883 to 1897, inclusive, has been made payable out of the said fund, and his salary has been so paid up to the beginning of this year, when the state treasurer refused to pay said warrant. Counsel for respondent moves the court to quash and set aside relator's application, upon the ground, substantially, that the appropriation act, in so far as it appropriates moneys out of the general school fund to pay said salary, is in direct violation of section 3 of article 11 of the constitution of Nevada, and is null and void. And they say: "If the act of 1897 is not contrary to article eleven, section three, of the constitution of the state, respondent has

no defense to the action. If it is, the application for the writ prayed for by relator should be dismissed." As to these latter propositions we concur with the counsel. The argument of counsel, then, with reference to the duties of the state controller and state treasurer, relating to the general school fund, based on the provisions of the statutes, other than the appropriation act of 1897, is foreign to the question submitted to the court, as these provisions of the statutes in no manner determine or affect the constitutional power of the legislature to provide for the payment of relator's salary out of said school fund. Besides, if the act of 1897, in appropriating money out of that fund to pay said salary, is constitutional, we find no legal barrier against such payment being made. Under the same provisions of the several statutes cited, the respondent for the years 1895 and 1896, and his predecessors in office for the 12 years next preceding, paid the superintendent's salary out of the general school fund. In the case of *State v. Westerfield* (lately decided by this court) 49 Pac. 119, the question involved was as to the constitutionality of an appropriation made for the salary of a teacher of the state orphans' home, which was made payable out of the general school fund. In that case we held, in effect, that under the authority of *State v. Rhoades*, 4 Nev. 312, the legislature was prohibited from applying the interest derived from the state school fund to any other branch of state expenditure except that immediately connected with the educational system. We held that, in contemplation of the constitution, the school at the orphans' home is not a part of our educational system, and that under the authority of *State v. Dovey*, 19 Nev. 396, 12 Pac. 910, the children at the orphans' home were not entitled to any of said interest or moneys arising from the special tax required to be levied by section 6 of article 11 for the purposes of the university and common schools. But there is a material difference between that case and the case at bar. In article 11 of the constitution, which provides for the common school system, the office of the superintendent is created. It was created solely for the benefit of the common schools. The superintendent is their chief officer. His official duties are directly connected with them, and the state's expenditures with reference to his office are immediately connected with the common school system.

Counsel for respondent argue that, as said section 3 provides that the interest received from the investment in bonds of what is called the "State School Fund" shall be distributed among the several counties for the benefit of the common schools, it prohibits any part of it from being applied to relator's salary. The attorney general, on the part of the relator, contends that, "even though that portion of the general school fund derived from interest be subject to the restriction placed upon it by section 3 of article 11 of the constitution,—that it shall from time to time

be apportioned among the several counties, as the legislature may provide by law,—there is no such restriction or rule laid down to be followed by the legislature as to the portion of the money in said fund derived from taxation.” We fully agree with the attorney general on this point. Article 11 of the constitution required the legislature to provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year; that the legislature shall provide a special tax, which shall not exceed two mills on the dollar of all taxable property in the state, in addition to the other means provided, for the support and maintenance of the state university and common schools. It will be observed that it is optional with the legislature whether it shall provide funds to establish and maintain a school in each district for a greater period than six months in every year or not; and the legislature has the option of levying a special tax of a fractional part of a mill on the dollar, up to two mills on the dollar, or twenty cents on the hundred dollars of all taxable property. The legislature of 1897, like those preceding it, provided that, of the ad valorem tax levied on each \$100 of taxable property for state purposes, 5 cents shall go into the general school fund; and it was provided by the general appropriation bill, as it had been provided by every other appropriation bill for the last 14 years, that the salary of the superintendent shall be paid out of that fund. The moneys that go into this fund from said source amount to over \$10,000 per year. If it were necessary to distribute all of this school money derived from taxation among the several counties to support the common schools, for the length of time required by the constitution,—six months in every year,—there might be some force in the contention on the part of the respondent. But such necessity does not appear, and it is not claimed to exist. Then, whether the relator's salary shall be paid out of this fund, or from some other source, is simply a question of policy on the part of the legislature, with which the courts have nothing to do, and over which they have no control. Practically, it does not make a farthing's difference to the taxpayers whether relator's salary is paid out of this fund or the general fund in the state treasury. The constitution leaves it entirely to the discretion of the legislature whether it shall put 5 cents of the proceeds of said ad valorem tax into the general school fund for common school purposes, or a lesser sum or a greater sum, provided the greater sum does not exceed 20 cents on the \$100 of taxable property; and it is likewise left to its discretion as to what part of the moneys that it puts into the said fund shall be distributed among the said counties, and as to what part shall be otherwise used for the benefit of these schools, for purposes and uses immediately connected with the common school system.

If anything was needed to support our views of the constitutionality of the appropriation in question beyond the terms of the constitution, it may be found in the following facts: In 1881 the legislature, by an act reducing and fixing the salaries of the state officers, by its terms made the salary of the superintendent payable out of the general school fund, which act took effect on the first Monday of January, 1883. The legislature of 1883 made an appropriation for this salary out of said fund, and likewise at every session thereafter. In 1885 an amendment was proposed, and passed, to section 6 of article 11, which simply changed the section by making two mills on the dollar the maximum limit of the special tax levy, instead of one-half of a mill, as it was in the original section. In 1887 the amendment was agreed to and passed, and at a special election in 1889 it was ratified by the people. In view of the fact that, long prior to the proposal and adoption of said amendment by the legislature and its ratification by the people, the salary of the superintendent was made payable out of the general school fund by the said act of 1881, and by subsequent appropriation bills, we may reasonably conclude that such payment is within the contemplation of the constitution, that it was intended to be sanctioned and ratified by the amendment; otherwise, it would have been restricted by the amendment. Indeed, it may be reasonably inferred that the provision of the legislature making the salary of the superintendent of public instruction payable out of the general school fund was among the reasons of raising the maximum rate of said tax to two mills on the dollar. A statute will always be sustained by the courts if there be any reasonable doubt of its unconstitutionality. This rule is so well settled that authorities need not be cited. But it clearly appears to us that the constitution does not restrain the legislature from appropriating moneys out of the general school fund to pay relator's salary. The motion of respondent to dismiss this application is denied. The writ prayed by the relator will issue.

BELKNAP, C. J., and MASSEY, J., concur.

HOLBROOK et al. v. BALOISE FIRE INS. CO. (Sac. 233.)

(Supreme Court of California. July 16, 1897.)

INSURANCE—FORFEITURE—WAIVER—CONSTRUCTION OF CONTRACT—MORTGAGEES—KNOWLEDGE OF DOUBLE INSURANCE—ESTOPPEL.

1. An agreement for appraisal between an insurance company and insured provided that the submission was without reference to any other matter of difference than the damage to the property, and should be of binding effect only so far as regarded the same; and the policy provided that the company should not be held to have waived any condition by proceeding to an appraisal. *Held*, that the company did not waive a condition rendering the policy void in case of a double insurance.

2. Mortgagees who procure insurance on the mortgaged property, payable to them in case of loss, are not the "insured," within a condition in the policy making it void if the insured procure double insurance, where the owner pays the premium, and is the person said in the policy to be insured.

3. Plaintiffs made the owner of property a loan through H., who was also agent of an insurance company. The owner agreed with H. that plaintiffs should have insurance, and the mortgage contained a like stipulation. H. filled out an application for insurance, and signed the owner's name to it, and then issued the policy. The issuance of such policy was the only attempt at compliance with such stipulations, and the owner gave plaintiffs his note for the amount of the premium advanced by them to H. *H. v. H.*, that the facts showed, at least, that H. was the owner's agent to obtain the insurance, and H.'s knowledge must be imputed to the owner, though the owner had no actual personal knowledge of the issuance of the policy.

4. Where mortgagees procured and retained a policy on the mortgaged property, payable to them in case of loss, and showing on its face that the owner was the insured, and acted on the assumption that he had actual knowledge of the issuance of the policy, they could not claim that they should not be affected by mere imputed knowledge of the owner, who procured other insurance, contrary to the terms of such policy.

Commissioners' decision. Department 2.

Action by S. W. Holbrook and others against the Baloise Fire Insurance Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

BRITT, C. Action on a policy of fire insurance which contained a clause against double insurance, as follows: "This entire policy, unless otherwise provided by agreement, * * * shall be void if the insured now has or shall hereafter make or procure any other contract of insurance * * * on property covered by this policy." The defense relied on is that the insured committed a breach of this condition by obtaining additional insurance without defendant's consent.

Plaintiffs loaned a sum of money to one J. C. D. McMahan. In the course of the negotiation of such loan, it was agreed that plaintiffs should have, as security, a mortgage upon land of the borrower in the city of Stockton, and a policy of insurance on a building to be erected thereon. The mortgage was executed by McMahan on November 9, 1892. It provided, among other things, that he would keep the buildings on the land insured to the amount of at least \$1,000, and assign the policies of insurance to the plaintiffs. One Henderson negotiated the said loan as broker both of the mortgagor and the mortgagees. He was also the local agent for the defendant insurance company. On December 5, 1892, he filled out a blank form of application to defendant for insurance to the amount of \$1,000 on McMahan's building, then in course of erection. The paper was entitled "Application and Survey of J. C. D. McMahan," and it was stat-

ed therein that the insurance was for the security of a mortgagee. Henderson signed the name of McMahan thereto as applicant. Thereupon he issued on behalf of defendant the policy in suit, wherein it was stated that the Baloise Company "does insure" J. C. D. McMahan for the term of three years against loss by fire to the amount aforesaid on his said building; loss, if any, payable to said mortgagees. The policy was delivered to the mortgagees. The premium was paid from funds of theirs in the hands of Henderson, but, on the completion of the building, McMahan gave to them his note for the amount thereof. After the issuance of this policy, and, as we understand the facts and the argument of counsel, after the execution of his note to plaintiffs for the said premium advanced by them, McMahan obtained a policy from the Insurance Company of North America to the amount of \$1,200 upon his interest in said building. Defendant had no notice of such subsequent insurance until after the fire by which the building was destroyed. After such notice, however, defendant joined the North American Company in an agreement with McMahan to submit the question of the amount of the loss to appraisers; and such amount was thus ascertained to be the sum of \$1,210.36. Said agreement for appraisal contained a provision that the submission was without reference to any other matter of difference within the conditions of the insurance, and should be of binding effect only so far as regarded the damage to the property; and it was one of the clauses of defendant's policy that it should not be held to have waived any condition of the policy by proceeding on its part to an appraisal in the manner stated. The findings of the court disclose the matters above set out. It was further found that defendant did not intend to insure the interest of plaintiffs as mortgagees in said building, but did intend to insure the interest of McMahan therein "for the benefit and security of plaintiffs"; also, that McMahan "had no actual personal knowledge of the issuance" of said policy of defendant. Judgment was for plaintiffs in the sum of \$550.15, the court prorating the liability of defendant with that of the North American Company.

In view of the terms of the agreement by which the two insurance companies submitted to arbitration the question of the amount of the loss, and the provisions of the policy in suit looking to such submission, the contention of respondents that the steps taken by defendant in that matter operated to waive the forfeiture insisted upon cannot be sustained. *Stockton, etc., Agricultural Works v. Glen's Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633; *Johnson v. Insurance Co.*, 41 Minn. 396, 43 N. W. 59. The question, then, is whether the "insured" procured the second insurance within the condition against the same contained in the policy. Respondents contend that they, and not McMahan, were the "insured," and hence were not affected by his act. But the

payment of the premium was, in effect, made by McMahan. He was the person said in the policy to be insured. If the mortgage had been discharged before the loss, he would still have been indemnified by the policy for the full period named therein. Therefore we think it clear that the stipulation in the policy for payment to the mortgagees in case of loss was but a provisional assignment of the contingent proceeds of the contract, and had not the effect to substitute the mortgagees for the mortgagor as the party insured. "It is still," said the supreme court of Wisconsin in the discussion of a similar provision, "the owner of the premises who is insured, and the contract of the company is with him alone, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it." *Williamson v. Insurance Co.*, 86 Wis. 395, 396, 57 N. W. 46. See *Gillett v. Insurance Co.*, 73 Wis. 203, 41 N. W. 78; *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191; and the note in 28 Am. Law Reg. (N. S.) pp. 221-243, where the learning pertaining to this subject is well digested. We do not perceive how the finding that defendant intended to insure the interest of McMahan for the benefit and security of plaintiffs, understood, as it must be, in connection with the other facts found, at all influences the case. The finding declares no more than the implications from the policy itself and the circumstances attending its issue.

We agree with respondents that McMahan could not become the insured without his knowledge or consent; but we think they mistake in the assertion that he procured the North American policy "in total ignorance of the issuance of the Baloise policy." It is true the court found that McMahan "had no actual personal knowledge" of its issuance; but, considering the other facts found, this must be held to mean no more than what it literally imports,—that he had no knowledge thereof derived from the immediate exercise of his own senses; for, in the first place, he had agreed with the plaintiffs, through Henderson, that they should have, as part of the security for their loan, a policy of insurance on the building. A similar stipulation was inserted in the mortgage executed by him. The issuance of the Baloise policy was the only attempt at compliance with his promises in this regard. And, secondly, he gave to the plaintiffs his promissory note for the amount of the premium they had advanced to Henderson. If these facts do not show that McMahan had actual notice of the Baloise policy, they at least show that Henderson was the agent of McMahan, to whom the latter committed the matter of obtaining the same, and that Henderson's knowledge of the issue thereof must be imputed to McMahan. And, since the plaintiffs accepted and retained the policy showing on its face that McMahan was the insured, they are in no position to say that they should not be affected by mere imputed knowledge of McMahan. They acted on the

assumption that he had actual knowledge. The insured having procured further insurance without the consent of the insurer, the policy sued on became void, in virtue of the express provision for such result. *Locey v. Insurance Co. (Cal.)* 11 Pac. 791. We recommend, therefore, that the judgment be reversed, and the cause remanded, with directions to the court below to render judgment for defendant on the findings.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to render judgment for defendant on the findings.

(117 Cal. 443)

MORTON v. MORTON. (S. F. 656.)

(Supreme Court of California. July 1, 1897.)

DIVORCE—SETTING ASIDE DECREE BY DEFAULT — DISCRETION OF COURT.

On motion to set aside, on the ground of excusable neglect, a decree of divorce for cruelty entered against a husband by default, defendant testified that he and plaintiff had become reconciled and cohabitated together after the suit was commenced until the summons was served, when he went away; that plaintiff promised him she would not take any judgment in the case, and that without notice to him she took the judgment. Plaintiff testified that the place on which they lived was her separate property, and she passively endured defendant because she could not help herself; that she never forgave his offenses, or made any agreement to do so; and that there was never any reconciliation after the action was commenced. *Held*, that a denial of the motion was not an abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Fannie A. Morton against John D. Morton for divorce, in which there was a decree for plaintiff by default. From an order denying a motion to set aside the decree, defendant appeals. Affirmed.

T. A. McGowan, for appellant. H. C. Gesford (Dinkelspiel & Gesford, of counsel), for respondent.

BELCHER, C. The plaintiff instituted this action in the superior court of Napa county to obtain a divorce from the defendant upon the ground of extreme cruelty. The complaint was filed September 25, 1895, and the summons was duly served on defendant October 14th thereafter. He failed to appear, and on November 11th judgment was entered dissolving the bonds of matrimony between the parties, and awarding the plaintiff permanent alimony in the sum of \$20 per month, and \$35 costs of suit. Defendant received at San Francisco, on November 20th, notice of the entry of the judgment, and on December 7th he served and filed notice that he would move the court to vacate and set aside the judgment upon the ground that it was taken against him

through his mistake, inadvertence, surprise, and excusable neglect. The motion was heard by the court in January, 1896, and thereafter denied, and from that order this appeal is prosecuted.

The motion was submitted upon the affidavit of defendant, and oral testimony given by Edward A. Bell and by the plaintiff and the defendant. The substance of defendant's affidavit was that, after the commencement of this action, he and the plaintiff lived and cohabited together as husband and wife, at their home near Callistoga, in Napa county, until about the middle of October, 1895, when he left, and went to San Francisco; that prior to the commencement of this action plaintiff had commenced another action for divorce against him, and thereafter they had become reconciled, and lived together, and both had been advised by their respective attorneys that by reason of such reconciliation the action could not be further prosecuted; that plaintiff had told defendant that he must leave, as she would no longer live with him, and he had told her that she could obtain a divorce if she so desired, but that he would not permit a divorce upon the grounds set out in the complaint, as the charges of cruelty therein made were not true; that he would leave Napa forever, provided she would not ask a decree awarding to her any alimony or other sums of money; that plaintiff promised defendant that she would not take any judgment in this case, but would wait a year, and then have her attorney file a new complaint, asking for a divorce upon the ground of desertion, but not asking either alimony, counsel fees, or costs; that defendant transferred all his real and personal property to plaintiff, and, relying upon the promises made by her to him, left the county of Napa without filing any answer in this case; and that after his departure, and without notice to him, plaintiff caused judgment by default to be entered against him. Edward A. Bell testified that he represented the defendant on the settlement made between him and the plaintiff as to their property rights; that no written agreement was entered into, but his understanding was that, under the agreement, plaintiff took all the personal property then on her farm near Callistoga, and paid defendant therefor the sum of \$40; and that nothing was said one way or the other about the divorce. Plaintiff testified: That the premises on which she and defendant were living at the commencement of the action were her separate property, and that she continued to live there with defendant until the summons was served because she had no other place to go to, and did not want to leave her personal effects to the mercy of defendant, as he had threatened to destroy them if she ever left him. That "I never at any time entered into any agreement with defendant, express or implied,

to condone his matrimonial offenses, or to forgive him; neither did I ever forgive him or condone his offenses, and never was there at any time any reconciliation between us after the commencement of this action. I passively endured the defendant because I could not help myself, until I had an opportunity of safely taking other action. After this action was commenced defendant treated me with harshness and cruelty, as he had done before, and our relations continued just as strained as previously. Every allegation of defendant's affidavit on this motion to the effect that a reconciliation was had between us, or that we entered into any agreement of condonation, is absolutely false." She also testified that all the statements made in defendant's affidavit, except those contained in the first paragraph thereof as to the commencement of the action and the judgment, and that she and defendant lived together until the middle of October, 1896, were untrue. Defendant testified "that John D. Morton was not his real name; that his real name was John D. James; and that he had been convicted of a felony in the state of California, from San Diego county, and had served a term in state's prison at San Quentin; and he also stated, in substance, that prior to the granting the divorce he was willing for her to get a divorce, and that he had declined to make a defense."

It is settled law in this state that applications of this kind are addressed to the sound legal discretion of the trial court, and that its action in granting or denying them will not be disturbed on appeal unless a clear abuse of such discretion is shown. *Coleman v. Rankin*, 37 Cal. 247; *Garner v. Erlanger*, 86 Cal. 60, 24 Pac. 805; *Williamson v. Drill Co.*, 95 Cal. 652, 30 Pac. 762. That the court believed the facts to be as stated by the plaintiff, and not as stated by the defendant, is clearly shown by its action, and, this being so, there was obviously no abuse of discretion in denying the motion.

The point that plaintiff must be held to have condoned defendant's offenses, because she lived and cohabited with him after the action was commenced and until the summons was served, cannot be sustained. In an action for divorce on the ground of cruelty there can be no condonation unless there is a reconciliation between the parties, a remission of the matrimonial offenses, and an express agreement to condone. "Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness." Civ. Code, § 117. "Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from successive acts of ill-treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." *Id.* § 118. The order should be affirmed.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(117 Cal. 441)

FRITSCH v. STAMPFLI et al. (Sac. 225.)

(Supreme Court of California. July 1, 1897.)

APPEAL—AFFIRMANCE.

Where reversal is asked on alleged insufficiency of the evidence, and a so-called bill of exceptions is unintelligible, and not such as to be considered on appeal, the judgment will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by Christina Fritsch against William Stampfli and others to quiet title. From a provision in the judgment that plaintiff has no title to a specified part of the land, she appeals. Affirmed.

C. E. McLaughlin, for appellant. Goodwin & Webb, for respondents.

BRITT, C. Suit to quiet title to a body of lands in Plumas county. Plaintiff appeals from a certain provision of the judgment to the effect that she has no title to a tract of about 20 acres, parcel of the larger body, and relies for reversal upon alleged insufficiency of the evidence to support the findings of the court. There appears in the transcript on appeal a paper entitled "Bill of Exceptions," purporting to set forth evidence received at the trial, concluding with the statement that "the foregoing was substantially all the evidence touching the said tract of land." Following this is another document, headed "Defendants' Amendments to Plaintiff's Bill of Exceptions." The amendments cover several pages of printed matter, and are proposed to be inserted at sundry places, designated by reference to numbers of lines and pages in the original draft of the plaintiff's bill, as we surmise, but there is nothing in the transcript here to indicate the points of insertion. Next is a stipulation of counsel that the amendments suggested were correct, and "that the plaintiff's bill of exceptions herein, with the defendants' amendments thereto attached, be settled," etc. Then appears an order, signed by the judge, settling and allowing the "within bill of exceptions." There was no engrossment, no incorporation of the proposed bill and amendments in one paper, and the statement at the close of plaintiff's proposed bill, that the matter preceding it "was substantially all the evidence," was permitted to stand. For the reason that the so-called bill of exceptions is unintelligible, and is not presented in a manner to be considered in this court, the judgment must be affirmed. Marlow v. Marsh, 9 Cal. 259; Skillman v. Riley, 10 Cal. 300; Baldwin v. Ferre, 23 Cal. 461; Kimball v. Semple, 31 Cal. 657.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(117 Cal. 417)

DONNELLY v. SAN FRANCISCO BRIDGE CO. (S. F. 623.)

(Supreme Court of California. June 25, 1897.)

OSTENSIBLE AGENCY—PROOF—LIABILITY FOR TORT—PERSONAL INJURY—FELLOW SERVANTS.

1. A company began the construction of a pier under contract, and placed its superintendent, S., in charge of the work and employes. An employe was negligently injured, and sued the company. Defendant showed that before the injury it had assigned the contract to S., and that he was doing the work on his individual responsibility. Plaintiff showed that he was never notified of a change of employers; that there was no change in the work; that the time book and time checks were the blank forms used by the company; that the workmen presented their vouchers on the printed forms of the company to the office of the company, and there received their money. *Held*, that S. was defendant's ostensible agent.

2. Plaintiff could prove an ostensible agency without having pleaded it, since he did not know that his demand would ultimately rest on it.

3. Civ. Code, § 2334, providing that a principal is bound by the acts of his ostensible agent "to those persons only" who have incurred a liability or parted with value on the faith of such agency, deals solely with contract obligations, and does not exonerate a principal for liability for torts of an ostensible agent.

4. In putting a jackscrew into position, blocks for a foundation had to be thrown down 10 or 12 feet. The workmen above inquired if the way was clear, and several workmen, as well as the contractor's superintendent of construction, answered that it was. A workman in the way below was struck by a falling block. The superintendent was near him, and was negligent in not seeing him before he answered the workman above. *Held*, that the injured workman and the superintendent, as to the act causing the injury, were fellow servants.

Department 2. Appeal from superior court, city and county of San Francisco; W. P. Daingerfield, Judge.

Action by J. W. Donnelly against the San Francisco Bridge Company. There was a judgment in favor of plaintiff, and from an order denying it a new trial defendant appeals. Reversed.

R. P. Wright, for appellant. Reddy, Campbell & Metson, for respondent.

HENSHAW, J. Plaintiff sued defendant to recover damages for injuries sustained by him while in its employ by reason of its negligence. He recovered judgment, and this appeal is taken from the order of the court denying defendant a new trial.

Plaintiff showed that the defendant had entered into a written contract with the Olympic Salt Water Company, a corporation, to construct a pier on the beach near the Cliff House, in the city and county of San Francisco. The work of construction was commenced by the defendant under the contract. M. B. Stone was the superintendent of the defendant company, and in charge of the work. Plaintiff was employed by the company, through its su-

perintendent, and went to work on the 5th day of July, 1893, and continued to work on the pier until he received the injuries complained of. It was not disputed upon the trial that plaintiff was employed for the defendant by its superintendent. Upon the 21st day of July, 1893, the work of pile driving for the construction of the pier was in process. A pile had been driven too deep, and the plaintiff, with other men, was sent by the superintendent to lay a foundation for a jackscrew to raise the pile. This required the plaintiff to work under the pile driver. Plaintiff was engaged in carrying and arranging blocks upon which to place the jack. The blocks were supplied from a place 10 or 12 feet above, from which height they were thrown down to the workmen below. M. B. Stone, the superintendent, was supervising the work. Plaintiff, while stooping down to pick up a block, was struck by one thrown from above. The man above asked, before he threw the block, if all was clear below, and was answered in the affirmative by the superintendent and others, and the block was allowed to fall. The superintendent, when he gave his answer, was standing within a few feet of the plaintiff, and there was nothing to obstruct his view of him. It appears also that Stone noticed the plaintiff the instant after he had given the order, and called to the workman above to hold. The time was too short; the block was already falling. This evidence certainly leaves the question one for the jury as to whether or not M. B. Stone was negligent in giving the order, and from the jury's determination it must be concluded that it deemed he was. That Stone was the superintendent in charge of the work when it was commenced, there is no room for doubt. The defense, however, undertook to show that before the time of the injury it had assigned the contract to Stone, and that thereafter, and at the time of the injury, it was no longer in charge of, or connected with, the labor of construction, and that Stone was carrying on the work as an independent contractor upon his own individual responsibility. Plaintiff in turn met this by evidence to prove that Stone continued at least to be the ostensible agent of defendant in charge of the work. In this he was quite successful. He showed that no notice was ever given to him of the pretended change in his employers; that the work was conducted under the direction of Stone after the date of the contract in precisely the same manner as that which characterized it before. He showed that the time book kept for the work, and the time checks issued to the men, were upon printed blank forms used by the corporation, and that the workmen presented their vouchers upon the printed forms of the company to the office of the corporation, and there received their money, as they had been wont to do. In short, after the date of the contract, whereby it is claimed that the sole management and control of the work was turned over to Stone, the work was in all respects conducted by Stone as it had been

during the time preceding. The evidence of the time book and time checks, of the payment of the laborers, and of the general conduct of the work, was all admissible to establish the ostensible agency. *Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 36 S. W. 1114; *Forbes v. Electric Co. (Or.)* 23 Pac. 670. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent, who is really not employed by him. Civ. Code, § 2300. There is shown in this case an existing agency, a secret termination of it under circumstances designed to transform the agent into the principal, and this without any knowledge or means of knowledge of the changed conditions afforded to those who had taken original employment under the defendant. The doctrine of ostensible agency draws its support from the equitable principles of estoppel in pais, and it would not be easy to call to mind a clearer instance of ostensible agency than that here presented by the evidence. But appellant makes reply that, if the agency was ostensible, the plaintiff should so have pleaded under the general rule that where a cause of action rests upon estoppel the estoppel must be pleaded. To this, however, it need only be said that a party is not bound to plead an estoppel where he is without knowledge that his demand must ultimately rest upon it. Estoppel in this case was not the foundation of the plaintiff's claim. He believed, and was given cause to believe, that Stone was the actual agent. By the evidence of the defense he was driven to rest upon proof of an ostensible agency, and this proof, under the circumstances, he was clearly entitled to make without a direct pleading to the point. In this respect the case is not dissimilar to that of *Blood v. Water Co.*, 113 Cal. 221, 41 Pac. 1017, and 45 Pac. 252, where the subject is considered.

It is further contended by appellant, however, that under ostensible agency a principal is not bound for any of the torts of the agent, and reliance is had in this regard upon section 2334 of the Civil Code, which declares that a principal is bound by the act of his agent, under a merely ostensible authority, to those persons only who have in good faith and without ordinary negligence incurred liability, or parted with value upon the faith thereof. But the preceding section (2330) provides: "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." Section 2334 deals solely with rights and liabilities arising out of contract. It was not designed to destroy the effect of the universally accepted principle of law declared in section 2330, and limit the responsibility of the principal only to the contractual liabilities arising from the ostensible authority. No reason exists why the principal un-

der an ostensible authority, which through fault or negligence he has permitted, should be exonerated from liability for the torts of the ostensible agent, any more than would the principal in the case of an actual agency; and, as has been said, the general rule is as declared in section 2330. But it is not for all torts or acts of negligence of the agent of the master that the latter is responsible to a servant or employé injured thereby. The master's duties to his employés are three: First, to supply them with suitable appliances for their labor; second, to afford them a reasonably safe place in which to perform their tasks; and, third, to use due care in the selection of fit and competent fellow employés. If in any duty enjoined by law upon the master there is a failure of performance, as a result of which an employé is injured, the master is responsible, whether he undertook the performance of that duty personally, or whether it was delegated by him to the least and lowest of his employés. For in the performance of such duty the general rule that an employé may not obtain compensation from the master for injury resulting from the act of a fellow employé has no application. Upon the contrary, however, where the injury has resulted from the omission or negligent performance of an act which it was no part of the duty of the master to perform, and in the doing of which no duty of the master was being performed, then the person through whose negligence the injury has resulted, whatever may be his grade or rank of employment, is not, as to that act, the representative of the master, and the responsibility for injury is upon the individual actor, and not upon the employer. These propositions of law are firmly established. In *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. 708, the first proposition is elaborately considered by this court in bank, and it is said: "If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible." To like effect are the cases of *Elledge v. Railway Co.*, 100 Cal. 282, 34 Pac. 720; *Nixon v. Lead Co.*, 102 Cal. 458, 36 Pac. 803; *Mullin v. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Railway Co. v. Needham*, 11 C. C. A. 36, 63 Fed. 107; *Railroad Co. v. Moore*, 20 Kan. 632; *Railroad Co. v. Baugh*, 149 U. S. 387, 13 Sup. Ct. 914. The second proposition is thus clearly enunciated in the case of *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017: "The liability of the appellant is to be determined by the character of the act through which the injury was sustained, or of his functions in reference to the act, and not by the rank or station of the employé under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its

performance is his agent, and the master is responsible for the negligence. If, on the other hand, it is an act which may be delegated to another, or may be performed by an employé, the person by whom it is performed is a fellow servant with the other employés, irrespective of his rank, and the master is not responsible to them for his negligence in its performance. Whether one acts as a fellow servant or as a representative of the master is a question of law." In addition to the numerous authorities there cited to support the text, there may be added the very instructive cases of *Crispin v. Babbitt*, 81 N. Y. 520; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Cullen v. Norton*, 120 N. Y. 6, 26 N. E. 903; and *Moody v. Manufacturing Co.*, 159 Mass. 72, 34 N. E. 185.

Under the facts of the case at bar it is quite apparent that Stone, in answering to the call of the workman that all was clear below, was not performing on behalf of the defendant corporation any duty by law imposed upon it. The employés were engaged in a task within the scope of their employment. It cannot be successfully contended that the appliances were not suitable, the place of labor not reasonably safe for the character of the work, or the fellow employés not fairly competent and careful. If, as suggested in the brief of respondent, the workman above should have himself looked, and not trusted to the declaration of the men below, then, clearly, the act was the result of negligence of a fellow employé. But, aside from this, in the absence of the superintendent, it would have been the duty of the men to have proceeded with this particular work. Others of the laborers, it appears from the evidence, made like answer as did the superintendent to the call of the workman above. It was competent and proper for them to do so. In adding his voice to the rest, the superintendent performed no duty due to the employés from the master, and was in the act but a fellow servant of the injured man. The judgment and order are therefore reversed, and the cause remanded.

We concur: MCFARLAND, J.; TEMPLE, J.

KING v. LAMB. (Sac. 223.) 117 Cal. 401

(Supreme Court of California. June 25, 1897.)

STREET IMPROVEMENTS — RESOLUTION OF INTENTION — PUBLICATION — VOTE — CHARACTER AND AMOUNT OF WORK — DEFINITENESS — EVIDENCE — HARMLESS ERROR.

1. The designation of the newspaper in which shall be published a resolution of intention relative to a street improvement to be ordered by the board of trustees may be embodied in the resolution itself.

2. Where the resolution itself was published as required by the order, the fact that the designation recited that "notice of the adoption of this resolution of intention shall be published for a period of two days, and the notice thereof for six

days," was immaterial; the words "notice of the adoption of" being treated as surplusage.

3. St. 1891, p. 196, provides that the resolution of intention to order a street improvement shall be passed and be posted conspicuously for two days, and published by two insertions in some newspaper. The Sacramento city charter, with reference to the passage of ordinances, requires only that the vote shall be taken by yeas and nays, and be entered in the minutes. *Held*, that a resolution of intention passed by the board of trustees of Sacramento, when posted, need not set out the names of those voting for or against it.

4. A resolution of intention to order a street improvement, specifying that "wherever old cross walks exist, and are taken up, they shall become the property of the superintendent of streets," and giving specifications for the construction of cross walks and drainage culverts, and the size and quality of materials to be used, was not objectionable, as failing to determine the character and amount of the work to be done.

5. A specification that the curbing should be securely nailed at each stake, such stakes to be of a certain material and size, "three feet long, or longer, if required, and to be not over four feet long," was sufficiently definite.

6. Where the proceedings for a street improvement were sufficient to create a lien for the work done, any error in admitting evidence that the owner of the property affected desired the work done, was without prejudice.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by Antonio King against Manuel J. Lamb. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

White, Hughes & Seymour, for appellant. Martin Devine, for respondent.

HAYNES, C. This is an action brought by the plaintiff to foreclose a lien for street work upon the north 56 feet of lot No. 4, in the block bounded by T and U and Second and Third streets, in the city of Sacramento, the property of the defendant. The plaintiff had findings and judgment for the sum of \$70.74, with interest, and an attorney's fee of \$15. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The main ground upon which defendant relies for a reversal of the judgment and order is that the board of trustees never acquired jurisdiction to order the improvement. Three points are made in support of this contention:

1. "That the board of trustees did not designate the newspaper in which the resolution of intention should be published." That part of the resolution material to be noticed is as follows: "The daily Bee is hereby designated as the newspaper published and circulated in the city of Sacramento in which notice of the adoption of this resolution of intention shall be published for a period of two days, and the notice thereof for six days, as often as said newspaper shall be issued therein. Adopted March 19, 1894, by the following vote: Ayes: Wachhorst, Kent, Davis, Brag, Towser, Devine, Leonard, Lawton, Hennish. Noes: None. W. B. Lawton, President of the Board of Trustees. O. S. Flint, Clerk of the

Board of Trustees of Sacramento City." No order or resolution was passed by the board of trustees relative to the publication to be made of the resolution of intention other than appears in the resolution itself, and it is contended that an order to publish a "notice" of the adoption of a resolution cannot be construed as providing for the publication of the resolution, and that the requirement of the statute in this particular is jurisdictional. No question is made but that the resolution, as adopted, was published in accordance with the requirements of the statute, and we think it was not at all material that a separate order was not made designating the paper in which the publication should be made. It is contended, however, that the order here was not for the publication of the resolution of intention, but for the publication "of a notice of the adoption" of such resolution. If the words "notice of the adoption of" had been omitted, the direction would have been perfectly clear that the resolution should be published for a period of two days, and the notice thereof for six days; but the words above quoted may be regarded as mere surplusage, which cannot mislead, and certainly did not mislead, since the resolution itself was published as required by the order.

2. It is further contended that the resolution of intention was not posted. It is conceded that the resolution as posted contained the entire body of the resolution, but omitted the vote by which it was passed and the name of the president of the board, but it was signed, "O. S. Flint, Clerk of the Board of Trustees, Sacramento City." Upon this point the statute requires: "Before ordering any work done or improvement made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do, and describing the work, which shall be posted conspicuously for two days on or near the chamber door of the city council, and published by two insertions in one or more daily, semi-weekly or weekly newspapers, published and circulated in said city and designated by said council for that purpose." St. 1891, p. 196. We are not referred by counsel to any provision requiring the vote by which an ordinance or resolution is passed to be published in connection with the publication of the ordinance or resolution. Nor do we find any such provision either in the statute under which the street improvement in question was made (St. 1891, p. 196, § 3), nor in the charter of the city of Sacramento. Section 15 of said charter (St. 1893, p. 550) provides: "No proposed ordinance shall be adopted except by vote taken by yeas and nays, and the names of the members voting for and against the same shall be entered in the minutes." By section 13 it is provided that "no ordinance passed by the board shall take effect until ten days after its passage and approval, unless otherwise provided in the enactment." The publication of ordinances is not made essential to their

validity. The street law not having provided for the publication, in connection with the resolution or ordinance, of the names of those voting thereon, such publication is unnecessary, unless required by the charter of the city, which, as we have seen, requires only that the vote be recorded in the minutes. We think the posting of the resolution without attaching the names of those voting for or against it was a sufficient compliance with the statute.

3. It is further contended that the board of trustees did not determine the character and amount of the work to be done, and the place where the work was to be done, and for that reason did not acquire jurisdiction to do the work. Under this head, appellant specifies that the board of trustees did not determine how many cross walks should be laid, or the length of the stakes or posts to which the curbing was to be nailed, nor the number of drainage culverts, and the places where the same should be put. In relation to the cross walks it is said that the specifications state that "wherever old cross walks exist, and are taken up, they shall become the property of the superintendent of streets," and that this language is capable of the construction that some of the existing cross walks were to be taken up, and others not, but that the board left the determination of that question to the discretion of the city surveyor or the superintendent of streets. But this contention, we think, cannot be sustained. The specifications clearly specify how the cross walks and drainage culverts are to be constructed, the size and quality of the materials to be used, so that the precise amount of material used in each is capable of exact ascertainment, as well as the number of each. For example, the cross walks are to be made of first-class Oregon pine, 2x12, and 3 feet wide, and well spiked to the sills. The sills are to be 4x6 redwood, put down at intervals of 4 feet. The culverts are to be made of the best quality 8-inch redwood, and made 12x18 inches inside measurement, with cross sills at intervals of 6 feet of 2x6 redwood, and also specifies how the cover is to be made, and of what material, and how put on; and, in connection with these specifications there is an "approximate estimate," in which it is specified that the quantity of lumber to be used in the cross walks is 8,592 feet, board measure, and in the culverts 1,544 feet; and it is not claimed that more than these amounts of lumber were used in the construction of the work for which they were designated. Besides, we think it should be reasonably understood that cross walks and culverts are put in only at street crossings, and that it required no special designation of the place where they were to be laid. As to the curbing stakes, the specifications provide that "the curbing shall be securely nailed at each stake or post, such stake to be of first-class 3x4 redwood, 3 feet long, or longer if required, and to be not over four feet apart." We think this sufficiently definite. It might be in a

particular locality, owing to the nature of the ground, that a stake somewhat longer should be required; but it does not appear that longer stakes were required or were used. Even if it were so, we should not feel inclined to hold that the board had not jurisdiction to order the work because of so trifling an uncertainty. The case of *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, cited by appellant in support of these contentions, involved very different facts from those in the case at bar. In that case the superintendent of streets was authorized to use a discretion which increased the cost of different portions of the work from 25 to 50 per cent., and that discretion was not controlled by any fixed rules, but its exercise was intrusted solely to the judgment or volition of the officer; and it is quite true, as there stated, that "the legislative department of the city has no power to delegate to any other officer or body the authority to determine upon the necessity of making such improvement, or the character or extent of any improvement which it may itself direct to be made."

Appellant also contends that the court erred in admitting in evidence a paper of which the following is a copy: "To the Honorable Board of Supervisors: We, the undersigned property owners, having property fronting on T street, from Third street to Eighth street, agree that the contract for grading said street be given to Antonio King, he being the lowest bidder;" and in permitting proof that the defendant signed said paper. We suppose this testimony was admitted as tending to show that the defendant was willing and desired that the plaintiff should perform the work in question under the contract made with him, pursuant to the proceedings had for that purpose; but whether the court erred in admitting the evidence need not be decided, since it is apparent that if the proceedings for the improvement of the street under which the work was done were sufficient, in face of the objections made thereto by the defendant, and which have already been considered, he could not be injured by the admission of this evidence. We advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

120 Cal. 311

MURRAY et al. v. TULARE IRRIGATION CO. (Sac. 170.)

(Supreme Court of California, June 25, 1897.)

DEEDS—GRANTEES—ACKNOWLEDGMENT—VALIDITY
—DESCRIPTION OF PROPERTY.

1. Where there are several grantees named in a deed, each receiving a separate and defined interest, and the grantor's acknowledgment is taken by one of them, the deed must be treated as if executed separately to each of such grantees, and

good as to each of them except the one taking the acknowledgment.

2. A deed describing the property as the "W. Water Ditch," in T. county, and giving the general particulars as to its head and course, contains a sufficient description, it appearing that the ditch was generally known as the "W. Ditch," and that there was no other ditch in the county having the same name.

Department 1.

Action by A. H. Murray, Sr., and others against the Tulare Irrigation Company. There was a judgment in favor of plaintiffs, and from an order denying its motion for a new trial defendant appeals. Affirmed.

PER CURIAM. This is an action to determine conflicting claims to water. The action was commenced April 12, 1892, by the plaintiffs, for themselves and 19 others interested with them, to obtain an injunction restraining the defendant corporation from diverting any of the waters of the Kaweah river until after plaintiffs' ditch, known as the "Watson Ditch," is supplied with 20 cubic feet of water per second. It is alleged in the complaint that the Kaweah river is a large natural water course, which flows from the Sierra Nevada Mountains down to the head of another natural water course, known as "Mill Creek," in the county of Tulare; that Mill creek has its head in and takes its water from the Kaweah river at a point about $3\frac{1}{2}$ miles above and east of the city of Visalia, and has flowed and still continues to flow in its natural channel from its head down to below the city of Visalia, and thence on to another stream, called "Cross Creek"; that about the year 1854 one Wiley Watson constructed a water ditch, known as the "Watson Ditch," leading out of said Mill creek, and passing through and over the lands now owned and occupied by the plaintiffs, and through certain sections of land to a tract of land known as the "Fair Grounds" or "Race Track"; that, at the time said ditch was constructed, it had capacity to carry about three cubic feet of water per second, and in the spring of 1855 said Wiley Watson turned into said ditch water from Mill creek sufficient to fill the ditch for the purpose of irrigating the race track, which was then owned and occupied by him, and he continued to use the water on said land until about the year 1856, when the ditch was enlarged to a size sufficient to hold and carry 27 cubic feet of water per second; that, after the ditch was so enlarged, water was turned into the same from Mill creek to the amount of about 20 cubic feet per second for the purpose of irrigating the lands now owned and occupied by plaintiffs, and the lands of the other parties united in interest with plaintiffs; that plaintiffs and their grantors have had, uninterruptedly, continuously, peaceably, and adversely to the defendant and to the whole world, under a claim of right, and with the knowledge and acqui-

escence of defendant, the exclusive possession of said Watson ditch, and the use of the water of said Kaweah river and Mill creek, to the extent of the amount diverted into said ditch about the year 1856, ever since said year, except when prevented by said defendant, as hereinafter stated. The names of the other persons united in interest with the plaintiffs in the subject of the action are then stated, and it is alleged that plaintiffs and such other persons are the owners of said Watson ditch, and all water rights and privileges thereto appertaining, and have a right to appropriate and divert through said ditch, as now located, 20 cubic feet of water per second, before defendant is entitled to take or use any of the waters of said river. It is further alleged that, about the year 1882, the plaintiffs or their grantors, and the said parties interested with them or their grantors, changed the head of said Watson ditch to a point on Mill creek at the head of the Evans ditch, and entered upon said Evans ditch, in pursuance of an agreement and understanding with the owners thereof, and together with the owners of the Burch ditch, enlarged the said Evans ditch to a size sufficient to enable the same to carry about 100 cubic feet of water per second; that, in pursuance of said agreement and understanding, the waters of the Kaweah river, appropriated through the old head of the Watson ditch prior to 1882, have been conducted through the Evans ditch, so enlarged, and from thence into the old channel of the Watson ditch, commencing at a point named, which is now the head of the Watson ditch; that the other portions of the Watson ditch have not been changed as to the route thereof since 1856; that plaintiffs and the other parties united in interest with them are the owners in fee of an undivided one-fourth interest in the Evans ditch, so enlarged from its head at Mill creek, down to the point where the Evans ditch, the Watson ditch, and the Burch ditch separate or diverge. It is also alleged that in the year 1875 the defendant constructed a ditch leading out of, and which diverts water from, the Kaweah river, at a point above the head of plaintiffs' ditch, and above the head of Mill creek, and about eight miles east of the city of Visalia, but for many years thereafter it made no claim to the water of said river, and took out of said river at said point only such water as had been turned into the river above the head of its ditch from a stream known as "St. John's River," and from other sources of supply unknown to plaintiffs; that defendant never claimed any portion of the waters of the Kaweah river, or the right to the use thereof, until about the month of September, 1887; that defendant always recognized and respected the prior right of plaintiffs and the others united in interest with them to the waters of said river and creek, to the extent of 20 cubic feet of water per second, and never took any of the water belonging to plaintiffs, or any of the water accustomed to flow in and through the Watson

ditch, at such time or times as the said water was required by the plaintiffs or their associates, until in or about the summer of 1891; that during the summer of 1891, and at various times since then, plaintiffs and their associates have needed for use all the water which prior thereto had been accustomed to flow in and through the said Watson ditch, and which of right belonged to them, but they were deprived of the use of said water by defendant; that by means of its said ditch, and a dam constructed by it in said river below the head of the ditch, known as the "Goad Dam," defendant turned the said water away from the ditch of plaintiffs, and has ever since wrongfully and unlawfully, and against the will and without the consent of plaintiffs or their associates, diverted the same into its said ditch; that, by reason of said diversion, plaintiffs have been wholly deprived of a large portion of the water, and at times of the whole of the water of said river; and that defendant threatens to continue to divert the water of said river, to which plaintiffs have a prior and superior right, and, unless restrained, will continue to do so, to plaintiffs' irreparable injury.

The defendant, by its answer, denied most of the allegations of the complaint, and then set up that in October, 1874, it was duly organized as a corporation, and that the object and purpose for which it was organized was to acquire and possess the right to divert and appropriate water from the Kaweah river, to construct, own, maintain, and operate water ditches and dams, and, by means thereof, to divert water from said river, and to distribute and furnish the same to its stockholders for the irrigation of agricultural lands in certain townships in the county of Tulare; that the Kaweah river flows through section 20 in one of the townships named, and in March, 1875, defendant obtained from the owner of said tract of land the right to take from said river 7,000 inches of water, measured under a 4-inch pressure, and the right to construct its ditch, and to place and maintain a dam in the channel of the river (being the dam referred to in the complaint as the "Goad Dam"), and by means of said ditch and dam to divert said quantity of water for distribution to its stockholders; that in March, 1875, defendant caused to be posted in a conspicuous place on the south bank of said river, and at the point of intended diversion, a notice that it claimed 7,000 inches of the water of the river, measured under a 4-inch pressure, which notice was thereafter, during the same month, duly recorded in the office of the county recorder; that, within 60 days after said notice was posted, defendant commenced the construction of its ditch and dam, and on May 1, 1875, the ditch was completed for a distance of about 11 miles; that defendant commenced the diversion of water from the said river by means of its ditch and dam on or about May 1, 1875, and ever since said date has used said ditch and dam, and by means thereof has diverted from the river about 115

cubic feet of water per second, which has been distributed by defendant, and used by its stockholders, for the irrigation of the agricultural lands described in the notice. The answer then pleads in bar of the action the statute of limitations, and also a judgment recovered in Tulare county by James Evans and others against the defendant in this action, whereby it was determined that the plaintiffs in that action had a prior and superior right, as against the defendant, to divert and use water from the Kaweah river to the extent of 12 cubic feet of water per second, the answer averring that the plaintiffs in this action are the successors in interest of the plaintiffs in that action.

The case was tried, and the findings were very full, covering all the issues raised by the pleadings. Among other things, the court found that the plaintiffs were the owners of the Watson ditch, and had a right to divert through the same from Mill creek 19.63 cubic feet of water per second, which right was prior and superior to the right of defendant to divert through its ditch any water from the Kaweah river or Mill creek. Judgment was accordingly entered perpetually enjoining defendant from diverting any water from the said river or creek, or in any way preventing the full flow of the waters of said streams down to and into the plaintiffs' ditch, until the same shall be first supplied, at the head thereof, with the quantity of water to which plaintiffs were found to be entitled. A motion for new trial was made upon a bill of exceptions, and denied, and from that order defendant appealed.

The motion for new trial was based upon the following grounds: (1) Insufficiency of the evidence to justify the findings and decision of the court. (2) Errors in law occurring at the trial, and excepted to by defendant. (3) That the decision was against law.

Appellant attacks the findings, and earnestly contends that, as to 10 different and material matters contained in them, they were not justified by the evidence. During the trial 15 witnesses were called and examined on behalf of the plaintiffs, and 23 on behalf of the defendant, and the evidence, presented in a condensed form in the bill of exceptions, covers 886 pages of the printed transcript. Upon nearly every disputed question in the case the evidence was conflicting, and to follow up and discuss all the points made would obviously require a very lengthy opinion, and subserve no useful purpose. We have carefully gone over and examined the evidence, and, under the circumstances, deem it enough to say that, in our judgment, it was quite sufficient to justify each of the findings objected to.

Appellant also contends that the court committed 21 different errors in law in its rulings upon the admission or rejection of evidence, each of which was prejudicial to its side of the case, and calls for a reversal. The first ruling complained of was the admission in

evidence of a deed which purported to have been executed by C. J. Giddings to J. O. Blakely and others. The deed named 29 grantees, to each of whom it conveyed a certain fractional interest in the property described, leaving still a fractional interest in the grantor, who was one of the plaintiffs; and it was acknowledged by the grantor before one of the grantees, who was a notary public. The property was described as "that certain water ditch situate in the county of Tulare, state of California, known as the 'Watson Ditch,' which ditch runs through a portion of sections 27, 28, 32, and 31 in township 13 S., R. 25 E., M. D. B. and M., and carries water from Mill creek to the land of the said G. J. Giddings and others in that vicinity, and along the line of said ditch, together with all water rights, drops, head gates therein or thereunto belonging or appertaining; also an undivided one-fourth interest in and to that portion of that certain other water ditch, situate in said county and state, known as the 'Evans Ditch,' between the point on said Mill creek where the said Evans ditch diverts its water from the said Mill creek and the point on said Evans ditch, near the center of said section 27, where the said Evans ditch and the said Watson ditch and another water ditch, known as the 'Burch Ditch,' separate and divide." The defendant objected to the introduction of the deed in evidence, on the ground "that the same is irrelevant and immaterial to any of the issues in the case, and because the instrument is incompetent to prove any fact in issue. It cannot be ascertained therefrom what property is sought to be conveyed by the instrument." It appears that the same property had been conveyed to said Giddings by Emily P. Watson, the widow and only heir of Wiley Watson, deceased, and her deed had been introduced in evidence without objection. It is argued that the deed was inadmissible because—First, there was no evidence that it was executed by Giddings other than the certificate of acknowledgment attached thereto, and, as the acknowledgment was taken by one of the grantees, it was wholly void and insufficient to prove the execution; and, second, there was no evidence to identify the property described in the deed as being the same property described in the complaint. Neither of these grounds of objection can be sustained. It is true the grantee in a deed cannot take and certify the acknowledgment of his grantor, and, if he does so, the certificate as to him is void. But where, as here, there are several grantees, each taking a separate and defined interest, the deed should be treated as if made separately to each of such grantees, and we see no reason why, and have discovered no authority to the contrary, the acknowledgment should not be held good as to all of them except the party taking it. There would be just as good reason for saying that, if a legatee named in a will were one of the two subscribing

witnesses to its execution, the will would be void as to all the other legatees; but the contrary rule generally prevails, and is declared by our statute. Civ. Code, § 1282. "Every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof" (Code Civ. Proc. § 1951); and "a grant duly executed is presumed to have been delivered at its date" (Civ. Code, § 1055). The ditch referred to is described in both the complaint and deed as that certain water ditch in Tulare county known as the "Watson Ditch," and the general particulars as to its head and course are substantially the same. There was abundant evidence that it was generally known and spoken of as the "Watson Ditch," and no evidence that there was any other ditch in the county having the same name. When property has a descriptive name, it may be conveyed by that name, and defects in other parts of the description may be disregarded. Civ. Code, § 1092; *Halley v. Amestoy*, 44 Cal. 132; *Martin v. Lloyd*, 94 Cal. 195, 20 Pac. 491. It must be held, therefore, that the property described in the deed was sufficiently identified as being the same property described in the complaint.

The other rulings complained of are so numerous that we have neither time nor space to enter upon a full discussion of them. We have carefully read and considered the very elaborate and able briefs of counsel upon both sides, and, after doing so, feel constrained to say simply that we do not find in the rulings any error prejudicial to the complainant.

The point that the decision was against law is based upon the theory that the findings in regard to the bar of the statute of limitations were inconsistent with and contradictory to certain other findings in regard to the location, construction, and use of defendant's ditch. We see no such inconsistency. All the findings must be read and considered together, and, when so read, they seem to be in entire harmony, and to justify the conclusions reached by the court. It follows that the order appealed from must be affirmed, and it is so ordered.

117 Cal. 425

WASSERMANN v. SLOSS. (S. F. 553.)

(Supreme Court of California. June 26, 1897.)

CONTRACTS—PUBLIC POLICY—TRANSFER OF STOCK FOR ILLEGAL PURPOSE—RECOVERY.

1. Where a stockholder of a corporation transferred to its president shares of stock to be used to influence certain persons high in authority and influence in certain governments in obtaining renewals of certain leases from such governments held by the corporation, and such shares were not so used, in an action by the stockholder against the president to have it declared that defendant holds such shares in trust for plaintiff, the question whether such contract was void as against public policy is immaterial.

2. Where a stockholder of a corporation transferred to its president shares of stock to be used in corrupting certain persons in connection with the renewal of leases held by the corporation, the stockholder was entitled to a return of the stock on demand at any time before it was so used, and, on failure of the president to return it, could maintain an action to recover it.

3. On a motion for nonsuit, any question arising from the fact of variance between the evidence of plaintiff and his principal witness cannot be raised.

Department 1.

Action by Max Wassermann against Louis Sloss. From a judgment of nonsuit, and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

GAROUTTE, J. By this action it is asked that a certain 400 shares of stock of the Alaska Commercial Company be declared to be held in trust by defendant for the benefit of plaintiff, and that an accounting be had of the earnings of said stock while so held by defendant. Defendant set up title to the stock in himself. Plaintiff offered evidence in support of his case, and upon motion of defendant was nonsuited. He moved for a new trial, which motion was denied, and thereupon appealed to this court from the judgment and order denying his motion. The motion for the nonsuit was based upon five distinct and separate grounds, and it was granted by the trial court solely upon the fourth ground. In view of the law that, if any of the grounds upon which the motion was based justified the action of the trial court, then the order of said court will be affirmed upon appeal, appellant's counsel, in their brief, have reviewed and discussed these grounds serially in detail. In reply, respondent's counsel, for the purpose of sustaining the action of the trial court in granting the nonsuit, have limited themselves to the fourth and fifth grounds stated in the motion. For these reasons this court will likewise limit its consideration to those grounds, deeming respondent's present position a waiver of the remaining grounds insisted upon at the hearing of the motion before the lower court.

The trial court granted the nonsuit upon the fourth ground, namely, that the action was one which attempted to enforce a contract that was against sound morals and public policy. The pith of the action disclosed by the complaint as bearing upon this particular question of morals and public policy may be stated substantially in a few words. Defendant, Sloss, was president of the Alaska Commercial Company, a corporation engaged in the sealing industry in and about the territory of Alaska. It held certain leases from the government of the United States and also that of Russia. Plaintiff was a stockholder in this corpora-

tion. These leases were soon to expire. A renewal of them was greatly desired by the corporation. Defendant, as president of the corporation, was actually engaged in the effort to secure such renewals. He represented to plaintiff "that, in order to obtain such new leases, or any or either of them, it would be necessary for him (the defendant) to be in such a position as to enable him to interest certain persons high in authority and influence in the respective undertakings and with the respective governments aforesaid; that all of the members of said company should be willing to make some sacrifices to that end; that, in order to place the defendant in a position to interest certain persons high in authority and influence in the said respective undertakings, and that to successfully negotiate the obtaining of the said new leases respectively, it would be indispensable for him (the said defendant) to have a certain amount of stock of the old company at his disposal, to be used by him in and about the procuring of the said new leases; and that said negotiations could not be successfully conducted by the defendant unless he had the said shares of stock at his disposal, to be used in the manner hereinbefore stated. The said defendant then requested of the plaintiff that he (plaintiff) should transfer to the defendant four hundred shares of the capital stock of said company (out of the one thousand four hundred shares so owned by plaintiff as aforesaid), and represented, promised, and agreed to plaintiff that he (the defendant) would use the said shares of stock so placed at his disposal by plaintiff as aforesaid in the course of said negotiations looking towards the obtaining of the new leases, respectively, and for the purpose of influencing certain persons high in authority and influence with reference to the government of the United States and that of Russia, respectively, whose good offices it would be necessary to obtain to that end." The plaintiff believed these statements of the defendant, and, relying upon them, transferred to him 400 shares of said stock to be used for the purposes aforesaid. The complaint further alleges that this stock was thereupon converted by defendant to his own use. As tending to show a contract against good morals and public policy, after a careful consideration of the evidence, we are prepared to say that it is weaker than the allegations of the complaint. And, if the objection here insisted upon as to the character of this evidence is good, then an objection could well have been taken to the complaint at the very inception of the litigation.

This case has been thoroughly argued, and a great portion of that argument has been addressed to the character of the contract entered into between these parties. But from the standpoint at which we view the case we deem the question immaterial. It may be here suggested that the action is in no

sense one to enforce a contract. Whatever relationship the transaction occurring between these parties, as pictured by the aforesaid recitals of the complaint, bears to the cause of action, be that bond close or distant, it is a relationship disaffirmed and repudiated. As we view this whole question, the good or bad morals of this undertaking are immaterial, for the reason that the venture was in no sense executed, and until executed both parties are given an opportunity for repentance and rescission. Seeing the error of his ways, the law says a party may withdraw from the transaction; and it extends to him a helping hand by offering the inducement of giving back to him anything of value with which he has parted. Putting this case against plaintiff as bad as may be imagined, he transferred his stock to defendant to be used by defendant in corrupting servants of the respective governments. The transaction progressed no further. The stock was not so used. The precipice which would have been death to plaintiff's cause of action was never reached. No one was corrupted, and the stock was not stained. The parties' intentions as to the use to which this stock was to be put are not the controlling factor. It is not what was intended to be done with the stock that christens the transaction, but rather what was actually done. If defendant had disposed of the stock as contemplated, plaintiff would have had no remedy, for the evil would have been accomplished, the harm would have been done, and of necessity his plea for relief would not have been heard. In this case plaintiff gave certain stock to defendant, to be used for a certain purpose. He was plaintiff's bailee of the stock. The bailee did not use it for the purpose agreed upon, but took it to his own use. There is no principle of law to justify such a transaction. If plaintiff, upon the second day subsequent to the transaction, had changed his mind, and notified defendant of such change, and demanded a return of his stock, upon principle and authority he would have been entitled to such return. The authorities all hold that, if he had done this any day prior to the time when the agreement was fully executed, he would be entitled to a return of his stock. That this agreement was purely executory cannot be questioned. It could not be executed until the stock was applied to the purposes intended. If the question as to what company should obtain the leases here sought were still an open one, if it had not been settled at the commencement of this action, and if the stock had not been applied as contemplated, then, certainly, plaintiff could recover. (The court is now addressing itself to the single question here under discussion.) The fact that these leases have been secured by other parties is wholly immaterial. That fact does not enter in any way as an element in the question here discussed, and upon principle the case stands exactly as it did a moment after the stock was transferred to the defendant. The authori-

ties seem to be in direct accord with the views we have expressed. The question presented is an interesting one. It has been carefully and fully briefed by counsel. Our investigation has led us to the examination of many cases aside from those cited by counsel, and we find no case opposed to the doctrine of a right of recovery upon the part of a plaintiff where similar facts are presented. There are hundreds of cases found in the reports of this country and England where courts have refused to entertain actions based upon unlawful or void contracts. Our state reports contain many of them. At the present day it may be said that all courts agree upon that doctrine. In *Langton v. Hughes*, 1 Maule & S. 599,—a case which is the landmark upon this question in English reports,—it is held that a druggist is not entitled to recover for drugs sold a brewer which he knew were to be used by the brewer in unlawful manufacture. The judge declared that by such sale the druggist aided and abetted the brewer in violating the law. A common and simple illustration is found where an action is brought to recover money loaned to another for the purpose and intention of playing a gambling game prohibited by law. *McKinnell v. Robinson*, 3 Mees. & W. 431; *Tyler v. Carlisle*, 79 Me. 211, 9 Atl. 356. The case at bar, upon its facts, does not bring it within the rule declared by the foregoing authorities. Those are all actions to recover money agreed to be paid upon an illegal contract. It was sought to enforce an agreement made by one of the contracting parties. Here Sloss was the agent or bailee of the plaintiff. He was given stock to be used by him for a certain purpose. The stock was still the property of the plaintiff; the title was still in him. Sloss, as long as he retained possession of it, as long as he did not apply it according to instructions, held it purely as the agent of the plaintiff. He could only apply it to the single purpose authorized. If he converted it to his own use, it would be criminal embezzlement. For a court to support his present position would not be in the interest of sound public policy, but, on the contrary, would be offering a premium upon the dishonesty of agents, servants, and bailees. It is said in *Norton v. Blinn*, 22 Am. Law. Reg. (N. S.) 785: "In the second place, it is contrary to public policy and good morals to permit employes, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations." In this case, if the stock had been applied to the purposes intended, plaintiff would have no standing in court, for, in the language of many cases, the purpose would have been carried out; and this principle applies in all those cases where money or property is given to another party to be used in an illegal transaction. It has no reference

to illegal contracts such as are outlined by the preceding cases. Persons may not be punished, either in civil or criminal courts, for unlawful intentions. It is the consummation of these unlawful intentions that places a party without the law. If the unlawful intention or transaction is not carried out, if nothing is done under it, my servant has my property, and I am entitled to its return. As in the present case, he is acting under a special agency which I have a right to revoke at any time before performance; and, when so revoked, I am entitled to my own. It cannot be better public policy to deny me a recovery of the stock than to encourage my agent to commit a criminal offense. Dunlap's Paley, Ag. *66, declares the general principle thus: "As long as money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before the application, it is a debt which may be recovered at law or in equity." Wood, Mast. & S. § 202, says: "While the courts will not enforce an illegal contract, yet if a servant or agent of another has in the prosecution of an illegal enterprise for his master received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction." In *Express Co. v. Reno*, 48 Mo. 264, it was held that Reno, who had deposited a certain sum of money in the bank, which money was to be paid to a sheriff when he secured the pardon of Reno's brother, who was then in the penitentiary, could recover the money as his money as long as it remained in the possession of the bank. *Taylor v. Lendey*, 9 East, 49, is a case where plaintiff gave a sum of money to the governor of the poor house to be used for the use of the poor, a magistrate agreeing to stifle a threatened prosecution against him in consideration thereof. Plaintiff brought an action to recover the money so given to the governor. Lord Ellenborough said: "Take it that the money had been paid by the plaintiff to the defendant for a charitable purpose, but before the defendant had made any application of it the plaintiff countermanded the payment. Was there not an end of the authority, and could the agent persist in applying it against the direction of his principal? The question, therefore, is reduced to the case of a countermanded agent." In *Peters v. Grim*, 149 Pa. St. 164, 24 Atl. 192, in referring to an unlawful transaction in stocks, the court said: "If, when the first deposit was made by plaintiff, with directions to buy the stock, he had countermanded the directions before anything was done under them, it could not be pretended that defendant could have retained the money on the ground of illegality in the contemplated transaction. Intent as to a future act does not make illegality." In *Morgan v. Groff*, 4 Barb. 524, it is held: "That as long as money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded

by the principal before its application, it is a debt which may be recovered from the agent by the principal, either at law or in equity." That was a case where money was given to an agent to be bet upon an election, which money the agent failed to bet, but converted to his own use. In *Bone v. Ekless*, 5 Hurl. & N. 924, the owner of a ship authorized his agent to sell the same for £6,500 to the Turkish government, and to expend £500 of that amount in bribing government officials to assist in making the sale. The ship was sold, and the agent paid out £300 of the £500 as contemplated. In an action the owner was held entitled to recover the £200, notwithstanding the agent pleaded the facts showing the use to which the money was to be applied; one of the judges saying: "But the real nature of the case is that the plaintiff received the whole of the money upon the sale of defendant's ship, and claims to retain part of the money upon the illegal arrangement, which, however, he has not carried out. He might have discharged himself by actual payment of the money, but he has not paid it; the illegality would have been the payment for illegal purposes. Before that was done the defendant claimed the money, and was entitled to recover it." See, also, *Taylor v. Bowers*, 1 Q. B. Div. 291. In *Johnston v. Russell*, 37 Cal. 670, the law is declared that either party to a wagering contract upon the election may withdraw from the transaction at any time before the event upon which the result of the wager is dependent has happened, and under such circumstances the party withdrawing may recover his money from the stakeholder. From the legal principle declared by that case, it necessarily follows that the same party could have recovered his money from an agent to whom he had given it to be wagered. When the money has passed into the hands of the stakeholder the law has been violated. When it is in the hands of the agent or servant to be wagered no violation of the law has yet occurred. It follows that the doctrine of the above case goes to lengths beyond anything demanded by the facts of the case at bar. It will thus be seen from the array of cases cited that authority is not lacking to support plaintiff's right of recovery. There are cases containing incidental statements that may look the other way, but the facts there were not the facts of this case. In those cases it will be found that the plaintiff relied upon an illegal contract for a recovery, and the statements were not necessary to the decision of the case, and not called for by the facts before the court.

The court is asked to sustain the order granting the motion for a nonsuit upon the fifth ground stated. It is claimed by respondent's counsel that a serious "variance" exists between the evidence of plaintiff and his principal witness, Seligman. Conceding such a variance to exist, any question arising from it cannot be raised upon a motion for nonsuit. It is but fair to respondent, Sloss, to say that

by his answer he in no way relies upon the illegality of any contract entered into between himself and Wassermann for the purpose of defeating Wassermann's cause of action. He claims that he purchased the stock from Wassermann, and relies upon his title under such purchase. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

117 Cal. 534

COCHRAN et al. v. LOS ANGELES COUNTY. (L. A. 241.)

(Supreme Court of California. June 9, 1897.)
STATE SCHOOL.—EXPENSE OF KEEPING INMATES —
LIABILITY OF COUNTIES.

St. 1889, p. 111, §§ 16-18, provide that any infant, between 10 and 16 years of age, convicted of or charged with a crime, may be committed to the reform school. Section 20 provides that the board of trustees may receive into the institution infants between the ages of 10 and 18 on the written complaint of parent or guardian, for reasons stated. Section 24 provided that such board should determine the expense per month of taking care of each infant committed "under the provisions of section 20 of this act," and, when any infant was committed at the instance of a parent, the cost of keeping and transportation should be paid by such parent or guardian, unless, for good cause, said board otherwise ordered, in which case such expense should be borne, one-half by the county from which the infant was committed, and the remaining one-half by the state. Such section was amended by St. 1893, p. 323, by omitting the quoted clause, and by adding a clause that "where a minor who has no parent, who is able to pay such expense, is committed, it shall be borne, one-half by the state, and one-half by the county." *Held*, that the county must pay one-half the expense of keeping all minors committed from it, for any cause, whose parents are unable to pay such expense.

Commissioners' decision. Department 1.

Action by William G. Cochran and others, trustees of the Whittier State School (a body corporate), against Los Angeles county (a public corporation). From a judgment in favor of plaintiffs, defendant appeals upon the judgment roll. *Affirmed*.

BELCHER, C. This is an action brought by the trustees of the Whittier State School against the county of Los Angeles to recover the sum of \$3,064.05, with interest thereon, being one-half of the cost of keeping and taking care of certain minors committed to said school under the provisions of the Whittier State School act. The defendant demurred to the complaint, and, the demurrer being overruled, answered. The case was then tried, and judgment rendered in favor of the plaintiffs, according to the prayer of the complaint. From that judgment defendant appealed upon the judgment roll; and its only contention is that the complaint did not state facts sufficient to constitute a cause of

action, and hence its demurrer should have been sustained. It is alleged in the complaint "that, at the instance and under and pursuant to the judgments and orders, duly made and given, of the superior court of said Los Angeles county, there were committed to said Whittier State School the following minors, hereinafter named, who were inmates of said school under the commitments of said court, and were received at the dates, and cared for during the times and periods, set opposite their names respectively," and "that none of said minors were committed at the instance or on complaint of any of their parents or guardians or protectors respectively, but were committed by said superior court of defendant county, in each case, after complaint or information or pending investigation by the grand jury of said Los Angeles county, and while criminal charges were made against said minors respectively, and each of them was committed other than under section 20 of said acts hereinbefore mentioned."

In 1889 an act was passed by the legislature to establish in Los Angeles county an institution to be known as the "Reform School for Juvenile Offenders." St. 1889, p. 111. Sections 16, 17, and 18 of the act provide that any boy or girl, between the ages of 10 and 16 years, convicted or charged with the commission of a crime, may be committed to the institution. And section 20 provides that the board of trustees may, under such rules as they may prescribe, receive into the institution, whenever it may be convenient so to do, infants, between the ages of 10 and 18 years, committed to its custody by any judge of a superior court, on the written complaint of the parents or guardian of the infant for reasons stated. Section 24 provides: "Said board of trustees shall, with the approval of the governor, estimate and determine as near as may be the actual expense per month of keeping and taking care of each infant committed to said institution, under the provisions of section 20 of this act, not including the use of the grounds and buildings, and shall include a statement of such estimated price in each biennial report to the governor. When any infant is committed to said institution at the instance of his or her parent or guardian, or other protector, the cost of keeping said infant, including the cost of transporting to and from the institution, shall be wholly paid by such parent or guardian, unless, by reason of the poverty of such parent or guardian, or other good cause, said board of trustees shall otherwise order and direct: in each case such expenses, including the cost of transportation, shall be borne one-half by the county from which such infant is committed, and the remaining one-half shall be borne by the state. * * *" In 1893 the act was amended in several respects. St. 1893, p. 323. The name of the institution was changed to that of the "Whit-

tier State School,* and the purpose for which it was established was declared to be "the discipline, education, employment, reformation and protection of juvenile delinquents in the state of California." Section 24, as amended, is as follows: "Said board of trustees shall, with the approval of the governor, estimate and determine, as near as may be, the actual expenses per month of keeping and taking care of each minor committed to said institution, not including the use of grounds and buildings, and shall include a statement of such estimated price in each biennial report to the governor. When any minor is committed to said institution at the instance of his or her parent or guardian, or other protector, the cost of keeping said minor, including the cost of transportation to and from the institution, shall be wholly paid by such parent or guardian; unless, by reason of the poverty of such parent or guardian, or other good cause, said board of trustees shall otherwise order and direct; in such case such expenses, including the cost of transportation, shall be borne one-half by the county from which such minor is committed, and the remaining one-half shall be borne by the state; and in every case where a minor who has no parent, guardian or other protector, who is able to pay the cost of transportation to and cost of maintenance at said school, is committed thereto, such cost of transportation and maintenance of such minor shall be borne one-half by the state and the other half by the county from which said minor is committed. * * *

It is contended for appellant that the meaning and import of section 24 was not changed by the amendment in any material respect; that, in so far as the section still imposes upon counties the burden of paying one-half of the expense of the transportation and maintenance of minors, it refers to the class who are incorrigible or abandoned and indigent, and are committed under the provisions of section 20, and not to the criminal class who are committed for violation of the penal statutes of the state. It will be observed, however, that in the amended section the words "under the provisions of section 20 of this act" are entirely omitted, and it is made the duty of the board to estimate the expense of keeping each minor committed to said institution. If the legislature had intended to charge the counties only with the expense of keeping minors committed under the provisions of section 20, no reason is perceived why those words were eliminated from the section as originally passed. Again, there was added by the amendment the clause: "And in every case [not merely in the case of incorrigibles, etc.] where a minor who has no parent, guardian or other protector, who is able to pay the cost of transportation to and cost of maintenance at said school, is committed thereto, such cost * * * shall be borne one-half by

the state and the other half by the county," etc. This language seems plain and unequivocal, leaving no room to doubt that the legislature intended to impose upon the counties the burden of paying one-half of the expense of keeping all minors committed to the institution, for any cause, whose parents, guardians, or other protectors were unable to pay such expense. That the legislature was authorized to pass such an act and impose such burdens upon the counties was, in effect, held in *Society v. Reis*, 71 Cal. 627, 12 Pac. 796. It follows that the demurrer was properly overruled, and the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(117 Cal. 545)

ALISON et al. v. GOLDTREE et al. (L. A. 104.)¹

(Supreme Court of California. July 10, 1897.)

RES JUDICATA.

Where an accounting was had against a trustee at the instance of certain of the beneficiaries before a court having jurisdiction of the subject-matter and the parties, the judgment therein was res judicata as against the trustee, where no demand was made to distribute the funds, though all the beneficiaries were not parties to such accounting, the judgment roll of the former case not showing that the omitted beneficiaries were within the jurisdiction of the court.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Jane Allison and others against Isaac Goldtree and others. Decree for complainants, and Goldtree appeals. Affirmed.

Ernest Graves and E. P. Cole, for appellant. Myrick & Deering and Louis Lanny, for respondents.

HENSHAW, J. This action is in equity, and is brought by the plaintiffs as beneficiaries, under an express trust created by the will of Jonathan Thompson, deceased, against defendant Isaac Goldtree, as trustee of the trust, to compel an accounting from and after the 2d day of October, 1892, and for the removal of the trustee. The defendants other than Isaac Goldtree were brought in, as claiming some beneficial interest under the trust. Proper allegations were made, showing that, in another action against this trustee for an accounting, it was adjudged and decreed that there was due to the trust from him the sum of \$12,154.68. By this earlier action the transactions of the trustee were passed upon by the court from the inception of his duties to the 2d day of October, 1892. It is pleaded that this judgment is a final determination of the trustee's responsibility down to the date last mentioned, and for that reason the accounting is asked only for the period of time that has since elapsed. From

the judgment obtained against him in the former action, Goldtree took his appeal, and the decision of the matter, with many of the facts pertinent to this consideration, will be found set forth in *Re Thompson's Estate*, 101 Cal. 349, 35 Pac. 991, and 36 Pac. 98, 508. Defendant Goldtree, for answer, denied the validity of the former judgment pleaded against him, and undertook to set forth all of his transactions and dealings with the trust, from the beginning of his connection with it to the present time. Such portions of his answer as contain these matters were upon motion stricken out. Upon trial the judgment was admitted in evidence against him, and was treated by the court as determinative of all matters pertaining to his relations with the trust, down to the date of the judgment. Goldtree therefore was not allowed to make proof of any of these antecedent transactions. The court found that there was due from Goldtree to the trust the sum of \$12,194.21, and ordered his removal from office. From this judgment, and from the order denying him a new trial, he appeals.

It is urged as a fundamental error, pervading the whole case, that the judgment in *Re Thompson's Estate*, supra, was treated by the court as valid, subsisting, and a finality between these parties litigant, when in law it was absolutely void; that, therefore, the court erred in striking out the portions of defendant's answer, erred in allowing the judgment to be admitted in evidence against him, and erred in forbidding him to treat his dealings with the trust as open to complete hearing and settlement in this action. This is predicated upon the very familiar principles of equity procedure that it will not permit litigation by piecemeal, and that, in an accounting upon a trust, all of the beneficiaries of the trust are necessary parties, coupled with the facts that in the former case not all of the beneficiaries under the testamentary trust were before the court; that the absence of the others was not accounted for nor explained. Therefore, it is urged, the judgment could not operate by way of bar or estoppel to the rights of defendant Goldtree to make a full showing of his dealings with the trust property. It is certainly the general rule, as appellant contends, that in an action in equity against a trustee for an accounting the beneficiaries of the trust are necessary parties; and, where the absence of any of them is shown by the trustee, the court will order them brought in, and will refuse to proceed until they are before it, or, should it so proceed despite the legal protests of the trustee, the decree will be reversed upon appeal. But the rule in such a case is a rule of convenience. It is designed for the protection of the trustee himself, in order that he may not be subject to harassment by further litigation at the instance of the omitted beneficiaries, who would not be bound by the former judgment. Thus, it is said in *Barbour on Parties* (page 555): "If

a party omits to object either by plea, answer, or demurrer for want of parties who are only necessary to protect him from further litigation, the court may refuse to sustain the objection at the hearing, and, if the objection be not raised upon the record or by a demurrer *ore tenus*, it will not be a ground for a reversal of the decree." In *Dias v. Bouchaud*, 10 Paige, 445, the learned chancellor (Walworth) draws the distinction with his usual clearness: "I think the defendants would have had the right to insist in relation to a part of the relief prayed for by the bill that such persons should have been made parties, so as to make the account of the trust and of the application of the trust property conclusive upon them, and that he might not be compelled to account a second time to them in relation to the same matter; but a person may be a necessary party, within the meaning of the rule requiring all persons interested to be made parties, although the proper decree may be made as to the subject-matter of the litigation in his absence, if the defendant makes no objection; and in such a case, if the defendant neglects to make the objection by plea, answer, or demurrer, of the want of parties who are only necessary to protect him from further litigation, the court, in its discretion, may refuse to sustain the objection at the hearing, or to require the cause to stand over to add new parties in that stage of the suit." So, here, in *Re Thompson's Estate*, an accounting was had at the instance of certain of the beneficiaries, though not of all, against the trustee. It was decreed that the court had jurisdiction of the subject-matter of the litigation, and the determination of the court was that there was due to the trust from Goldtree a large sum of money. It was not attempted in that action to distribute the fund among the beneficiaries, or to determine their respective interests therein. In the action at bar all of the beneficiaries were present. The major portion of them, by their bill, adopt the determination of the court in the former action as stating the true amount due to the trust, and bind themselves accordingly. As to them, then, there is no possibility to Goldtree of future embarrassment or litigation. Such of the beneficiaries as are made defendants do not object to the introduction of the former judgment, but consent to and are likewise bound by it.

There are, then, these facts presented: First. That, upon direct appeal from and attack upon the judgment in *Re Thompson's Estate*, objection was made in this court for the first time to the absence of necessary parties to the proceedings in the trial court, and the objection was not held valid. Second. As declared in the opinion upon the former case, the court had jurisdiction of the subject-matter of the litigation. Third. Its judgment was but a determination that there was due to the trust from the trustee a certain sum of money, and this determination did not attempt to ap-

portion the funds among the beneficiaries. It was not a decree either calling upon the absent parties to act, nor yet did it prejudice them in any of their rights. Fourth. The judgment roll in the former case presented upon this appeal does not show that the omitted beneficiaries were within the jurisdiction of the court. And, finally, all the beneficiaries in the present action have accepted the former decree as to the amount due from Goldtree, and thus the latter is entirely relieved from all danger of embarrassment from future suits. The rule requiring all the beneficiaries to be parties being, as has been said, one of convenience for the trustee, to protect him from such future annoyance, and the trustee in the former action not having availed himself of his right to demand their presence before judgment was taken against him, he may not in this case be allowed to invoke it. For these reasons, it is held that the rulings of the court in the matters complained of were correct. In *McPherson v. Parker*, 30 Cal. 455, relied upon by appellant, the trial court overruled the demurrer brought by one creditor against the assignees for the benefit of creditors of an insolvent. The bill demanded an accounting and the payment to plaintiff of his pro rata share of the trust property. It did not, however, make the other creditors parties. The court very properly held upon direct attack, under the appeal of the assignees, that the bill should not have been retained, placing the decision upon the well-settled ground that the decree so obtained, at the instance of one creditor, in the absence of the other, would not be binding upon the creditors not parties, and, when complied with by the trustees, would not protect them against future litigation. But in this case the point was made in the trial court, and regularly brought before the appellate tribunal for review. In *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236, another case to which appellants look for support, action was brought by plaintiff to declare a trust, and compel the performance of it. The plaintiff, however, claimed the trust property in his own right, and to the exclusion of another, who, it appeared, was an actual beneficiary therein under the trust. This court, in its opinion, quoted the provisions of the Code of Civil Procedure (section 339), to the following effect: "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but, when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in." The gist of the decision is found in the following sentence: "In the absence of Selover as a party, a complete determination of the controversy, we think, cannot be had without prejudice to his (Selover's) rights." Such, however, was not the case presented by the bill in the Case of Thompson's Estate. There, as has been before pointed out, while all the beneficiaries were not par-

ties to the action, they were all named in the bill as beneficiaries, and the only decree sought was a decree establishing the amount due from the trustee to the trust. The only injury which could result from the absence of certain of the beneficiaries was the danger of future litigation against the trustee at their instance. But the trustee's failure to present the point to the trial court was equivalent to a waiver of this rule designed for his benefit.

The allowance by the court of commissions to the trustee, and of attorney's fees for services rendered to him in this and the former litigation does not call for extended consideration. The trustee, upon this trial, testified that he managed the trust funds in all respects as he had formerly done. As to his former management, the court found that "he willfully mismanaged his trust, and had mingled the trust funds with those of a partnership of which he was a member, and had permitted them to be used in business for the partnership, and at no time kept the funds distinct from the funds of the partnership." Under this finding, it may not be held that the allowances were unreasonable. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(117 Cal. 481)

HIBERNIA SAVINGS & LOAN SOC. v. THORNTON. (S. F. 613.)¹

(Supreme Court of California. July 8, 1897.)

MOTION FOR JUDGMENT ON PLEADINGS—ACTION ON NOTE—COMPLAINT—CONSTRUCTION.

1. On a motion for judgment on the pleadings, the court cannot consider any matter outside of the complaint, or any defense thereto in the answer, but must determine the motion as it would a demurrer to the complaint on the same ground.

2. Where a complaint merely contains the ordinary allegations in an action on a note, and a copy of the note contains the clause at the end thereof, "This note secured by a mortgage of even date herewith," it does not appear from the complaint that the note is secured by a mortgage, so as to defeat the action on the note.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Hibernia Savings & Loan Society against Charles O'Neill on a note. Defendant died pending the action, and R. S. Thornton, his executor, was substituted. From a judgment in favor of defendant on the pleadings, plaintiff appeals. Reversed.

Tobin & Tobin, for appellant. B. J. Newman, for respondent.

HARRISON, J. Upon a former appeal in this action (109 Cal. 427, 42 Pac. 447) the judgment was reversed upon the ground that it appeared from the findings that the promissory note upon which the action was brought had been at the time of its execution secured by a mortgage upon real property, and that by reason of the provisions in section 726, Code Civ. Proc., the makers were

not liable to an action upon the note, independent of a suit to foreclose the mortgage. When the cause again came on for trial in the superior court, the defendant moved for judgment upon the pleadings, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The court granted the motion, and rendered judgment in favor of the defendant, reciting therein: "It appearing from said complaint that the promissory note set forth in the complaint is secured by mortgage, and that said complaint does not ask for or pray that the mortgaged property be sold, and the proceeds applied to the costs of said action, expenses of sale, and to the payment of the promissory note sued upon in this action, as provided by section 726 of the Code of Civil Procedure of the state of California," etc. From this judgment the plaintiff has appealed.

The right of a defendant to move for judgment upon the pleadings, when the complaint fails to state a cause of action, is well settled in this state. *Kling v. Montgomery*, 50 Cal. 115; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129; *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671. Upon such motion, however, the court cannot consider any matter outside of the complaint, or any defense thereto in the answer, but the motion is to be determined upon the same principles as would be a demurrer to the complaint upon the same ground. All the facts alleged in the complaint are admitted for the purposes of the motion, and the court is to determine whether these facts constitute a cause of action. If the necessary facts are contained in the complaint, the objection that they are defectively set forth, or are in an ambiguous or uncertain form, will be unavailing. There must be an entire absence of some fact or facts essential to constituting a cause of action. The complaint in the present action contains the ordinary allegations in an action upon a promissory note. It alleges the making of the note by the defendant and his wife, setting forth a copy thereof, the demand for its payment after maturity, that no part of it has been paid, and prays for judgment. The defendant, however, contends that by reason of the clause at the end of the promissory note, viz. "This note secured by a mortgage of even date herewith," it appears from the complaint that the note was secured by a mortgage, and therefore the complaint fails to show a right to maintain a separate action upon the note. There is, however, no averment in the complaint that the note was secured by a mortgage, and the recital to that effect in the note cannot, as matter of pleading, be treated as the equivalent of such averment. It is only by inference or argument from this recital that it can be assumed that a mortgage was ever executed, and the rule is as much in force under the Code as at common law that argumentative pleading is not permis-

sible. "Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint" (*Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527); and for the purposes of pleading the rule is the same, whether the instrument is set forth by copy in the body of the complaint, or is attached thereto as an exhibit. The defendant might have demurred to the complaint on the ground that it was doubtful or uncertain therefrom whether in fact the note was secured by a mortgage, but, in the absence of such demurrer, the complaint was sufficient to sustain a judgment by default for the amount of the note. In the answer the defendant has set forth affirmatively that the note was secured by a mortgage, but, as we have seen, this allegation could not be considered in determining the matter. Neither were the matters shown at the former trial or upon the appeal available in support of the motion, since the reversal of the judgment was by reason of the facts found by the court upon the trial of the cause. This motion for judgment on the pleadings was made in the absence of the plaintiff's counsel, but the grounds upon which it was to be determined were not changed by this fact. The plaintiff afterwards moved to set aside the judgment, on the ground of excusable neglect, but its motion was denied, and it has also appealed from that order. As the reversal of the judgment has the effect to give to the plaintiff the relief sought by that motion, it is unnecessary to consider the merits of the motion upon this appeal. The judgment and order appealed from are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

117 Cal. 407
HUELLMANTEL v. HUELLMANTEL et al.
(S. F. 609.)

(Supreme Court of California. June 25, 1897.)
DIVORCE TO WIFE—ASSIGNMENT OF HOMESTEAD—
DURATION—PROPERTY RIGHTS OF HUSBAND.

1. Under Code Civ. Proc. § 146, subd. 4, providing, with reference to a divorce on the ground of extreme cruelty or adultery, that, "if a homestead has been selected from the separate property of either, it shall be assigned to the former owner of said property, subject to the power of the court to assign it for a limited period to the innocent party," such "limited period" cannot exceed the life of the innocent party.

2. A wife, who had claimed a homestead in a lot which was the separate property of the husband, was granted a divorce on the ground of extreme cruelty, and was assigned half of the lot as a homestead, "for herself, her heirs and assigns, forever." The husband had previously conveyed the entire lot to a third person. The husband and the grantee were satisfied with the conveyance. The decree of divorce required the

grantee to convey to the wife the part assigned to her as a homestead, and to reconvey the other part to the husband. *Id est* error, since the wife's interest in the homestead could not exceed a life estate, and while the entire property was subject to a lien for alimony, maintenance, etc., it would pass ultimately to the husband's grantee.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Caroline Huellmantel against Bernard Huellmantel and others. From a judgment in favor of plaintiff, and from an order denying them a new trial, defendants appeal. Affirmed in part and reversed in part.

A. Morgenthal, for appellants. M. Cooney, for respondent.

McFARLAND, J. This is an action for a divorce brought by a wife against her husband. Certain other persons were made defendants, as claiming some interest in the property involved in the litigation. The court found that the defendant was guilty of extreme cruelty and willful neglect. A decree was entered granting a divorce to plaintiff upon these grounds, and also making disposition of certain property. The husband and also the defendants Herman Scholden, Francis Steffen, and Rosalia Steffen appeal from the judgment, and from an order denying a motion for a new trial.

The evidence as to the extreme cruelty and willful neglect was, no doubt, somewhat conflicting, but we think that it fully warranted the court below in finding those issues in favor of the respondent. This is certainly so as to the charge of extreme cruelty; and, that being established, the finding as to willful neglect is immaterial. That part of the judgment which decrees a divorce is clearly correct, and should not be disturbed. But that part of the decree which disposes of the property interests involved is erroneous. Upon a first examination of the case we were inclined to think that the judgment might be modified, but upon further examination we find that this result cannot be reached, because there are certain findings which are erroneous, and which cannot be changed here.

The appellant Huellmantel, at the time of his marriage with respondent, was the owner of a certain lot of land in the city of San Francisco. Upon the front part of said lot there is a three-story building, which had generally been rented to tenants, and on the rear part of the lot there is a smaller house, in which the husband and wife resided. Several years ago the respondent filed a homestead claim upon the whole of this lot. By the decree, the rear half of the lot, described by metes and bounds, including said dwelling house and a certain right of way, is given as her homestead to the respondent absolutely, "for herself, her heirs and assigns, forever." The setting apart of this portion of the lot to the respondent was clearly correct if it had been given to her for a limited period only, but it was error to award it to her absolutely,

as stated in the decree. The specific findings of fact show that the whole lot was the separate property of the husband at the time the homestead was filed, and has ever since remained such. Section 1238 of the Civil Code provides that "the homestead may be selected from the community property or the separate property of the husband, or, with the consent of the wife, from her separate property"; but, when we seek to learn the legal effect of the filing of a homestead, we must look to other provisions of the Code to find what rights attach under it when those rights come to be enforced. Certain sections of the Code provide for the protection of a homestead against forced sale. Section 1474 of the Code of Civil Procedure provides how a homestead shall be disposed of upon the death of the husband or wife. And section 146 of the Civil Code provides how it shall be disposed of upon the dissolution of the marriage by divorce. The latter provision is the only one with which we are concerned in this case, and the fourth subdivision of that section provides as follows: "If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of said property, subject to the power of the court to assign it for a limited period to the innocent party;" the innocent party being the one who obtains the divorce upon the ground of adultery or extreme cruelty. Therefore in the case at bar the court could assign the property to the respondent only for a limited period, which, as heretofore held by this court, cannot exceed the life of the party to whom it is assigned. This part of the judgment would have been correct if, instead of the words "her heirs and assigns, forever," there had been a limited period of time stated, such as the court below may have determined to be just.

The court found "that all the allegations of plaintiff's said complaint are true," but that finding is not sustained by the evidence, for it is averred in the complaint that all of the property was community property, which is not true, and there are other averments not true. The appellants Francis Steffen and Rosalia Steffen aver in their answer that they were the owners of all the property above described, claiming title thereto under a certain deed made to them by the appellant Bernard Huellmantel, which deed was executed after the filing of said homestead claim of the respondent; and the court finds that neither of them "had any title to said property at the time of commencing this action, and their claim of title and pretended interest was and is without foundation in fact, the said deed being their only basis of claim." And, by the decree, said Francis and Rosalia Steffen are adjudged to forthwith execute a deed of conveyance to plaintiff of the homestead portion of said real property above described, and also convey to the appellant Bernard Huellmantel the title to the remaining portion of said real property. The finding last above mentioned, and also the said portions of the decree just referred

to, were erroneous, and cannot be sustained. The court found that the deed from Huellmantel to the Steffens was fraudulent and void, because made for the purpose of enabling said Huellmantel to successfully refuse to support and maintain the respondent as his wife. But the deed was not void as between the respondent Huellmantel and the Steffens as to the land not homestead. There is no ground, therefore, for that portion of the decree which orders the Steffens to reconvey to the appellant Huellmantel, even though it was proper for the court to decree that the alimony, maintenance, etc., of respondent by her husband, shall be a lien upon said property conveyed to the Steffens. Neither is there any ground for adjudging that the Steffens convey absolutely to the respondent the homestead part of said land, for either the appellant Huellmantel or his grantees are entitled to said homestead land after the expiration of the limited period for which it shall be assigned to respondent. That part of the judgment which declared the extent of the land that was homestead was not the partition of a homestead by carving a smaller one out of a larger tract, which was all impressed with the homestead character, as may be done in suits by creditors and in some other instances. It was only an adjudging that the land on which the dwelling house stood, with certain land used in connection therewith, constituted the homestead, and that the other part of the lot had never been impressed with the homestead character. *Lubbock v. McMann*, 82 Cal. 229, 22 Pac. 1145. This latter part of the lot appellant Huellmantel had the right to convey, and his grantees took the title subject to any liens which respondent may have against it. Neither appellant Huellmantel nor the Steffens object to the validity of the conveyance from the former to the latter. The evidence as to the alleged interest of appellant Scholten in the premises was quite meager, but that matter can be reinvestigated at another trial. That part of the judgment which decrees a divorce to the respondent, and fixes the amount of alimony, counsel fees, etc., is affirmed, and as to those matters the order denying a new trial is affirmed; but all that part of the judgment which undertakes to determine and dispose of the real property described in the complaint is reversed, and as to all that part of the judgment the order denying a new trial is reversed, and a new trial is ordered.

We concur: HENSHAW, J.; TEMPLE, J.

(117 Cal. 497)

PEOPLE v. CUMMINGS. (Cr. 250.)

(Supreme Court of California. July 8, 1897.)

FALSE PRETENSES—INDICTMENT—ALLEGATIONS AND PROOF—VARIANCE—VERDICT—SUFFICIENCY.

1. An indictment for obtaining, under false pretenses, a note alleged to have been executed by the person defrauded, is not sustained by evi-

dence showing the note was jointly executed by him and another.

2. It is immaterial that such other person, as between him and the person defrauded, was merely a surety.

3. A verdict in a criminal case must contain, either in itself or by reference to the indictment, every element of the crime.

4. Where an indictment charged defendant with defrauding S. of a note for \$175, by false pretenses, a verdict that "the defendant is guilty of defrauding S. of the note of \$175 in the indictment mentioned" was insufficient.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

James H. Cummings was convicted of obtaining property by false pretenses, and appeals from the judgment and from an order denying him a new trial. Reversed.

George D. Collins, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

HENSHAW, J. The indictment charged the obtaining of the property of C. Schnelle by means of false and fraudulent pretenses. Defendant was convicted, and appeals from the judgment and from the order denying him a new trial. His first attack is upon the form of the indictment. It will serve no beneficial purpose to set out in full this pleading, which is of great length, and, without doing so, no satisfactory analysis of appellant's objections thereto can be made. It must suffice to say that after a critical examination we hold the indictment to be sufficient in law to charge the appellant with the designated offense. The gravamen of the charge was this: That, in an exchange of property induced to be made by Schnelle under the fraudulent representations of Cummings, Schnelle was defrauded of "his (C. Schnelle's) promissory note for the sum of \$175, which said note was dated October 3, 1894, and was payable thirty days after date, in gold coin of the United States, and said note was paid by said C. Schnelle in gold coin of the United States on or about the 16th day of November, 1894, to the assignees of said James H. Cummings, which said note was the personal property of said C. Schnelle, and was of the value of \$175, and of the goods and personal property and moneys of the said C. Schnelle." Under the proofs, it was disclosed that the note was executed by C. Schnelle and L. W. Schnelle as joint makers. The instructions followed the indictment, and proceeded upon the theory that the note was the promissory note of C. Schnelle. In this respect the cause is identical with *People v. Reed*, 70 Cal. 529, 11 Pac. 676, where it was held that an indictment for obtaining, under false pretenses, a promissory note alleged to have been executed by the person defrauded, is not sustained by evidence showing that the note was jointly executed by him and another. It is not sufficient answer to this to say, as is here urged on behalf of the people, that, as between C. Schnelle and L. W. Schnelle, L. W. Schnelle

was but a surety. The question is the simple one of a variance between a criminal pleading and the proofs made thereunder.

The only other objection which we deem necessary to be considered is that which goes to the form of the verdict, and, of necessity, to the judgment which must be supported by it. The jury found that "the defendant is guilty of defrauding C. Schnelle of the note of \$175 in the indictment mentioned." A good verdict must contain, either in itself or by reference to the indictment, all the elements of the crime. If silent on some element of the crime, the verdict will not sustain a judgment. 1 Bish. New Cr. Proc. § 1005. It is quite apparent that this verdict, standing alone and without reference to the indictment, is not sufficient. The defendant is found "guilty of defrauding C. Schnelle" of a promissory note. There is no such crime known to the law. The only reference to the indictment is a reference whereby the identity of the note is fixed. If the jury had found the defendant guilty of defrauding C. Schnelle of the note for \$175, in the indictment mentioned, knowingly and designedly, and by the false and fraudulent representations and pretenses in said indictment charged, their verdict in this or in any equivalent language would have been sufficient. But there is no reference in the verdict to the indictment as an aid to determine by what means the fraud was consummated, and, unless it was consummated as charged in the indictment, not only was the verdict insufficient, but the defendant could not be found guilty at all. The only cases which respondent cites in support of the sufficiency of this verdict are two. The first of these is *People v. Gilbert*, 57 Cal. 96, where the verdict was: "We, the jury, find the defendant guilty as indicted, to the sum of \$90." The defendant was charged with the crime of embezzlement. The reference in the verdict made it explicitly to appear that the jury found him guilty of embezzlement, and that they further found that the sum which he embezzled was \$90. This verdict, while not admirable in form, was legally sufficient. The other case relied upon is that of *People v. Jochinsky*, 106 Cal. 640, 39 Pac. 1077. The defendant was charged with burglary, and the verdict was: "We, the jury, find the defendant guilty of burglary in the first degree; and we further find that the goods taken from Price's store on the night of the 13th and 14th of April, 1893, were brought from Sonoma county into the city and county of San Francisco, state of California, by the defendant." The jury's declaration that they found the defendant guilty of burglary in the first degree was a full and sufficient verdict. The only objection urged to it was that it contained more than the law required. The court merely held that this amplification could be treated as surplusage, and that a legal verdict still remained. For these reasons, the judgment

and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

117 Cal. 539

GOULD v. EATON et al. (L. A. 168.)

(Supreme Court of California. July 9, 1897.)

NATURAL WATER COURSES — RIPARIAN RIGHTS — DIVERSION OF WATER — INJUNCTION.

1. Each riparian owner is entitled to the natural flow of the stream through his land, with the limitation that the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes; but such superior proprietor cannot, as against an inferior proprietor, divert to nonriparian lands the water which he would have a right to use for riparian purposes, but which he does not in fact use, since his riparian right is appurtenant to the land bordering on the stream.

2. Where nonriparian owners divert part of the waters of a stream, and claim the right to do so, the right of a riparian owner to an injunction does not depend on the amount of injury received, since he is entitled to the flow of the entire stream, as against them, and their claim to the right to divert it authorizes him to invoke the aid of equity in order that such claim may not ripen into a right.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by one Gould against one Eaton and others to enjoin the diversion of waters. From a judgment granting plaintiff relief in part, defendants appeal. Modified.

R. Y. Hayne & W. S. Day, for appellants.
R. B. Canfield, for respondent.

HARRISON, J. The facts involved in the judgment herein are set forth in the opinion given upon an appeal therefrom by the plaintiff. *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319. The present appeal is by the defendants from that portion of the judgment which enjoins them from diverting to lands not riparian to the creek any of the waters naturally flowing in its channel, and from preventing or interfering with the flow directly back into the stream from the mouth of the tunnel constructed by them, of 1.43 inches of water, measured under a 4-inch pressure. The court found that this amount of water was abstracted and diverted from the channel of the stream by reason of the tunnel constructed by the defendants, and the appeal is directly from the judgment, upon the judgment roll, without any bill of exceptions. The finding by the court of the amount of water diverted by means of the tunnel cannot be questioned, by reason of the statement therein of the mode by which this amount can be ascertained. The evidence before the court by which it determined that the loss could thus be ascertained is not before us, and it must be assumed that it was of a satisfactory character, and the conclusion of the court thereon must be accepted by us as correct.

To the extent that the water diverted by

1 Rehearing denied.

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the tunnel is taken from the stream, the defendants are in no different position than they would have been if Barker, the riparian owner from whom they received the right to construct the tunnel, had given them the right to lay a pipe from the stream, and granted them the water that should flow through it. The only right in the riparian land which was granted to the defendants was "to enter thereon to prospect for water, and to excavate a tunnel to develop the same at a place to be selected by them within thirty days from the date of their agreement, and the right of way over said land for the purpose of making said tunnel." Under this agreement, they selected a place for the tunnel about 30 feet west of the stream, and constructed it in a direction nearly parallel with the stream. The defendants are, therefore, in no respect riparian owners, nor are their rights in the water which flows from the tunnel in any respect those of a riparian owner. The grant from Barker gave them no right in the land which is adjacent to the stream, and they took by the contract no riparian rights in the waters of the stream, and no greater right to these waters than Barker could confer upon any other nonriparian owner. The rights of a riparian owner are limited to the ordinary and reasonable use of the water which flows in the stream, and do not include a proprietorship in the corpus of the water. His right to the water is limited to its use for such as are termed ordinary purposes,—*ad lavandum et ad potandum*,—or such other uses as are connected with the land bordering on the stream. It is not necessary here to determine the extent to which such uses may be carried, or the purposes to which the water may be applied. They do not in any case include the right, as against an inferior proprietor to divert the water to nonriparian lands. Each riparian owner is entitled to the natural flow of the stream through his land, with the limitation, however, that the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes. The superior proprietor cannot, however, divert to nonriparian lands the water which he would have a right to use for riparian purposes, but which he does not in fact use. His riparian right is appurtenant to the land bordering on the stream, and does not give him the right to divert the water to lands which are not riparian to the stream; and, as he cannot exercise this right himself, he cannot, as against an inferior proprietor, confer it upon another. As against himself or his grantee, he may contract for the diversion of the water to nonriparian lands. Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107. But the rights of the inferior proprietor will not be affected by such contract. If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the entire stream. *Waterworks Co. v. Potter*, 3 Hurl.

& C. 800; *Ormerod v. Mill Co.*, 11 Q. B. Div. 155; *Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co.*, L. R. 7 H. L. 697. The plaintiff's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner, he has a right to the flow of the entire stream, as against any diminution thereof by one who is not a riparian owner, and the claim of the defendants that they have a right to divert a portion of its flow authorizes him to invoke the aid of equity in order that this claim may not ripen into a right. *Moore v. Waterworks*, 68 Cal. 146, 8 Pac. 816; *Stanford v. Felt*, 71 Cal. 249, 16 Pac. 900; *Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co.*, L. R. 7 H. L. 705.

That portion of the judgment which requires the defendants to permit this amount of water to flow back into the creek "in the manner in which the water from said tunnel was flowing back into said creek at the time of the commencement of the trial of this action" is not authorized. If the water which is diverted from the creek is allowed to return to it before it reaches the land of the plaintiff, the manner in which it is returned is immaterial to him; and, if the defendants can at any time change the manner in which it at present is returned, with advantage to themselves, they should be allowed this privilege, so long as the rights of the plaintiff are not impaired.

The judgment should be modified in another particular. The court finds that, as the tunnel is now constructed and used, it diverts the amount of 1.43 inches of water from the stream, and will continue to divert this amount of water "under the conditions now existing." The judgment, however, renders it incumbent on the defendants to permit 1.43 inches of water to flow back into the stream under all circumstances, and independent of the conditions now existing. It should be modified by giving to either party leave, upon showing that these conditions have changed to an extent authorizing the interference of the court, or that the operation and use of the tunnel will justify it, to apply for a corresponding change in the judgment. The superior court is directed to modify its judgment in accordance with the foregoing opinion, and, as so modified, the judgment will stand affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(117 Cal. 478)

HIBERNIA SAVINGS & LOAN SOC. v.
KAIN et al. (S. F. 526.)

(Supreme Court of California. July 8, 1897.)

MORTGAGES—DIFFERENT PROPERTIES—JOINT FORECLOSURE.

Eight mortgages executed to plaintiff by a common mortgagor, and a subsequent mortgage set up by cross complaint, were foreclosed in the same action. The first three of plaintiff's mort-

gages covered lots A, B, and C. The last five and cross complainant's mortgage covered lots A, B, C, and D. *Hell* error to find the aggregate of plaintiff's eight mortgages, and order a sale of the four lots to satisfy it, since the first three did not cover lot D.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Hibernia Savings & Loan Society against M. William Kain, Emma B. Kain, and another. From a decree in favor of plaintiff, defendants Kain appeal. Modified.

Sullivan & Sullivan, for appellants. Tobin & Tobin and T. C. Coogan, for respondent.

BELCHER, C. On eight different occasions between May 19, 1888, and August 20, 1890, inclusive, the defendants M. William Kain and Emma B. Kain, his wife, borrowed from the plaintiff, the Hibernia Savings & Loan Society, certain sums of money, and for each sum so borrowed they executed to the plaintiff their joint and several promissory note, and a mortgage, to secure payment of the same, upon certain real property in the city and county of San Francisco. The first three notes were for the aggregate sum of \$9,500, and the mortgages to secure the same were upon lots or parcels of land which may be designated as lots A, B, and C. The other five notes were for the aggregate sum of \$17,000, and the mortgages to secure the same were upon the same lots, A, B, and C, and another lot, designated as lot D. Subsequently, on December 15, 1891, the said defendants borrowed from the defendant Louis Metzger the sum of \$2,000, for which sum they executed to him their joint and several promissory note, and a mortgage, to secure payment of the same, upon the said lots A, B, C, and D. The mortgagors failing to pay their indebtedness to the plaintiff, it brought this action to foreclose each of its said mortgages, making Metzger a party defendant. Metzger answered, and filed a cross complaint, praying for the foreclosure of his mortgage also. The defendants Kain suffered their defaults to be entered, and thereupon a decree was rendered foreclosing all the mortgages set up in the complaint and cross complaint. From that decree this appeal is prosecuted by the Kains on the judgment roll.

By its decree, the court found and adjudged that there was due and owing to the plaintiff, upon the notes and mortgages set forth in the complaint, the sum of \$28,213.87, and that the sum of \$600 was a reasonable amount to be allowed plaintiff as an attorney's fee; that there was due and owing to the defendant Metzger, upon the note and mortgage set forth in his cross complaint, the sum of \$2,240, and that the sum of \$100 was a reasonable amount to be allowed him as an attorney's fee; that the plaintiff and Metzger each had a valid lien upon the premises described in the complaint for the amount so found due each of them respectively, but that the plaintiff's lien was prior and paramount to that of Metzger. The decree then proceeded in the usual form to di-

rect a sale according to law of all the mortgaged premises, or so much thereof as might be necessary to raise the amounts due the plaintiff and Metzger, together with interest, costs of the suit, counsel fees, and expenses of sale; that the proceeds of the sale be first applied to the payment of the costs of the sale, the costs of the suit, the counsel fee due the plaintiff, and the amount due the plaintiff, to wit, \$28,213.87, with interest thereon from the date of the decree; that the balance then remaining be applied to the payment of the amount due defendant Metzger, to wit, \$2,240, with interest thereon from the date of the decree, together with his counsel fee and costs; and that, if the proceeds of the sale should be insufficient to pay the said amounts as directed, then judgment should be entered against the defendants Kain for such deficiency or deficiencies.

The only point made for a reversal is that the court erred in decreeing that plaintiff had a lien on the four lots, A, B, C, and D, for the aggregate indebtedness due from the appellants, and in ordering a sale of the four lots to satisfy said indebtedness. This point, we think, is well taken. Lot D was covered by the last five mortgages, but not by the first three. It was error, therefore, to subject that lot to the payment of all the indebtedness evidenced by the eight notes and mortgages. The court should have found the amounts due on the first three notes and on the last five notes, and then have rendered its decree accordingly. The cause should be remanded, with directions to the court below to modify the decree as above suggested.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to the court below to modify the decree as above suggested.

(117 Cal. 520)

MITCHELL v. WINNEK et al. (L. A. 201.)
(Supreme Court of California. July 9, 1897.)

**SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—
CERTIFICATES—HOLDERS OF STATE
NORMAL SCHOOL DIPLOMAS.**

Const. art. 9, § 7, providing that county superintendents and boards of education shall have "control" of the examination of teachers and the granting of teachers' certificates, does not prohibit the legislature from prescribing to whom and on what conditions certificates shall be granted; and hence a rule of a county board that holders of state normal school diplomas must have had one year's experience to entitle them to certificates higher than the primary grade is not superior to Pol. Code, § 1503, as amended by St. 1893, p. 267, providing that such diplomas shall entitle the holders to grammar grade certificates.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Edith A. Mitchell against I. F. Winnek and others, constituting the board of education of San Diego county, for a writ of mandate to compel such board to is-

sue to her a certificate of the grammar grade as a teacher in said county. From a judgment dismissing the petition, plaintiff appeals. Reversed.

Y. R. Palmer and Gibson & Titus, for appellant. A. H. Sweet, Dist. Atty., for respondents.

HAYNES, C. The plaintiff, who is the holder of a diploma of graduation from a normal school of this state, applied to the board of education of San Diego county for a teacher's certificate of the grammar grade, and her application was refused by the board. She thereupon filed her petition in the superior court praying for a writ of mandate requiring said board to issue to her a certificate of the grammar grade as a teacher in said county. A general demurrer to her petition was sustained by the court, without leave to amend, and judgment was thereupon entered, dismissing her petition. This appeal is from said judgment.

The refusal of the board to grant the certificate was based upon one of the rules of said board, which reads as follows: "Rule 4. No certificate higher than primary grade will be issued to any applicant who has not had two years' experience in teaching in the public schools; provided that holders of state normal school diplomas, of California State University diplomas, or Leland Stanford, Jr., diplomas, shall be required to have but one year's experience." Appellant bases her right to said certificate upon section 1503 of the Political Code, as amended in 1893 (St. 1893, p. 267), the first and second subdivisions of which are as follows: "First. The board of trustees of each state normal school, upon the recommendation of the faculty, may issue to those pupils who worthily complete the full course of training and study prescribed a diploma of graduation. Second. Said diploma shall entitle the holder thereof to a grammar grade certificate from any city, city and county or county board of education in the state." Respondents base their right to adopt rule 4, above quoted, and to refuse the certificate applied for, upon section 7 of article 9 of the constitution of this state. This section, after providing that the governor, superintendent of public instruction, and the principals of the state normal schools shall constitute the state board of education, and after prescribing their duties in relation to compiling and adopting text-books, and after further providing that they shall, in addition thereto perform such other duties as may be prescribed by law, proceeds as follows: "The legislature shall provide for a board of education in each county in the state. The county superintendents and the county boards of education shall have control of the examination of teachers and the granting of teachers' certificates within their respective jurisdictions."

The question to be decided, therefore, is

whether said rule 4, adopted by the board of education, is paramount to the provisions of section 1503 of the Political Code, above quoted; the contention of respondents being, in effect, that the said provision of the constitution vests in them a power superior to that of the legislature in prescribing the conditions upon which certificates shall be issued to teachers. The principal controversy between counsel is as to the meaning of the word "control," as used in the clause of the constitution above quoted; respondents contending that it is synonymous with the term to "govern," "rule," or "regulate"; that the fact of governing includes every exercise of authority, and to "regulate" is the power to prescribe the rules by which it shall be governed. In order to sustain the contention of respondents, it is obvious that the word "control" must have been used in its largest sense; in other words, that the control thus vested in the board of education is unlimited and exclusive. In adopting rule 4, the board must have exercised legislative functions, and, if such legislation enacted by the board of education can supersede an enactment by the state legislature upon the same subject, they must have the absolute, unlimited, and exclusive power to legislate upon that subject. I do not think it was intended by the framers of the constitution, nor by the people in adopting it, that the provision in question should have the construction thus put upon it by respondents. Article 9 of the constitution is devoted to the subject of education. Among other provisions contained in this article, section 5 makes it compulsory upon the legislature to provide for a system of common schools; and section 6 includes normal schools among the kinds of schools which may be provided for, and, in pursuance of the power to provide for normal schools, the legislature enacted said section 1503 of the Political Code. The "control" of the examination of teachers by the county board does not necessarily imply that the legislature may not prescribe the rules by which the qualifications of teachers shall be determined, nor what shall entitle one to a certificate. Not only was it contemplated that all applicants for the position of teachers would not be educated in the universities or normal schools, and that therefore many teachers would necessarily be examined by the county boards, but as to those it is competent for the legislature to prescribe the general rules or standard by which their qualifications to teach should be determined, and the enactment of such rules would be entirely consistent with the "control" of the county board in making such examinations, and in granting certificates in conformity therewith; and such is the legislative construction of the provision of the constitution under consideration.

Section 1771 of the Political Code (St. 1893, p. 259) provides: "County boards of education have power: First, to adopt rules and regula-

tions, not inconsistent with the laws of this state, for their own government; second, to prescribe and enforce rules for the examination of teachers; third, to examine applicants, and to prescribe a standard of proficiency which will entitle the person examined to a certificate, and to grant certificates of three grades, valid throughout the county, except as provided in section 1775." It then provides for the number of years for which certificates shall be granted for high school, grammar grade, and primary departments. Section 1775 provides: "That the county board may without examination grant county certificates of either the grammar or primary grade to the holders of life diplomas of other states, and of the San Francisco normal class diplomas—when recommended by the superintendent of public schools of said city—university diplomas and state normal school diplomas of other states." It will hardly be contended that the county boards have power to grant certificates to teachers for a longer term or a different term than that authorized by these provisions of the Code; yet it must follow that, if the control of the county board is absolute, unrestricted, and unlimited, they can control the term of the certificate, and grant life certificates, or certificates for any term of years, whenever they see proper. In view of the entire provisions of the constitution upon the subject of "Education," we think it could not have been intended that the legislature should be excluded, prevented, or prohibited from prescribing to whom and upon what conditions certificates shall be granted. We have already said that the enactment of rule 4 is a legislative act. It specifies the conditions upon which certificates shall be granted. It is as much the exercise of legislative power as is the code provision that those having diplomas from state normal schools shall be entitled to a certificate upon presentation of their diplomas; yet the constitution provides that the legislative power of this state shall be vested in the legislature. No other body can have or exercise legislative powers unless that power be given by the constitution, or delegated by the legislature, and this power the legislature has delegated to the county board, in a restricted form, by the provision that their rules and regulations shall not be inconsistent with the laws of this state. "It has never been questioned, so far as I know," says Redfield, C. J., "that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organization of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution

of the United States, or of the particular state in question." *Thorpe v. Railroad Co.*, 27 Vt. 142.

If, therefore, it be asserted, as it is here, in effect, that the power of the legislature to enact section 1503 of the Political Code does not exist, the restriction or limitation of that power must not only be found in the constitution, but the prohibition of its exercise must be clear. It must appear either from express words or by necessary implication. It is not asserted that there is any express prohibition, nor does the use of the word "control" necessarily imply that the power of legislation upon the subject in question is prohibited to the legislature. Apparently inconsistent provisions must be harmonized, and each given some effect, if that be possible. To give the word "control" the effect given it by the court below, some qualifying word, such as "exclusive," "absolute," or "unlimited," must be implied, since without such implication that word does not necessarily imply that the legislature had no power to declare that holders of the specified diplomas should be entitled to certificates of the grammar grade. Counsel for respondents quotes from the Debates of the Constitutional Convention (volume 3, p. 1400) the discussion upon a proposed amendment to section 8 of article 9, which section related to "local boards of education," the last clause of which was as follows: "They shall also have control of the examination of teachers and the granting of teachers' certificates within their several jurisdictions." It was proposed to amend said section by adding the words "subject to general legislative enactments." This amendment was opposed upon the ground that section 7 of said article, which provided for a state board of education, had been defeated. Mr. Laine said: "It seems to me that it will open the door to bring back the old system. We have got rid of this board of education [meaning the state board], but that thrusts us back to the old system whenever the legislature desires to have it so." And Mr. Larkin contended that it "would destroy all we have done in relation to placing the schools under local control. It will again reinstate the old law. * * *

We have placed it under the local control of the counties, and that amendment will destroy all that we have done." The amendment was defeated. It is apparent that the contest was between a state system and a local system of common schools. The convention had just defeated the provision for a state system by defeating the section providing for a state board; but counsel has overlooked the fact that section 7, as it now stands, is a new section, which was ratified by the people in 1894, and which provides for a state board of education, and establishes the state system which was defeated in the convention of 1879. Said proposed amendment was defeated upon the sole ground that it would place it in the power of the legislature to re-establish the state system, which the convention had rejected by

rejecting the provisions which have since been incorporated in the constitution by an amendment. It is true, the language in the concluding part of the section adopted by the convention is the same as the concluding part of the section as it now stands; but the system of schools adopted by the convention was swept away by the amendment, and a different system adopted, and this should have great weight in the construction of the clause immediately under consideration; and so the whole constitution should be examined with a view to arriving at the true intention of each part. Cooley, Const. Lim. (4th Ed.) p. 70.

The defendants refused to grant a certificate to the petitioner solely because of the requirements of rule 4, adopted by them; and as the adoption of that rule was the exercise of legislative power, which is nowhere given to them by the constitution, and is in excess of the power granted them by section 1771, Pol. Code, as amended by the act of 1893 (St. 1893, p. 259), the judgment should be reversed, with directions to the court below to overrule the demurrer, and to issue a peremptory writ of mandate, as prayed for by the petitioner.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer, and to issue a peremptory writ of mandate, as prayed for by the petitioner.

(117 Cal. 556)

SAN DIEGO WATER CO. v. CITY OF SAN DIEGO et al. (L. A. 326.)

(Supreme Court of California. July 10, 1897.)

APPEAL—BRIEF—IMPROPER CRITICISM OF TRIAL JUDGE.

A brief in which appellant insinuates that there are matters outside the record which show that the trial judge was guilty of gross impropriety in maintaining his right to try the cause, and that he ought, as a matter of delicacy, to have declined to sit, will be stricken out.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the San Diego Water Company against the city of San Diego and others. From an order overruling a motion to change the place of trial, plaintiff appeals. Motion to strike appellant's brief from the files. Granted.

Works & Works and Trippett & Neale, for appellant. Gibson & Titus (Delmas & Shortridge, of counsel), for respondents.

PER CURIAM. This is an appeal from an order overruling plaintiff's motion for a change of the place of trial. The motion was based upon the ground that the judge of the superior court was disqualified to hear and determine the cause, by reason of his interest as a taxpayer and water consumer of the municipal corporation defendant. In support of its appeal a brief has been filed by the plaintiff, containing matter which respondents contend is

scandalous and impertinent, upon which ground a motion is made to strike the brief from the files.

The following passages from the introductory and concluding portions of the brief are those which are particularly objected to: "That the conditions were such that a judge, in justice to himself and to the parties interested, but particularly in justice to himself, would have been justified in declining to sit as judge, no right-minded judge or lawyer will deny. He has not seen fit to exercise this right, but has driven us to the unpleasant task of asserting, and attempting to maintain, that he was legally disqualified to try the case. We say unpleasant task, because it is never pleasant for a lawyer to take the position that a judge has violated the doctrine, so jealously guarded by law, that no man shall sit as a judge in his own case. It is usually taken by the judge as a personal reflection upon him, and it is such a reflection, and one of the most serious character, where the judge has knowingly and willfully asserted his right to sit in the case. But, while the duty of an attorney under such circumstances is not a pleasant one, it is none the less a duty that he has no right to shirk or neglect. If the judge has acted in good faith, and simply erred as to the law which should govern his action, it is only an error, and casts no reflection upon his integrity as a judge. If he has willfully persisted in trying a case where he is disqualified, no condemnation of his conduct can be too severe. In either case an appellate court will be quick to give relief to the party who has been compelled to try his case before an interested judge, and in the latter to remove from the judiciary a stigma that must always attach to the court under such circumstances. Let us assume that the judge of the court below has acted in good faith in maintaining his right to sit in the case, and inquire into the cold law which should have governed his action. * * * There are many circumstances connected with the case, but not appearing in the record, that would show, perhaps as clearly as any case ever submitted to the courts for determination, the wisdom of the strict rule laid down in the decided cases against any action being taken in a cause by a judge who can be reasonably suspected of being influenced by self-interest, and the gross impropriety of a judge knowingly taking such action where such reasonable ground for suspicion exists."

With every disposition to put the most favorable construction upon the language of counsel, we cannot avoid the conclusion that they have in this instance overstepped the bounds of legitimate argument or criticism. Counsel have no right to suggest that there are matters outside of the record which would show that the judge of the superior court has been guilty of gross impropriety in acting upon the view that he was not legally disqualified to try the cause. The only question to be decided upon the appeal is the question

clearly presented by the record,—whether a tax and water rate payer of the city of San Diego can act as judge in the trial of this controversy. If he is not legally disqualified, the order must be affirmed; if he is disqualified, the judgment must be reversed; and the question whether he ought or ought not to have declined to sit in the case, as a matter of delicacy, although not technically disqualified, is one which could, by no possibility, be litigated in this court. The charge, therefore, of impropriety and indelicacy on the part of the judge of the superior court, which is certainly insinuated, if not directly made, in the passages above quoted from appellant's brief, should not have been made; especially as there is nothing in the record to sustain it. The motion to strike out is granted.

(117 Cal. 559)

PEOPLE v. WHELAN. (Cr. 278.)¹

(Supreme Court of California. July 12, 1897.)

CRIMINAL LAW—OBJECTIONS TO INDICTMENT—DECLARATIONS OF ACCUSED.

1. Where the court, on demurrer to an information, directs a new information to be filed, as provided by Pen. Code, § 1008, the act of the district attorney in procuring an indictment against defendant, instead of filing a second information, is a mere irregularity, which affords defendant no ground for complaint.

2. The strength and credibility of the declarations of the accused as corroborating evidence of his guilt are for the jury.

Department 1. Appeal from superior court, Sonoma county; Burnett, Judge.

Dan Whelan was convicted of obtaining money under false pretenses, and from the judgment, and from orders denying a new trial, and refusing a motion in arrest, he appeals. Affirmed.

Barham & Miller, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

VAN FLEET, J. Defendant was convicted of obtaining money under false pretenses, and appeals from the judgment, and from orders denying a new trial, and refusing to arrest the judgment.

Defendant demurred to an information filed against him, and the demurrer was sustained; but the court, being of the opinion that the defects could be cured, directed that a new information be filed, as provided by section 1008, Pen. Code. Instead of filing such new information, the district attorney laid the charge before the grand jury, and procured an indictment against defendant for the offense. Conceding, as contended, that this course was not in exact accord with the contemplation of the statute, it was, at most, but a mere irregularity, which in no way affected any substantial right of the defendant. Whether he was proceeded against by information or indictment could not be material to him, since both methods are equally competent, and each subserves equally the same purpose.

¹ Rehearing denied.

Defendant did not move to set aside the indictment, and whether, therefore, the irregularity complained of constituted a ground for such motion, under section 993 of the Penal Code, need not be determined. He chose rather to make the objection the basis of a plea of "former acquittal," and, after verdict, of a motion in arrest of judgment, on the ground that the grand jury had no jurisdiction to inquire into the offense. Obviously, the facts constituted no proper basis upon which to rest the plea of former acquittal. They did not show jeopardy, and were not otherwise a bar, as the statute expressly provides that the allowing of a demurrer is no bar to further prosecution when the court directs a new information to be filed. Section 1008, supra. Nor did the facts warrant the arrest of judgment. It was within the jurisdiction of the grand jury to take cognizance of the charge without an order of court submitting it to them. No such order was required, as the charge had not previously been examined by that or any former grand jury; and a demurrer having been sustained to the information, with a direction that a new one be filed, the status of the charge was, in all material respects, the same as though no information had ever been filed.

The indictment sufficiently charged the offense, and we discover no lack in the evidence to sustain the verdict. The declarations of the defendant and the other circumstances shown had a legal tendency to corroborate the testimony of the witness Brown, and, if believed, were sufficient to establish defendant's guilt. The strength and credibility of such corroborating evidence was for the jury. *People v. Barker*, 114 Cal. 617, 46 Pac. 601. Judgment and orders affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(117 Cal. 501)

ORTON v. BROWN et al. (S. F. 536.)

(Supreme Court of California. July 8, 1897.)

VERDICT—EXECUTION SALE—IRREGULARITY—ORDER OF REPALE—FAILURE TO RETAKE PROPERTY—COLLUSION—PLEADING.

1. If any material issue is raised by the pleadings, a verdict in favor of a party supports a judgment in his favor.

2. An execution sale of personalty was vacated, and it was ordered that the proceeds distributed by the sheriff should be repaid to him, and by him to the purchaser, and the property be resold. In an action against the sheriff for a failure to retake the property the complaint alleged that at the time of the sale there was a collusion between the sheriff and the purchaser; that the purchaser was wrongfully allowed to take the property out of the sheriff's custody. Defendant denied that the purchaser obtained possession otherwise than by the delivery of the property to him as purchaser. The complaint did not allege that the proceeds were repaid. *Held*, that a verdict for defendant supported a judgment for him, because the issue of collusion was either a material one, or else no cause of action was stated; the purchaser being ordinarily entitled to immediate possession on pay-

ment of the bid, and the sheriff's duty to retake the property depending on a repayment of the proceeds.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; Hunter, Judge.

Action by William Orton, assignee of the Consumers' Lumber Company, against F. M. Brown and others, for a failure to retake certain property after an irregular execution sale of it had been vacated. From a judgment in favor of defendants, plaintiff appeals. **Affirmed.**

John Turner, for appellant. Buck & Cutler, for respondents.

HAYNES, C. This appeal is from a judgment in favor of the defendants entered upon a verdict of the jury in their favor. This case was before this court upon an appeal from an order denying the plaintiff's motion for a new trial, and said order was affirmed. 113 Cal. 561, 45 Pac. 835. We can conceive of no reason why both appeals were not taken at the same time. It would certainly have lessened the expense to the parties, and materially lessened the labors of this court, to have had both appeals taken and heard together. Appellant states the questions to be determined on this appeal as follows: "(1) Is the verdict sufficient to support the judgment? (2) Does the verdict correspond with the issues presented by the pleadings? (3) What issues do the pleadings present?"

As to the first point, it may be said that, if any material issue is raised by the pleadings, the verdict must support the judgment; so that the only question is whether any issue was made which, if decided in favor of the defendants, entitled them to a judgment. This action is upon the bond of T. M. Brown, as sheriff of Humboldt county. The plaintiff is the assignee of the Consumers' Lumber Company, an insolvent corporation. The complaint alleges, in substance, the following facts: On May 2, 1891, and prior to the insolvency proceedings, one Georgeson obtained judgment against said corporation for the sum of \$1,031.58 and costs. On May 7, an execution issued thereon was levied upon certain lumber and shingles which had been attached in said action, and on May 20th said property was sold by the sheriff in one lot, and not in separate parcels, for the sum of \$700, to H. H. Buhne, Jr. Three days later said corporation, upon notice to the judgment creditor, the sheriff, and said purchaser, moved the court to set aside the sale upon the ground of irregularity, in that a large quantity of lumber and shingles were sold in one lot for a grossly inadequate price. Said motion was heard on June 3d, and an order made vacating the sale, and ordering "that the money paid by the sheriff to satisfy preferred claims be returned to the sheriff by the parties receiving the same, and that the \$700 paid by Mr. Buhne for

the property be returned to him by the sheriff," and ordering a resale of said property to be made according to law. Buhne appealed from said order June 23, 1891, and on November 21, 1892, the supreme court affirmed the order. 31 Pac. 257. The lumber company was adjudged an insolvent debtor August 14, 1891, and on appeal said judgment of insolvency was affirmed May 20, 1893 (33 Pac. 196), and the plaintiff herein was thereafter appointed as assignee. As to the foregoing facts there was no issue or controversy. The gist of the complaint is, in substance, that at or about the time of said execution sale the sheriff and Buhne, the purchaser, entered into a confederation and conspiracy, by which the sheriff willfully, and in violation of his duty, consented that Buhne should take the lumber and shingles out of the custody of the sheriff; that the same were taken by Buhne with the knowledge and consent of the sheriff; that afterwards, in December, 1892, an order for the resale of the property was issued, and delivered to the sheriff, but that he, by his said collusion and confederation above mentioned, had placed it beyond his power to comply with and execute said order. The value of said property was alleged to be \$6,300, in which sum plaintiff claimed damages. It will be observed that the motion to vacate the sale was not on the ground of fraud, but that the sale was irregular, because the whole of the property was sold in one parcel, and for an inadequate price, and that the confederacy charged in the complaint related to the possession of the property, and not to the sale itself. The answer of the defendants denied all these allegations of fraud and conspiracy, or that Buhne obtained possession otherwise than by the delivery of the property to him as such purchaser at said sale. The answer also denied that an order of resale was issued or delivered to the sheriff, or that the property was of any greater value than \$700; and defendants also pleaded the statute of limitations prescribed in sections 338, 339, and 341 of the Code of Civil Procedure in bar of the action. Counsel for appellant contends, however, that the allegations of fraud and collusion were not necessary to entitle the plaintiff to recover, and that, therefore, the denial created an issue upon an immaterial matter. But, if the complaint had not alleged that the sheriff parted with the possession of the property by a fraudulent collusion with Buhne, it would not have stated a cause of action. It was held upon the former appeal that the execution sale, though irregular, was not void; that the sale to Buhne was completed by the payment of the purchase money, and that the purchaser was thereupon entitled to the immediate possession of the property. If, therefore, the alleged fraudulent collusion is an immaterial averment, it follows that Buhne was rightfully in possession of the property, and was under no legal obligation

to surrender it to the sheriff, upon the sale being vacated by the court, without repayment of the money which he had paid for it; and there is no allegation that the money was repaid or offered to be repaid. The plaintiff, as assignee of the Consumers' Lumber Company, stands as the corporation would have stood. The order setting aside the sale, and which was set out in the complaint, shows that the money realized from the execution sale had been paid upon preferred claims against the lumber company, and therefore it had received the benefit of the money paid for the property. It was not in the sheriff's hands, so that he could refund it to Buhne, and neither the corporation nor its assignee could retain the proceeds of the sale, and have any legal or moral right to require Buhne to surrender the property to the sheriff, nor could the sheriff retake the property without such payment. It is therefore clear that without the allegations of fraud and collusion no cause of action would have been stated; nor is it clear that with those allegations a cause of action is alleged, since the order of the court vacating the sale required the repayment of the money, and, as that order was not complied with by the plaintiff, nor any offer made to comply with it, no duty rested upon the sheriff to retake the property. Either the issue was material or the complaint wholly bad, and in either case the judgment should be affirmed.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(117 Cal. 469)

KUHLMAN v. BURNS. (Sac. 276.)¹

(Supreme Court of California. July 8, 1897.)

BUILDING CONTRACT—FAILURE TO FILE SPECIFICATIONS—PRINCIPAL AND AGENT—NEW TRIAL.

1. Plaintiff entered into a written contract with defendant to furnish all the materials and labor for a building, according to certain specifications, for a sum exceeding \$1,000. The specifications, which were a part of the contract, were not filed with it, as required by Code Civ. Proc. § 1183, and the contract was therefore void. Plaintiff contracted for all the materials and labor used by him, and defendant paid for them, on plaintiff's orders. *Held*, that plaintiff was defendant's agent, and for the materials and labor could not recover from him more than the prices paid, though plaintiff secured reductions from the regular rates.

2. Newly-discovered evidence is not ground for a new trial unless it appears that a different result would have been reached had it been introduced on the trial.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; M. F. Johnson, Judge.

Action by A. H. Kuhlman against H. F. Burns. There was a judgment in favor of plaintiff for a part of his demand, and on his motion a new trial was granted. From the

order granting a new trial, defendant appeals. Reversed.

L. T. Hatfield, for appellant. E. C. Hart and A. A. De Ligue, for respondent.

BELCHER, C. It is alleged in the complaint in this case that between the 26th day of March and the 29th day of September, 1894, plaintiff furnished for defendant, and at his request, materials and labor for the construction of a three-story brick building in the city of Sacramento, and that the balance remaining due and unpaid for the reasonable value of such materials and labor is the sum of \$1,415.37, for which judgment is asked, with interest. The answer denies all the allegations of the complaint, and alleges that during the year 1894 defendant employed plaintiff as a mechanic to do certain labor in and upon the premises described in the complaint, and that he paid to plaintiff all the money agreed to be paid to him on that behalf, and is not now, and has not at any time since the completion of the work by the plaintiff on said premises been, indebted to him in any sum whatever. The court found the value of the materials and labor furnished by plaintiff for defendant in the construction of the said building, and the amount paid by defendant on account of such materials and labor, leaving a balance of \$54.61 still due and unpaid, for which sum judgment was entered in favor of the plaintiff. The plaintiff moved for a new trial upon the grounds of errors in law occurring at the trial, insufficiency of the evidence to justify the decision, and newly-discovered evidence. After a hearing, the court granted the motion, and from that order the defendant appeals.

It appeared from the evidence introduced at the trial that the plaintiff was a building contractor, and that he entered into a written contract with defendant, by the terms of which he was to furnish all the materials and labor, with certain exceptions, necessary for the construction of the building according to certain plans and specifications, for a sum exceeding \$1,000. The contract was filed in the office of the county recorder, but the plans and specifications, which, by the terms of the contract, were made a part of it, were not so filed. The plaintiff contracted for all the materials and labor used by him in the construction of the building, and the defendant paid for the same according to the contract prices. Plaintiff testified: "I made a contract with Mr. Knox to furnish the lumber, and Mr. Burns agreed with Mr. Knox to pay for it." Mr. Wallace, a witness for plaintiff, testified: "I furnished part of the hardware used in the construction of that building to Mr. Kuhlman, the contractor. I would not take him alone for the payment of the hardware bill, and Mr. Burns agreed to pay for it, and did pay for it on Mr. Kuhlman's order." Mr. Cook, a witness for plaintiff, testified that he was an architect by pro-

¹ Rehearing denied.

cession, and drew the contract, plans, and specifications according to which the building was constructed, and acted as superintending architect during its construction. "Mr. Kuhlman constructed the building according to said plans and specifications, and the building was accepted on the 29th day of September, 1894. The work done and the material and labor was paid for by Burns or by Kuhlman with money received from Burns on my orders." Plaintiff sought to prove by his witnesses what was the reasonable or market value of the lumber, hardware, and iron used in the construction of the building, and that it was all furnished to him for a price less than its reasonable or market value, because he was a building contractor. He also sought to prove what was the reasonable value of the carpenter work or carpenter labor necessary for the construction of the building according to the contract, plans, and specifications drawn by Mr. Cook. This offered evidence was all objected to by the defendant upon the ground that it was irrelevant, immaterial, and incompetent, and the objections were sustained, and exceptions reserved. It was upon these rulings, which were specified as errors in law, that the plaintiff chiefly relied in making his motion for new trial, and the court, assuming them to have been erroneous, granted the motion. We think the court erred in granting the motion for a new trial. There was no error in the rulings complained of. The contract was wholly void, because the plans and specifications were not filed in the recorder's office. *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Barker v. Doherty*, 97 Cal. 10, 31 Pac. 1117; *Greig v. Rordan*, 99 Cal. 316, 33 Pac. 913; *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765; *Pierce v. Birkholm*, 115 Cal. 657, 47 Pac. 681. Plaintiff must be held to have been the agent of defendant (section 1183, Code Civ. Proc.), and while acting as such he could not contract to pay one price for articles purchased, and then subject the defendant to pay him a larger price for the same articles. The defendant had paid for all the materials and labor furnished, except the sum of \$54.61, and to pay this sum was, we think, the extent of his liability.

The affidavit read by plaintiff in support of his motion furnished no valid ground for granting the motion. It stated, in substance, that, after diligent search for it, plaintiff, at the time of the trial, was unable to find a book in which he kept the time of the carpenters employed on the said building; that without the book plaintiff could not testify at the trial from memory as to the number of days each carpenter employed by him worked on the building; that he had since found the book, and with it he would be able to testify to the number of days each carpenter worked on the building, and the amount each received therefor, showing a much larger amount paid for carpenter work

than he was able to show at the trial. At most, the newly-discovered evidence appears to be cumulative, and not ground for granting a new trial. Besides, it does not appear that, if the book had been present at the trial, any different result would have been reached. The order appealed from should be reversed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

(117 Cal. 473)

HEFNER v. HERRON. (Sac. 235.)

(Supreme Court of California. July 8, 1897.)

ATTACHMENT—SUBSEQUENT JUDGMENT AND EXECUTION—INSOLVENCY PROCEEDINGS—DISSOLUTION OF ATTACHMENT.

The insolvent act of 1895 (section 21) provides that an assignment in insolvency shall dissolve any attachment "made" within one month prior thereto, and vacate any judgment or execution in any action against the debtor commenced subsequently to the action in which the attachment is dissolved. A creditor began an action in a justice's court September 16th, in which an attachment was served. On the same day another creditor began an action against the same defendant in the same court. September 23d judgment was rendered for each plaintiff, and executions were placed in the hands of the constable who had made the attachment. The executions were levied on the attached property, and sale was duly made. September 24th insolvency proceedings were begun against the debtor. *Held*, that the executions were not thereby affected, since no attachment was thereby dissolved, plaintiffs' liens being by virtue of the executions only.

Department 1. Appeal from superior court, Butte county; J. C. Gray, Judge.

Action by C. P. Hefner, assignee, against H. S. Herron. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John Gale, for appellant. R. E. Robinson and Warren Sexton, for respondent.

PER CURIAM. This action was instituted by the plaintiff as assignee of the estate of the Wah Sang Yen Company, insolvent debtors, to recover possession of six tons of dried fruit, or the value thereof. At the trial no evidence was introduced on either side, and it was stipulated that the only question to be determined by the court was whether the taking of the property, as alleged in the complaint and as explained and justified in defendant's answer, was wrongful or not. The facts stated in the pleadings are, in substance, as follows: In September, 1895, the Wah Sang Yen Company was a partnership, doing business in Butte county, and the defendant was then and at all the times mentioned the duly appointed, qualified, and acting constable of Honcut township, in that county. On September 16th one Burman commenced an action against the said company in the justice's court of said township, in which a writ of attachment was regu-

larly taken out and placed in the hands of defendant for service; and under and by virtue of this writ the defendant duly levied upon, attached, and took into his possession the said six tons of dried fruit. On the same day another action was commenced by one Herron against the same defendant, and in the same court; but it does not appear that any writ of attachment was taken out and served in that case. Such proceedings were thereafter had in each of said actions that on September 23d judgment was duly given, made, and entered therein in favor of the plaintiff and against the defendant,—in the one first named for the sum of \$99.24 and costs of suit, and in the other for the sum of \$22.35 and costs of suit. Thereupon writs of execution upon said judgments were duly issued, and placed in the hands of defendant for service, and thereunder, on the same day, he levied upon and took into his possession the said dried fruit. Subsequently, after due and legal notice, he sold at public auction so much of the same as was necessary to satisfy said judgments, costs, and expenses of sale. On September 24th the creditors of the Wah Sang Yen Company filed in the superior court of said county their petition, praying that the said company, and each of the members thereof, be adjudged and declared to be insolvent debtors under the provisions of the insolvent act of 1895. A receiver was thereupon appointed, and on October 14th an order and adjudication was duly made and entered in said court, whereby the said company as a co-partnership, and each member thereof, were adjudged to be insolvent debtors within the true intent and meaning of said insolvent act. On October 24th the plaintiff herein was duly elected assignee of the said insolvent estate, and two days later he qualified as such, and the clerk of the said court duly assigned and conveyed to him all the estate, real and personal, of said company as a partnership, and the estate of each of the members thereof. On November 4th, plaintiff, as assignee, demanded from defendant possession of the property described in the complaint as a portion of the property of said estate, but defendant refused to deliver up the same, and still withholds and detains it, except 580 pounds, which he has returned. As a conclusion of law from these facts the court found that the plaintiff, as assignee of the estate of the Wah Sang Yen Company, was entitled to have and recover of and from the defendant possession of the property described in the complaint, to wit, 6 tons of dried fruit, less 580 pounds, or the sum of \$213, the value thereof, in case a delivery could not be had, without costs; and judgment was accordingly so entered, from which the defendant appealed.

Section 21 of the insolvent act of 1895 reads as follows: "As soon as an assignee is elected or appointed and qualified the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of

the debtor, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same be then attached on mesne process, as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all of the estate of the insolvent debtor not exempt by law from execution. Whenever such assignment shall dissolve an attachment as herein provided, it shall also vacate any judgment made or entered, and dissolve and set aside any execution levied in any action or proceeding against the debtor commenced subsequently to the action in which the attachment is dissolved." The object sought to be accomplished by this statute is not very evident, nor does its language very clearly express the intention of the legislature. In addition to providing that the assignment in insolvency shall dissolve any attachment "made" within one month next preceding the commencement of the insolvency proceedings, it provides that whenever such a result shall follow the assignment shall also vacate and dissolve any judgment or execution entered or levied in any action or proceeding against the debtor commenced subsequently to the action in which the attachment is dissolved. The dissolving of an attachment is the condition upon which the insolvency proceedings can produce any effect upon a judgment or execution. Two things, therefore, must occur before any judgment is vacated, or any execution is dissolved, or a levy thereunder set aside, viz. an attachment must have been dissolved in the prior action, and the judgment and execution must have been had in an action commenced subsequently to the one in which the attachment was dissolved. If an attachment issued in some action or proceeding against the defendant had been already dissolved at the commencement of the insolvency proceedings, although levied within 30 days prior thereto, the judgment and execution in the subsequent action would not be affected. On the other hand, if the action had been commenced more than a year before the commencement of proceedings in insolvency, but an attachment had not been levied until within 30 days prior thereto, the judgment and execution in the subsequent action would have been vacated, although a year may have elapsed since the action was begun. Under the facts presented in the present case there is no ground for the application of the foregoing section of the insolvent act. Prior to the commencement of the proceedings in insolvency the suit of Burgan had passed into judgment, and the defendant held the property in question by virtue of a levy under an execution is-

sued upon that judgment. The attachment previously issued therein was no longer in existence, or capable of being dissolved, and whatever lien or claim the defendant had upon the property was by virtue of the execution. The section does not provide for dissolving a lien existing by virtue of final process, except in the one enumerated instance. In the absence of any statutory provision, a levy upon property by virtue of an attachment or execution creates an interest in the property superior to the rights of the assignee in insolvency, and only an express provision to that effect will make the proceedings in insolvency paramount to such lien. *Vermont Marble Co. v. Superior Court of San Francisco*, 99 Cal. 579, 34 Pac. 326. As there was no existing attachment to be dissolved, the judgment and execution in the action of Herron could not be affected by the proceedings in insolvency. The defendant, therefore, had the right, as against the claim of the plaintiff, to retain and dispose of the property under the execution by virtue of which he had taken it, and the judgment against him is erroneous. The judgment is reversed, with directions to the superior court to enter judgment upon the findings in favor of the defendant.

(33 Or. 65)

STEMMER v. SCOTTISH UNION & NATIONAL INS. CO. et al.

(Supreme Court of Oregon. July 26, 1897.)

APPEAL—DEPOSIT IN COURT BELOW.

Plaintiff sued to set aside an award made by appraisers appointed in accordance with the provisions of an insurance policy. Judgment was rendered sustaining award, and the insurance company deposited the amount thereof in court, and plaintiff appealed. *Held*, that a motion by appellant in the appellate court for leave to withdraw the money so deposited would be denied.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by Solomon Stemmer against the Scottish Union & National Insurance Company and others. Judgment for defendants, and plaintiff appeals. Motion for leave to withdraw money on deposit in the court below. Denied.

Thos. O'Day and J. W. Whalley, for appellant. Joseph Simon, for appellees.

PER CURIAM. This is a motion by plaintiff for an order permitting him to withdraw certain sums of money deposited by the defendants with the clerk of the circuit court of Multnomah county, in pursuance of a decree rendered against them. It is alleged in the complaint that plaintiff, having been engaged in manufacturing gloves in the city of Portland, insured his stock of goods, material, machinery, tools, etc., with the defendants, and, while the policies received were in force, a fire occurred, without his fault, design, or procurement, in consequence of which his property so insured, which was then of the value of \$19,623.51, was partially

destroyed, thereby entailing a loss of \$11,741.67; that thereafter the agents of the defendants, refusing to make any proper offer to settle said loss, and taking advantage of a clause contained in each of said policies, induced the plaintiff to agree to the appointment of appraisers to adjust the same, in pursuance of which an appraiser was nominated by the plaintiff, and another by the defendants, and these persons so named selected another, who was not impartial or disinterested, but had theretofore been and was in the habit of appraising losses by fire in which the defendant companies were interested; that the persons so selected estimated the value of the property insured at the sum of \$13,088, and the loss on the stock of goods and material at \$3,213, and on the tools and machinery at \$528. The suit was instituted to set aside the award of the appraisers, and the answer of defendants, after denying the material allegations of the complaint, avers that plaintiff caused the insured property to be burned; that the loss thereby occasioned did not exceed the sum of \$3,213 on the stock of goods and material, and the additional sum of \$528 to the machinery, etc.; and pray that the said submission to arbitration and the awards made by the appraisers be decreed valid and binding, and the amount so determined by the appraisers be found to be the loss sustained by plaintiff by reason of said fire, if any loss he has sustained thereby; and for further relief. A reply having put in issue the allegations of new matter contained in the answer, a trial was had resulting in an affirmance of the award made by the appraisers, which was apportioned to the defendants as follows: Scottish Union & National Insurance Company, \$723.50; Prussian National Insurance Company, \$1,564.95; Magdeburg Fire Insurance Company, \$659.35; Westchester Fire Insurance Company, \$793.20. The defendants thereupon deposited with the clerk the several amounts so found to be due, but plaintiff, refusing to accept the same, appeals from the decree thus rendered, and moves in this court for an order permitting him to withdraw the sums so deposited, without prejudice to his right of appeal. It has been held in this state that where the pleadings admitted a certain amount to be due at all events, and such sum had been voluntarily tendered or paid after judgment or decree, the amount so tendered or paid may be accepted by the prevailing party, without waiving his right of appeal: *Construction Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764. "A party," says Cockrell, C. J., in *Bolen v. Cumby* (Ark.) 14 S. W. 926, "may prosecute his appeal from a judgment partly in his favor, and partly against him, even after accepting the benefit awarded him by the judgment, provided the record discloses that what he recovers is his in any event; that is, whether the judgment be reversed or affirmed. But he waives his right to an appeal by accepting a benefit which is incon-

sistent with the claim of right he seeks to establish by the appeal." See, also, 2 Beach, Mod. Eq. Prac. § 926, and notes. The plaintiff, realizing the force of the rule announced in these cases, and that his receipt for the moneys so deposited would be tantamount to an affirmation on his part of the award which he seeks to set aside, refused to accept the amount so decreed by the court. The effect of granting plaintiff's motion would be a practical affirmation of the decree appealed from, without a hearing on the merits; and, since he has refused to withdraw the money for fear of the consequences on the right to maintain the appeal, we, without attempting to pass upon the issues made by the pleadings, must also decline to make the order requested, for fear our act might be construed as legislating in the interest of the future conduct of the parties, instead of applying the law to their past transactions. The motion must therefore be denied, and it is so ordered.

FOWLER v. FOWLER.

(Supreme Court of Oregon. July 26, 1897.)

HUSBAND AND WIFE—SEPARATION—LIABILITY OF HUSBAND FOR WIFE'S SUPPORT.

In a proceeding under Laws 1889, p. 92, to compel a husband to contribute to his wife's support, the wife, if living apart from her husband, must allege and prove that the separation is without her fault, and that he has, without just cause, neglected or refused to support her.

On rehearing. Reversed.

For original opinion, see 48 Pac. 692.

BEAN, J. The statement in the original opinion, that the record affirmatively shows that all the testimony in the case is not here is an error into which the court was led by a statement of one of the counsel, made at the opening of the hearing, and noted by the stenographer. From the certificate of the trial judge, however, to which our attention has been called by this petition, it appears that the record before us does contain "all the evidence in the case," and it will therefore be necessary to ascertain whether it is sufficient to support the order. The act of the legislature upon which the proceeding is based provides "that it shall be lawful for any married woman to apply to the circuit court of the county in which she resides for an order upon her husband to provide for her support and the support of her minor children, if any, by said husband living with her," and that "if it shall appear to the court, after hearing the parties, that said husband is able to support or contribute to the support of his wife and said children, if any, and that he neglects or refuses to perform his duty in that respect," it shall have power to make such decree as to her support as shall be

equitable, in view of the circumstances of both parties. Laws 1889, p. 92.

In her petition the plaintiff avers that she is living separate and apart from defendant, and that such separation is without fault on her part; and this was a material issue in the case. To entitle a wife living separate and apart from her husband to prevail in a proceeding under this statute, she must not only allege, but she must show by competent evidence, that the separation is without her fault, and that the husband has, without just cause, neglected or refused to support her. The statute was not designed to change the rule of the common law as to the liability of the husband for the support of his wife living apart from him. It was intended to give her a remedy directly against him, instead of having it worked out through some third person, as it had to be at common law. But it is only in cases where the husband could be compelled at common law to pay for necessities furnished his wife, living separate and apart from him, that she is entitled to an order for support under this statute. In either instance she must have a just cause for the separation. The husband's duty to support his wife is conditioned upon her not breaking up the marital relation without his fault or consent, and therefore, if she is living separate and apart from him, she must allege and prove that the estrangement is without her fault, before she can compel him to contribute to her support, under the provisions of the statute. Bish. Mar. & Div. §§ 1223, 1228; Weigand v. Weigand, 41 N. J. Eq. 202, 3 Atl. 699; Anderson v. Anderson, 45 Ill. App. 108; Jenkins v. Jenkins, 104 Ill. 134; People v. Naehr, 30 Hun, 461. Now, in this case there is not a particle of evidence in the record showing or tending to show that the petitioner is justified in living apart from her husband. It appears therefrom that she and her husband were married September 24, 1874, and still are husband and wife, and have no children; that, since the hearing on a former petition for support filed by the plaintiff, the defendant has not requested the plaintiff to live with him, and has made no provision for her support or maintenance, although requested to do so; that she has no means of support, and is unable to work. And this is the substance of all the evidence in the case, and wholly fails to show that the separation is without the fault of the petitioner. It is true, the court finds that she is without fault, but this finding is not supported by the evidence; and whatever knowledge or information the court may have had in relation to that matter, derived from evidence produced in former proceedings between these same parties, could not be used to support the judgment or order in this particular case, unless in some way made a part of this record. It follows from what has been said that the order from which this appeal is taken is erroneous, and must be reversed.

DODGE v. BIRKENFELD.

(Supreme Court of Montana. July 10, 1897.)

MORTGAGES—PAYMENT TO AGENT.

Where a note secured by mortgage is assigned by a mortgagee, and payment by the mortgagor, without knowledge of the assignment, is made to one whom he believes to be the agent of the original mortgagee, before the mortgage is due, and without production of the note or mortgage by such agent, it is not binding on the assignee of the mortgage, where neither the original mortgagee nor the agent to whom payment is made is shown to be the agent of such assignee.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

The plaintiff, Elizabeth Dodge, sued the defendant, A. Birkenfeld, to recover the amount of a promissory note, dated at Helena, Mont., October 6, 1890, and due October 6, 1893, made by George H. Pew, in favor of M. Bolles & Co., and interest thereon, and for judgment in foreclosure of a mortgage given by said George H. Pew and wife to M. Bolles & Co., and assigned to plaintiff. The defendant, Birkenfeld, answered, pleading payment and satisfaction, and setting forth that he had purchased the mortgaged premises on November 1, 1890, and received a deed therefor from Pew and wife; that he notified Wallace & Thornburgh, of Helena, agents of the owner, and holder of said note and mortgage, of his purchase of the property, and on April 14, 1891, paid to said Wallace & Thornburgh, agents as aforesaid, the whole amount due on said note and mortgage, and that at the time of said payment Bolles & Co. appeared to be the owners of the mortgage; that Wallace & Thornburgh gave to defendant a receipt for the amount of his payment, and subsequently, on July 18, 1891, as agents of Bolles & Co., Wallace & Thornburgh placed on record a duly-executed satisfaction of the Pew mortgage. In reply to defendant's answer, plaintiff denied payment, and alleged that the satisfaction of the mortgage was a forgery. Upon the trial the court refused to submit to the jury the testimony introduced by the defendant, offered to show that Bolles & Co. were the agents of the plaintiff in relation to the mortgage and note, and that Wallace & Thornburgh were their subagents, on the ground of the insufficiency thereof. Judgment was entered in favor of the plaintiff. Defendant moved for a new trial, which was denied him; and from the order denying the same, and from the judgment, defendant appeals. Affirmed.

A. C. Botkin and M. Bullard, for appellant.
Arthur J. Craven, for respondent.

PER CURIAM. It appears from the testimony that the plaintiff, Mrs. Dodge, a resident of Essex, Mass., on March 5, 1891, bought the note and mortgage sued on, from M. Bolles & Co., of Boston, for \$1,200, and on that day received a formal written assignment of said note and mortgage, all of which were delivered to her by Bolles & Co. Mrs. Dodge de-

posed that the note, mortgage, and an interest coupon therewith were actually in her possession from the day she bought them until some time in April, 1893, when she sent them to Bolles & Co., to be by them forwarded to Helena, Mont., for collection. After Bolles & Co. transmitted the papers to Helena, Mrs. Dodge communicated directly with her counsel in that city. She knew nothing of Wallace & Thornburgh, and had no knowledge of any attempted satisfaction of the mortgage in Montana. The record also shows that in November, 1890, the defendant, Birkenfeld, purchased from one Pew and wife the real estate described in the mortgage involved, and received a deed therefor. Mr. Birkenfeld notified Wallace & Thornburgh, whom he honestly believed were the agents of the owner and holder of the Pew mortgage and note, of his purchase; and on April 14, 1891, he paid Wallace & Thornburgh the whole amount of the Pew note and mortgage, intending to free the property of the mortgage lien, which at that time appeared to be owned by M. Bolles & Co. Wallace & Thornburgh gave Birkenfeld a receipt for his money, and on July 18, 1891, delivered to him a written satisfaction of the mortgage, signed by Bolles & Co.

The point involved was whether payment by Birkenfeld to Wallace & Thornburgh was payment to plaintiff. The court directed the order of proof, and required the appellant to first produce his evidence tending to prove that M. Bolles & Co. were the agents of plaintiff and respondent, before presenting evidence of any agency between M. Bolles & Co. and Wallace & Thornburgh. This ruling was evidently made to simplify the conduct of the trial, for plainly, if the evidence to prove that Bolles & Co. were plaintiff's agents was not sufficient to go to the jury, testimony tending to show an agency between Wallace & Thornburgh and Bolles & Co. was immaterial and of no consequence at all. The case was accordingly tried upon the foregoing theory, and, without reciting the testimony offered, we think it was correctly determined that the defendant had failed to present any evidence from which a jury could reasonably infer that Bolles & Co. were plaintiff's agents, either to receive payment of the note or to accept from Birkenfeld or any one else the amount due by Pew two years and a half prior to the date of the maturity of the note. As we have said, the relations that existed between Wallace & Thornburgh and Bolles & Co. did not affect Mrs. Dodge, for they were not her agents, except, possibly, to transmit the papers to Montana for collection, but with no other power at all. The note to secure payment of which the mortgage was given was negotiable paper, subject to transfer before maturity. The mortgage followed the note. It therefore made no difference whether or not the assignment of the note by Bolles & Co. to Mrs. Dodge was on record.

The case is easily decided by the controlling principle that a person dealing with one who assumes to be the agent of another is bound

to ascertain the scope of such person's authority; otherwise, he acts at his peril. Mr. Birkenfeld dealt with Wallace & Thornburgh at his own risk. It was a most incautious act for him to pay them the amount of the note not yet due, without demanding of and receiving at their hands the note itself, all on the assumption that they were the agents of the owners of the paper. In *Smith v. Kidd*, 68 N. Y. 130, it was said by the court: "If money be due on a written security, it is the duty of the debtor, if he pays to an agent, to see that the person to whom he pays it is in possession of the security; for, though the money may have been advanced through the medium of an agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor." The case is one of considerable hardship upon Mr. Birkenfeld, who must pay over again; but, for aught that appears in the record, it might be much more of a hardship to deny to Mrs. Dodge her right to recover the money she paid for the mortgage. Both principal parties are innocent. The only difference in their respective attitudes before the court is that Mrs. Dodge was not imprudent in the management of her interests, while Mr. Birkenfeld was in his. Under the circumstances of the case, the law is that defendant should lose by the unfaithfulness of Wallace & Thornburgh, rather than that plaintiff should. We find no error in the record, and must affirm the judgment. Affirmed.

BUCK, J., disqualified.

EDWARDS v. SPALDING et al.

(Supreme Court of Montana. July 10, 1897.)

On petition for rehearing. Denied.

For former opinion, see 49 Pac. 443.

PER CURIAM. Counsel for appellant, in the petition for rehearing in this case, insist that the court erred in the opinion heretofore delivered in holding that the lease in controversy was partnership property of the firm of the N. Dysinger Company, and that we erred also in holding that the appellant could not invoke the statute of frauds as a defense to this action. It is clear from a consideration of the petition that counsel differ from the court as to the facts relating to those issues, as well as the law applicable thereto. We are given no good reason in the petition why we should change our views on these matters, as expressed in our opinion.

Counsel further insist that we are wrong in saying in the opinion that "there is no allegation in the special defense that plaintiff accepted appellant's assigns as her tenants." When this language is considered and construed in connection with the language of the opinion immediately preceding it, there will be left no room for misunderstanding

what the court meant, and in substance said, —that there was no direct or positive allegation of release pleaded, or any facts stated that would in law amount to a release. The release is alleged as resulting from giving notice to pay rent, and accepting the same, by plaintiff from appellant's assigns. This alone does not, in our judgment, amount to a release, or constitute in law a sufficient allegation of release. We are clearly of the opinion that the case was rightly determined on its merits. The petition for rehearing is denied.

RAMSDELL v. CLARK.

(Supreme Court of Montana. July 10, 1897.)

NEW TRIAL.—SEPARATE CAUSES OF ACTION.—RECEIPT IN FULL.—BURDEN OF PROOF.—PAYMENT.

1. A complaint averring that defendant had leased a certain mine from plaintiff, and alleging, as a first breach, that defendant had worked the mine for six months, but had failed to pay over half of the net proceeds, as provided by the lease, and, as the second breach, that he had failed to work the mine in a workmanlike and substantial manner, and, as the third breach, that defendants had failed to work the mine at all after six months, sets forth three distinct causes of action.

2. Where a complaint sets forth three distinct causes of action, and the issues have not been blended, a new trial can be granted only as to those issues which have been improperly tried, under section 1170, Code Civ. Proc. 1895, defining a new trial to be a re-examination of an issue of fact in the same court after a trial.

3. Where, in an action on a lease, defendant introduced a receipt of "payment in full," under the lease, and it is not denied that plaintiff received the money specified therein, defendant established a *prima facie* defense, and the burden was on plaintiff to destroy the effects of the receipt.

4. Where, in an action for rent, defendant pleads that the lease has been modified, and also introduces a receipt in full of all claims under the lease, whether it was evidence of a settlement under the original lease or of the lease alleged to have been modified is immaterial, where the terms of the lease are not contradicted.

5. Where, in an action for damages for failure to work a mine under the terms of a lease, there was no evidence of damage, and the jury were instructed that, if they found for plaintiff, they could only assess nominal damages, no new trial should be granted on a finding for defendant.

Appeal from district court, Silver Bow county; John J. McIlhatton, Judge.

Action by Joseph Ramsdell, in his own right and as administrator of the estate of Clarissa Ramsdell, deceased, against William A. Clark. Verdict for plaintiff. From an order granting a new trial, defendant appeals. Modified.

This action was upon a lease entered into between the respondent (plaintiff below) and appellant (defendant below), on October 20, 1887. Under the terms of the lease, defendant was to take possession of a certain mine, situated in Silver Bow county, and to work and mine the same in "a good, workmanlike, and substantial manner, and to the best advantage," for one year, unless he negotiated a sale of the said property within that period. He was to "reduce and smelt the ore therefrom,

and concentrate the same," at his own expense, and sell the products, and, after deducting all expenses, he was to pay one-half the net proceeds to the plaintiff. Defendant took possession of the mine on the day of the execution of the lease, but worked the same for a period of six months only. Plaintiff instituted an action against defendant in the district court of Silver Bow county on January 30, 1892. The complaint alleged three breaches of the covenants contained in the lease. As the first breach it averred that defendant had worked the mine for six months, but had failed to pay over to plaintiff one-half of the net proceeds realized from the ores extracted. As a second breach it alleged that defendant had failed to work the mine in a good, workmanlike, and substantial manner during said six months, to the damage of plaintiff in a certain sum. The third breach set forth was that the defendant had failed to work the mine at all after the expiration of said six months, to the damage of plaintiff in a certain sum. The defendant answered the complaint, denying certain of the allegations therein. He also averred that the terms of the lease had been modified as to accounting in respect to concentrates. As a defense to the first breach, it was alleged that an accounting had been had with plaintiff under the lease, as modified on July 10, 1888, and that he (plaintiff) had been paid, and had accepted, in full settlement of his claims, what was found to be due him. A replication was interposed, which, among other denials, set forth that there had never been an accounting, and that the plaintiff had never been paid, and had never accepted, any sum in full settlement for what was due him by reason of the first breach of the lease. The case was tried to a jury. Upon the trial the defendant introduced in evidence the following receipt: "Dec. 6, '94. G. H. M. Office of W. A. Clark, Butte, Montana, 7-10, 1888. Received of Ramsdell Parrott lease, at the hands of W. A. Clark, five hundred and sixty and $\frac{79}{100}$ dollars, payment in full for balance of royalty on ore and supplies. \$560.79. [Signed] Joseph Ramsdell." The jury returned a verdict in favor of defendant. A motion was made for a new trial, which was granted. The appeal is from the order granting the motion for a new trial.

Corbett & Wellcome, for appellant. J. W. Cotter and Wm. Scallon, for respondent.

BUCK, J. (after stating the facts). The appellant concedes that there was no error in the order of the lower court granting a new trial so far as the second alleged breach of the lease is concerned, because the evidence was conflicting on that branch of the case. He objects, however, to the alleged order in so far as it grants a new trial as to the first and third breaches of the lease. Does the complaint contain more than one cause of action? We are of the opinion that three sep-

arate causes of action are set forth by plaintiff in his complaint. It is true each is connected with the same contract, but each differs essentially from the other two. Can a new trial be granted as to one or more of several causes of action included and tried in the same suit? We are of the opinion that this can be done where, as in this case, the issues have not been blended, and each cause of action remains distinguishable and separable even after verdict. Section 295, div. 1, Comp. St. 1887, and section 1170, Code Civ. Proc. 1895, define a new trial to be "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referees." The case of *Town Co. v. Neale* (Oal.) 20 Pac. 372, lays down this rule under an identical statute. See, also, *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, and 7 Pac. 74. Where the issue or issues in one cause of action have been properly tried, and those in another cause of action in the same suit have been improperly tried, it is the duty of the trial court, in passing upon a motion for a new trial, to grant it only as to those issues which have been improperly tried, where this can be done readily, and without confusion resulting upon the retrial.

Did the lower court err in granting a new trial as to the first cause of action set forth in plaintiff's complaint? In this connection it becomes necessary to investigate the law as to the force and effect of a receipt for money paid. Parsons, in his work on Contracts (8th Ed., 1893, vol. 2, p. 671), says: "A receipt for money is peculiarly open to evidence. It is only prima facie evidence either that the sum stated has been paid, or that any sum whatever was paid. It is in fact not regarded as a contract, and hardly as an instrument at all, and has but little more force than the oral admission of the party receiving. But this is true only of a simple receipt. It often happens that a paper which contains a receipt, or recites the receiving of money or of goods, contains also terms, conditions, and agreements or assignments. Such an instrument, as to everything but the receipt, is no more to be affected by extrinsic evidence than if it did not contain the receipt; but, as to the receipt itself, it may be varied or contradicted by extrinsic testimony in the same manner as if it contained nothing else." Bishop expresses a similar view in his book on Contracts (Enlarged Ed., 1887, § 176). From general expressions as to the rules governing a receipt in many opinions, it would seem that some of the courts have overlooked this dual character of which a receipt is capable. Thus, it is frequently asserted a receipt is not a contract; a receipt for money is only prima facie evidence of the truth of the statements therein contained; the signer of a receipt is not estopped by it; and no qualification is suggested or distinction expressed as to any contractual feature it may possess. This naturally gives rise to confusion on the subject. We shall quote from some of the opinions

which have discussed the law pertaining to receipts, particularly as to what recitals therein may be varied or controlled by extrinsic evidence.

In *Ryan v. Ward*, 48 N. Y. 204, Hunt, C., in his opinion, says: "There is but a single question of law in the case. During the delivery of the hides, payments for them were usually made weekly. On several of these occasions, receipts were given for the precise amounts paid, which were expressed to be in full for the hides. In fact, the payment was not in full, but a further sum was then due. This was known to the plaintiff. There was no error, and there was no fraud. Is the plaintiff cut off by these receipts from now recovering the balance actually due him?" He answers the question emphatically in the negative. Proceeding in a subsequent part of the opinion, he says: "The cases in which a receipt has been held to be conclusive upon the party giving it will be found to be cases where the claims or accounts were in dispute, and a compromise was agreed upon, or where a receipt was given for unliquidated damages." Earl, C., in his opinion in the same case, says: "It has long been settled in this state that a receipt furnishes mere prima facie evidence of the facts stated therein, and that it may be controverted or explained by parol evidence. [Citing authorities.] This grows out of the fact that a receipt is not a contract. It is a mere declaration or admission in writing. Where a contract is embodied in the receipt, then, so far as the receipt contains a contract, it cannot be controverted or explained by parol. It has never been intimated in any case in this state that it made any difference whether the receipt was for a specified sum of money or in full. The same rule applies, and no reason is apparent why it should not. A receipt for a specified sum of money contains a declaration that so much has been paid upon account or for a particular purpose. A receipt in full contains a declaration that a certain sum has been paid in full of all claims of a certain kind or of all demands. Neither kind of receipt embodies any contract. Both furnish only prima facie evidence, and are valuable only as such. Both are equally open to explanation or contradiction."

In *Coon v. Knap*, 8 N. Y. 402, the receipt under consideration was as follows: "Received, Brookfield, July 11th, 1849, of Wm. D. Knap, \$40.00, in full for damage done us by the stage accident of the 13th of June last." The actual payment of the \$40 mentioned in this receipt was not questioned. There was no mistake or fraud pleaded as to the obtaining of the receipt. The court held that it was a contract in the nature of a release, the terms of which could not be varied by parol evidence.

In *Goodwin v. Goodwin*, 59 N. H. 548, the receipt was as follows: "In the Matter of the Proof of the Will of Elisha Goodwin, Jr. In consideration of twenty-five hundred dollars to me paid by Martha A. Goodwin, ex-

ecutrix of said will, I hereby waive all right to contest said will or the proof thereof, and all claim I have or might have as heir of said deceased. [Signed] Elisha Goodwin." The court held, after discussing the distinction between a receipt regarded as a contract and as a mere acknowledgment: "The writing before us, denominated a 'receipt,' partakes of this double nature: In so far as it may be regarded as a receipt, it is capable of explanation and contradiction with regard to any fact erroneously recited; but in its main features it is more properly to be regarded as a contract, made binding upon the plaintiff by his signature, and on the defendant by being delivered to and accepted by her. In this aspect it could no more be varied or controlled by oral evidence than any other written contract between the parties. * * * By the terms of the writing in this case, the signer, in consideration of \$2,500, agrees that he will waive or release all claim he has or might have as heir of the deceased. The contract is positive. It might, perhaps, be avoided by showing that the plaintiff's signature was obtained by fraud, or through a mistake or misapprehension of material facts. But nothing of that sort is claimed; and, the interpretation of written contracts being a matter for the court to pass upon, parol evidence is not admissible to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used. If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence that the signer intended to express some other meaning is not admissible. [Citing authorities.]"

Krutz v. Craig, 53 Ind. 561, was a case wherein the plaintiff had given a receipt in the nature of a release to the defendant. The court there said: "A receipt is the written acknowledgment of the receipt of money or a thing of value, without containing any affirmative obligation upon either party to it,—a mere admission of a fact, in writing. But, when a receipt contains stipulations which amount to a contract, it becomes a contract, and must be governed by the law of contracts, and can be avoided only by fraud, mistake, failure of consideration, rescission, or some way known to the law."

In *Morris v. Railway Co.*, 21 Minn. 91, the plaintiff had presented to the defendant a bill for labor done and materials furnished under a contract between them. Upon this bill was the following: "Winona Division. Received of Saint Paul and Pacific Railroad Company, by the hands of William Crooks, chief engineer, three thousand four hundred and ninety-three dollars, in full for the above account. [Signed] Chas. A. F. Morris." It appeared from the evidence that the sum receipted for had not been paid to plaintiff by defendant. The court said: "A receipt

may be either a mere acknowledgment of payment, or it may also contain a contract. In the former case, and so far as it goes only to acknowledge payment, it is merely prima facie evidence of the fact of payment, and may be contradicted by oral testimony. But, in so far as it contains a contract, it stands upon the footing of other writings containing contracts, and cannot be contradicted or varied by parol. [Citing authorities.] As the receipt under consideration does not purport to set out the terms of the contract to which it refers, it cannot be said to contain that contract; neither can it be said to contain 'a contract of acquittance, release, and discharge,' any more than does any receipt in full. It must be regarded as a mere acknowledgment of payment, and, as such, its prima facie effect, as establishing full payment of the plaintiff's claim, may be overcome by parol explanation showing that the full payment acknowledged was not in fact made. * * * If the case were one of a compromise, or of a settlement of unliquidated damages, a somewhat different effect might perhaps be given to the receipt."

In *Tisloe v. Graeter*, 1 Blackf. 353, an early Indiana case, the receipt read: "Received of P. Tisloe 200 dollars for safe-keeping." It was held that the defendant could not prove by parol testimony that the money was not deposited for safe-keeping.

In *Guyette v. Town of Bolton*, 46 Vt. 228, the plaintiff had given the defendant a receipt for \$120, "in full as town bounty as a volunteer re-enlisted in the United States service for their credit on the quota of said town." The dispute was between an ex-soldier and the town as to a bounty for having enlisted as a volunteer in the United States army during the War of the Rebellion. The court in this case said: "The defendant also requested the court to charge the jury that the receipt executed by the plaintiff is prima facie evidence that the \$120 was accepted by him in full satisfaction of his claim, and that the burden is on the plaintiff to show that it was not so received. The court declined so to charge, but did charge that, 'if the plaintiff received the \$120 in full of all claim for bounty on the town, it is a full settlement, and the plaintiff cannot recover, and that the receipt tends to show a settlement in full, but that it is not conclusive; that a receipt may be explained and contradicted by testimony of witnesses.' This charge, we think, does not give the defendant the full benefit of the legal effect of the receipt. Speaking of it as a piece of evidence tending to show a settlement in full leaves the jury to infer that of itself it is not sufficient to make out a prima facie defense, but that the defendant must show something more; whereas the receipt of itself is a full and perfect defense prima facie, and casts upon the plaintiff the burden of explaining it, or in some way destroying its effect by his proof."

It can be seen from these quotations, *supra*, that, even keeping in mind the distinction between a receipt regarded as a mere acknowledgment, and as possessing a contractual feature, still the rule of law is not absolutely clear when it is to be applied to the language of each particular receipt. Thus, contrast the language of the receipt in the case of *Coon v. Knap*, *supra*, and the language of the receipt in *Morris v. Railway Co.*, and of those in *Ryan v. Ward*, *supra*. All these cases we have cited, however, recognize the distinction given by Parsons and Bishop. The mere expression contained in a receipt "in full payment" does not necessarily render the paper a contract in the nature of a release or waiver. Whether a receipt possesses any contractual feature or not must often be determined from its entire language, and also, at times, from the language in connection with the circumstances under which it was given. If A., to whom B. is indebted in the undisputed sum of \$200, is paid by the latter \$100, and signs a receipt for the sum of \$200, or, mentioning the sum paid, acknowledges payment in full of the debt, nevertheless A., in an action against B. for the unpaid balance, without showing any fraud, mistake, or other excuse for having signed the receipt, can contradict it by extrinsic evidence, and show that only \$100 was paid. It would only be evidence of B.'s having paid the debt just as an oral admission proved against A. would be. If, however, B. has been indebted to A. on an account the amount of which has been in dispute between them, a receipt by A. definitely specifying the entire account, and acknowledging a sum received as payment in full of the same, would possess a contractual feature; and, in order to contradict or vary the terms of it by extrinsic evidence in so far as it would be a contract, A. would be required to observe the rules of law applicable to contracts, and could not treat it in evidence against him as if it were of no greater weight than a mere oral admission on his part.

Let us apply these principles to the receipt given by the plaintiff, and relied upon by the defendant, in the case before us. As to the circumstances under which it was given, Wethey, a witness for defendant, testified that there had been a dispute between plaintiff and defendant as to one or two items of the account due under the terms of the Ramsdell-Parrott lease, and that the last settlement had between them was subsequent to the expiration of the six months during which the defendant had worked the mine. The receipt specifies the lease, and recites that a certain sum has been received by plaintiff as "payment in full for the balance of royalty on ore and supplies." The literal terms of the paper stand admitted, and Wethey's testimony as to it is uncontradicted. It is not suggested that the plaintiff did not actually receive the sum of money specified therein. After the admis-

sion in evidence of this testimony and the receipt, the defendant had established a prima facie defense as to the first cause of action. The burden was then upon the plaintiff to destroy the effect of this receipt. He failed to do so. It was incumbent upon him either to have had some excuse pleaded in order to have justified the introduction of oral testimony to vary the terms of or contradict the receipt; or, if he had been taken by surprise when the instrument was introduced, he might have asked leave to amend his pleadings; or he might have introduced evidence for the purpose of varying its terms, and, had he been allowed to do so without objection, he could have asked leave to conform his pleadings to this line of proof. But he had no excuse set forth in his pleadings, and followed neither of the other courses suggested.

It is contended by appellant that the trial court's instructions as to this receipt were conflicting, and based upon different theories as to its legal effect. We think that the criticism of the instructions in this respect is correct.

It is urged that the defendant pleaded a settlement under a modification of the lease, and offered the receipt in evidence, for the purpose only of showing a settlement under the lease as modified. It is true that he did so plead; but when this contract receipt was admitted in evidence without objection, whether it was evidence of a settlement under the lease as set forth in the complaint, or under the lease as alleged to have been modified, became immaterial, in the absence of any contradiction of its terms. This contract receipt was, as said in the case of *Guyette v. Town of Bolton*, supra, "a full and perfect defense prima facie, and cast upon the plaintiff the burden of explaining it, or in some way destroying its effect by his proof."

Appellant also insists that there was some evidence before the jury tending to weaken the effect of the receipt. Possibly there was some testimony which might have suggested a doubt as to the abstract justice of the settlement recited in the instrument. But there was no direct positive attack upon the receipt, such as should have been made in order to weaken or destroy its effect. Indirectly and by inference alone could the defense it constituted have been ignored. At the close of the trial, so far as the evidence was concerned, the defendant was entitled to a peremptory instruction that the jury should find in his favor as to the first cause of action. Despite, then, of erroneous instructions, the pleading in the answer of a modification of the lease and a settlement thereunder, and any mere possible inferences from the testimony to weaken the force of this receipt, the lower court committed error in granting a new trial as to plaintiff's first cause of action. We are also of the opinion that error was committed in grant-

ing a new trial as to the third cause of action set forth in the complaint. The plaintiff had not shown that he had sustained any damage by reason of the defendant's failure to work the mine after the first six months, and the jury had properly been instructed that, even if they found for plaintiff on this branch of the case, they could only assess nominal damages. For these reasons, the order granting the motion for a new trial must be modified. The case is remanded, with directions to the lower court to exclude from this order granting a new trial the first and third causes of action set forth in plaintiff's complaint, and to allow the order to stand only as to the second cause of action therein. Remanded.

PEMBERTON, C. J., and HUNT, J., concur.

(58 Kan. 461)

McDONALD v. CITIZENS' NAT. BANK OF CONCORDIA et al.

(Supreme Court of Kansas. July 10, 1897.)

PETITION IN ERROR—PARTIES.

Purchasers of land at a sheriff's sale are necessary parties in this court to a proceeding to reverse an order of the district court confirming the sale, and directing a deed to be made to the purchasers. Where the proceeding in this court is on a case-made, which was not served on the purchasers, and to which they are not parties, the petition in error will be dismissed.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Action by the Citizens' National Bank of Concordia against Charles W. McDonald. From an order overruling a motion to set aside a sale of real estate, defendant brings error. Dismissed.

Kennett & Peck and C. W. McDonald, for plaintiff in error. Pulsifer & Alexander, for defendants in error.

ALLEN, J. In this proceeding the plaintiff in error seeks to reverse orders of the district court overruling a motion to set aside a sale of real estate, and sustaining a motion to confirm the sale. Both the plaintiff in the action and the purchasers at the sale are named as parties in this court, but the case-made was never served on the purchasers. A motion is now made to dismiss on the ground that Rigby and Wilson, the purchasers, are not bound by the case-made, and that no review of the orders can be had without their presence. It has been repeatedly held that a purchaser at a sheriff's sale may prosecute a proceeding in this court to reverse an order of the district court setting aside the sale. *Moore v. Pye*, 10 Kan. 246; *Cowdin v. Cowdin*, 3 Kan. 528, 3 Pac. 369; *Jones v. Carr*, 41 Kan. 320, 21 Pac. 258. The purchaser, by his bid, the payments of the purchase money, and the sheriff's return of the sale, becomes a party to the record. As in the case last cited, his interests may be adverse to those of both the plaintiff

and the defendant. He is not obliged to depend on either one of them to protect his rights, nor has either of them authority to speak for him unless he gives it. In this case the purchasers paid \$3,000 for the property. They have a right to be heard in this court on a case properly served on them before any order is made affecting their rights, and a reversal of the order confirming the sale would certainly affect their title to the property under their purchase. The suggestion that the purchasers did not appear at the hearing of the motion in the district court, and that they therefore were not parties there, and need not be made parties here, is without force. They were constructively present when the motions were heard, for it was their duty, after having made the bid and paid the purchase money, to protect their interests when the motions were heard. They were bound by the order of confirmation, and would have been equally bound by an order setting aside the sale. The petition in error is dismissed. All the justices concurring.

(58 Kan. 478.)

YORK v. BARNES et al.

(Supreme Court of Kansas. July 10, 1897.)

TAX DEED—VALIDITY—RIGHT OF APPEAL.

1. The taxes on a city lot being delinquent, it was offered for sale by the treasurer, and the north four-tenths thereof sold for the whole amount of taxes levied on the lot. A tax deed issued on this sale recites that the north four-tenths was subject to taxation, and that it was sold for the amount of taxes levied on it, but the amount of taxes recited in the deed was the amount levied against the whole lot. *Held*, that when attacked before the statute of limitations has run, the deed is voidable, and conveys no title.

2. A judgment declaring the tax deed invalid, but requiring the defendant to pay a sum adjudged to be a lien on the land for taxes paid by the purchaser, having been rendered, and the defendant having paid the amount into court for the use of the plaintiff, he cannot thereafter prosecute a petition in error to reverse the judgment requiring the payment of such taxes.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by Charles H. York against A. C. Barnes and G. W. E. Griffith. Judgment for defendants, and plaintiff brings error. Affirmed.

David Ritchie, for plaintiff in error. Burch & Burch and Garver & Larimer, for defendants in error.

ALLEN, J. This action was brought by Charles H. York against A. C. Barnes and G. W. E. Griffith to quiet his title to the north four-tenths of lot No. 139 on Santa Fé avenue, Salina. The defendants filed a long answer, denying the plaintiff's title, and asking that his claim be declared invalid. The plaintiff claimed title under a tax deed to H. G. Pershing and a quitclaim deed from Pershing to him. The defendant Barnes claimed title to the whole lot under a sheriff's deed based on a mortgage for \$15,000, executed by Kaw

Tribe, No. 11, of the Improved Order of Redmen to the Western Farm Mortgage Trust Company, and by it assigned to him, and a foreclosure of the mortgage and sale of the lot to him. The trial court held the tax deed invalid, but found that the plaintiff had a valid lien for taxes paid and interest for \$168. The plaintiff brings the case here, alleging error in the judgment, and the defendants file a cross petition in error, alleging error against them in requiring the payment of the taxes. The tax deed under which the plaintiff claims recites that the north four-tenths of lot 139 was subject to taxation for the year 1888, and that the north four-tenths was sold for the taxes thereon. In fact, the sale was made for the taxes levied on the whole of lot 139, and the amount of taxes stated in the deed is the amount due on the whole lot. As the action was commenced within a short time after the tax deed was issued, this untruthful recital of a material fact is sufficient to avoid the deed, and the court rightly held it invalid, and that the plaintiff had no title. It is unnecessary to enter into a consideration of the questions attempted to be raised by the defendants' cross petition in error, for in the journal entry of the judgment, immediately after the order requiring the payment of \$168 to plaintiff, we find this recital: "Whereupon the defendant A. C. Barnes again tenders to the plaintiff in open court the sum of \$173.10 lawful money. In accordance with the findings of fact and conclusions of law herein, which tender was by the plaintiff refused. Said sum was thereupon paid into court by the defendant A. C. Barnes for the use of the plaintiff under the judgment rendered herein." The defendant, having voluntarily complied with the judgment so far as it is adverse to him, and having paid the money into court for the use of the plaintiff, is in no position to insist on errors in its rendition. The judgment is affirmed. All the justices concurring.

(58 Kan. 502.)

STATE v. GEARY.

(Supreme Court of Kansas. July 10, 1897.)

CRIMINAL LAW—TRIAL—PRELIMINARY EXAMINATION—AMENDMENT—JURY—IMPANELING—BYSTANDERS.

1. After a justice of the peace has certified to the court the record of a preliminary examination of an accused person, held by him for trial upon a charge of crime, he may, upon such trial, by leave of the court, complete such record in any respect in which it is deficient, by additional entries therein, not inconsistent with the record as previously made and certified.

2. Under the statute relating to the selection, summoning, and service of jurors in counties having over 30,000 inhabitants (chapter 166, Laws 1887), the court may, as in like cases in other counties, complete a jury panel from among the bystanders, when there shall not be regular jurors enough present for service.

(Syllabus by the Court.)

Appeal from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Bull Geary was convicted of robbery, and appeals. Affirmed.

F. E. & J. A. Smith, for appellant. L. C. Boyle, Atty. Gen., S. C. Miller, and I. F. Bradley, for the State.

DOSTER, C. J. The defendant was charged by information with the crime of robbery. Upon the trial in the court below, he filed a plea in abatement, alleging that he had not been accorded a preliminary hearing. In support of his plea, he introduced in evidence the transcript of the justice of the peace before whom he had been brought, and who had certified his case to the trial court. This transcript showed that on October 13, 1896, a complaint was filed charging defendant with the crime of assault with intent to commit robbery, and not robbery itself; that on the same day a warrant of arrest, reciting the offense charged in the complaint, was issued, and executed on the day following; and that the case, by order of the justice, was set for hearing for the 19th day of the month. The transcript further showed that, on the day of the hearing, an amended complaint was filed, and a new warrant of arrest issued, upon such amended complaint. What the allegations of this amended complaint were does not appear; neither does the transcript show what recitals of the commission of crime were made in the new or alias warrant. Upon the hearing of the case, the court found and adjudged as follows: "That a crime has been committed, and that there is reasonable ground to believe the defendant committed the crime charged in the warrant herein filed. It is therefore considered that said defendant be held to answer for such crime," etc. In addition to the transcript and warrant spoken of, the defendant also offered in evidence, in support of his plea, a paper marked "Amended Warrant," dated October 19, 1896, reciting the commission of robbery by him, together with an officer's return, showing the defendant's arrest, and the bringing him before the magistrate on the same day for trial. This amended warrant did not show, when offered in evidence, that it had been filed by the justice of the peace; but the justice, being present in the court room, was allowed by the court to indorse a filing on the back of such warrant, as of October 19, 1896, and was allowed to amend his transcript, so as to show an execution, return, and filing of the same on such day. The justice of the peace, being called as a witness, identified the paper marked "Amended Warrant" as the order for defendant's arrest, issued by and returned to him on the 19th day of October, 1896, and explained that he had carelessly omitted to file it and to note it on his docket. Thereupon the plea in abatement was overruled, to which the defendant saved exceptions.

It was within the power of the justice of the peace, after the case had been certified by him to the trial court, to complete his transcript, and otherwise to perform the clerical duties he should have performed upon the preliminary hearing. This case is unlike that of *Stuttle v. Bowers*, 31 Kan. 432, 2 Pac. 806. In that case it was held that, after an appeal of a civil

action had been taken, a justice of the peace, by the filing and approval of an appeal bond, had no power to alter his record so as to show a judgment by confession, instead of by default or upon trial, as it had at first shown. In this case nothing of that kind was done. The justice of the peace had certified an incomplete transcript, and had failed to perform the ministerial duty of placing his file marks upon all the papers. He changed nothing. He simply completed the performance of his duty. Under section 64 of the Code of Criminal Procedure, the court may order defaulting magistrates to certify and return the record of preliminary examinations of accused persons held by them for trial, and, in case of disobedience, may punish such magistrates as for contempt. The requirement to certify such cases to the trial court implies, of course, the obligation to fully and truly certify them, and the obligation to fully and truly certify implies the power to correct mistakes and supply omissions. A justice of the peace may not amend his transcript so as to make it speak something entirely different from what it had spoken before, or show an additional fact, upon the non-existence of which the defendant has been led to waive some legal right or otherwise put himself in a false position; but such justice may perform the clerical work of completing his transcript so as to make it speak the truth as late as any occasion for so doing may justify. There are no limitations of time stated or implied in the Criminal Code, which makes the duty of certifying and returning transcripts of preliminary examinations of accused persons within a given time jurisdictional.

In the trial of the cause the regular panel of jurymen drawn and summoned for the term at which the trial occurred was exhausted before a jury was obtained. The court ordered a bystander into the jury box, and he, over the objection of defendant, was allowed to serve. This objection to the juror was to him in his character as talesman alone. Wyandotte county has a population exceeding 30,000, and counties of such class are governed, in respect to the drawing and service of jurors, by Laws 1887, c. 166 (1 Gen. St. 1889, pars. 3598-3609). The only substantial difference between this statute and the one applying to other counties of the state is that in the more populous counties the list of jurors for service during the ensuing year is selected by a board of jury commissioners appointed by the governor, instead of by trustees of townships and mayors of cities, as in other counties. When the list has been made by the commissioners, and certified by the county clerk, the necessary jurors are drawn and summoned by the clerk in the presence of the sheriff and two justices of the peace, as in other counties. Section 7 of the Laws of 1887 (paragraph 3604 of the General Statutes) reads as follows: "That from the lists so made and certified by the said jury commissioners, all grand and petit jurors of the county shall be drawn and summoned as now

provided by law." The appellant, in his construction of this section, emphasizes the words "all jurors shall be drawn," etc., and insists that, unless a juror is selected, drawn, and summoned in accordance with this statute, he cannot legally serve if objection is made. He would construe the statute as though it read: "No one shall serve as a juror unless he shall be first selected, drawn, and summoned," etc. He would make the method of selection the determining factor in the juror's qualifications. The statute, however, is not to be so construed. It should be construed (with reference to this question) as though it read: "No juror shall be drawn and summoned except from the list selected by the commissioners." The occurrence of a juror's name on the list is made prerequisite to the act of formally drawing and summoning him for jury service, but it is not a test of his qualifications to serve. Section 26, c. 54, Gen. St. 1908, relating to jurors (being paragraph 3588, 1 Gen. St. 1889), declares: "When there shall not be jurors enough present to form a panel in any cause, the court may direct the sheriff or other officer to summon a sufficient number of persons having the qualifications of jurors to complete such panel from the bystanders or from among the neighboring citizens, and the officer shall summon the number so ordered: provided, that in case either party to such cause, by himself or his attorney, shall so request it, it shall be the duty of the judge of such court to select such jurors, and cause a venire to issue for the same, naming the jurors so selected therein as hereinbefore provided." In the case of *Tremby v. State*, 20 Kan. 116, the question raised by appellant as to the competency of a juror under this section was determined adversely to his contention.

The claims of error above noticed are the only ones made in the case. They are not valid, and the sentence of the court below will therefore be affirmed. All the justices concurring.

(58 Kan. 398)

NOBLE v. TEEPLE et al.

(Supreme Court of Kansas. July 10, 1897.)

WILLS—CONSTRUCTION—ESTATE DEVISED.

The last will of a father, executed before the abrogation of estates by joint tenancy by the act of 1891, which reads: "I bequeath to my son, Thomas, the sum of one dollar, and to Amanda Anne, wife of my son, Thomas, and her children, I bequeath the Fisher farm,"—will be construed to create a joint tenancy in the mother and children, and to evidence an intent to exclude the son from any inheritable interest in the land under the statute of descents, as the heir of the wife or children, there being no other words in the will from which a different intent can be inferred. (Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by Carrie Teeple and others against George M. Noble. Judgment for plaintiffs. Defendant brings error. Affirmed.

Rossington, Smith & Dallas and Clifford Histed, for plaintiff in error. T. F. Rager, for defendants in error.

DOSTER, C. J. This case involves the construction of a will. Isaac Teeple resided in Pennsylvania, and died there in 1880. He left a will, the provisions of which, so far as related to the question in controversy, are as follows: "As to my property, both real and personal, I bequeath to my son, Thomas W. Teeple, the sum of one dollar, and to Amanda Anne, the wife of my said son, Thomas W. Teeple, and her children by her present husband begotten, I bequeath what is known as the 'Fisher Farm,' a tract of land situate, lying, and being in the state of Kansas, in the county of Neosho, being the southwest quarter of section thirty-four (34), in township twenty-nine (29) south, of range eighteen (18); and in the event of the death of the said Amanda Anne Teeple, or all of her children so begotten, then the said estate is to go to the eight heirs of my body,—that is to say, in the event of the death of all the children before reaching the age of twenty-one years. And likewise I bequeath to them, the said Amanda Anne Teeple and her children so begotten, the judgment I hold against Barbara Fisher in the sum of five hundred and fifteen dollars (\$515.00)." Amanda Anne Teeple, the devisee named in the will, died in 1881. In 1883, Thomas W. Teeple, her husband, mortgaged the devised land. This mortgage was subsequently foreclosed, and at the foreclosure sale the land was purchased by the plaintiff in error, who received a sheriff's deed thereto. In 1886 the will of Isaac Teeple was admitted to record in Neosho county. The testator's grandchildren, the children of Amanda Anne Teeple, named in the will with her as devisees, sued the plaintiff in error to quiet their title to the devised land. Judgment went for them, to reverse which this proceeding in error was instituted.

The question for consideration is the character of the devisees Amanda Anne Teeple and her children in relation to each other. Were they tenants in common or joint tenants? If the former, an interest passed upon the death of Amanda Anne, under the statutes of descents, to her husband, Thomas W., which could be the subject of mortgage by him, and of judicial sale and deed. If the latter, the interest of Amanda Anne passed upon her death to her children, the other devisees. To our minds, the will created a joint tenancy in the devisees, and therefore, upon the death of the mother, her interest in the land became vested in her children. The distinguishing feature of joint tenancy is survivorship,—the casting of descent upon co-owners, and not upon heirs. Such species of tenancy existed in Kansas until abolished by the statute. Laws 1891, c. 203; *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904; *Simons v. McLain*, 51 Kan. 153, 32 Pac. 919. At common law a devise to one and his children, when the person named

had children living, constituted them joint tenants (Beach, Wills, 212; Schouler, Wills, 560); and generally, when an estate is given or granted to several persons jointly, without any expression indicating an intention that it shall be divided among them, it must be construed to be a joint tenancy (Martin v. Smith, 5 Bin. 16; Farr v. Trustees, 83 Wis. 446, 53 N. W. 738; Robinson v. Duvall, 79 Ky. 83). Joint tenancies, however, are not favored in the law, and will not be inferred in opposition to expressions in the devise or grant indicating a contrary intent. Nevertheless, words whose ordinary signification import an intent to create such tenancy will be allowed a corresponding legal signification. A fit and apt word to convey such meaning is the copulative conjunction. This was used in the will in question. The devise of the land was "to Amanda Anne Teeple and her children." An intent of the testator to likewise equally favor this daughter and her children is manifested in the clause bequeathing to them the judgment against Barbara Fisher. An intent to withhold from the son, Thomas W., all contingency of remainder in the land is manifested in that provision of the will which cuts him off with one dollar. Thomas was the son of the testator, but the unusual instance is afforded by this instrument of his exclusion from his father's bounty, and the gift to his wife and children of what would ordinarily go to him. Such exclusion of the one and favor to the others throws much light upon the testator's intention. While it more clearly negatives the idea of a contingent remainder in Thomas than it affirmatively defines the character of the estate actually devised, yet the fact of his exclusion clears the way to a better understanding of the terms of the will. It evidences an intention to declare a survivorship among the devisees named and described. Evidence of a negation of the theory of joint tenancy and survivorship is drawn by plaintiff in error from the use of the disjunctive in that clause of the will which passes the estate to the eight heirs of the testator's body "In the event of the death of said Amanda Anne, or all the children before reaching the age of twenty-one years." Had the contingent remainder thus provided for been limited to Thomas W., the husband of Amanda Anne, the father of the children, instead of being distributed, as it were, among eight, of whom Thomas was one, much more importance could be attached to the claim; but it is not consistent with the paternal intent of the testator, as manifested in the other clauses of the will, to suppose he meant to recall his bounty from the minor children upon the occurrence of their mother's death, and likewise to recall it from the mother in the event of her children's death, and in lieu thereof to confer only an eighth of it upon the one who stood to them in relations of protection and guardianship. Whenever necessary in order to ascertain the intent with which words are used, and to give them effect when their meaning is ascertained, the dis-

junctive "or" will be read conjunctively, and vice versa. Janney v. Sprigg, 48 Am. Dec. 557. We do so in this case, and read: "In the event of the death of said Amanda Anne, and all her children before reaching the age of twenty-one years, then the estate is to go to the eight heirs of my body." Thomas W. Teeple took no estate in the land upon the death of his wife. Upon her death her interest in such land passed by survivorship in joint tenancy to her children. The mortgage which Thomas W. Teeple executed attached to nothing. The foreclosure sale and deed under which plaintiff in error claims are void as against defendants in error, and the judgment of the court below is affirmed. All the justices concurring.

ATCHISON, T. & S. F. R. CO. v. CROSS et al.

(Supreme Court of Kansas. July 10, 1897.)

RAILROADS—OBSTRUCTING CROSSINGS—INJURIES TO TRAVELERS—NEGLIGENCE—ACTION FOR DEATH OF MINOR SON—DAMAGES—DEMURRER TO EVIDENCE.

1. In the little town of R., which is located on both sides of the tracks of the A., T. & S. F. R. Co., the company stopped its trains on a side track, so as to completely obstruct all travel from one part of the town to the other for about 25 minutes. It had been accustomed at intervals to so obstruct the streets, and the public were in the habit of climbing over, crawling under, and going around its trains. E. C., a boy 13 years old, for the purpose of going to his home, attempted to pass around the rear end of a freight train, which was so blocking up the crossings, and was struck and killed by the rear end of the train which had just commenced to move backward. *Held*: (1) That it was for the jury to say, from the facts disclosed by the evidence, whether, under the circumstances, license was given to the public to cross the tracks around the trains on its right of way; and that the court will not declare, as a matter of law, that it was negligence, which will bar a recovery, for the boy to attempt to cross behind the rear end of a freight train so obstructing the crossings. (2) That, under the conditions stated, it was the duty of the employes in charge of the train to move it with reference to the known custom of the people, and to take due precautions to avoid injury to any one who might attempt to cross behind the train.

2. Where the evidence offered by the plaintiff is deficient, and a demurrer thereto is overruled, if the defendant supplies the deficiency by testimony offered in its behalf the error in overruling the demurrer is rendered immaterial, and this court will not reverse the judgment because of the insufficiency of the testimony offered by the plaintiff.

3. In an action brought by parents against a railway company to recover damages for negligently causing the death of their minor son, the jury are not necessarily restricted to an allowance of the value of the son's services during minority, but may take into consideration pecuniary benefits which the parents may reasonably be expected to receive from him after reaching his majority.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by John B. Cross and another against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. Buck & Spencer and Waters & Waters, for defendants in error.

ALLEN, J. At Reading, a small town in Lyon county, the tracks of the Atchison, Topeka & Santa Fé Railroad Company are crossed by the three streets of the town, which run north and south. There are three railroad tracks crossing these streets. The north one is a side track called the "Passing Track." Next is the main track, on the south side of which the station house is located. South of this is what is called the "House Track." The town of Reading is built on both sides of these tracks. At about 3 o'clock in the afternoon of December 10, 1892, a freight train going west was run on to the passing track, and stopped so as to obstruct the crossings of all three of these streets. There is testimony showing that this obstruction continued for 25 or 30 minutes, leaving no opening on either street for persons desiring to cross. After the freight train had been so placed on the passing track, a west-bound passenger train was run in behind it, on the same track. In front of it were a number of empty cars, thus nearly filling the track between the switches. While these trains were standing on the side track, a passenger train going east passed them on the main line. Elmer Cross, a son of the plaintiffs, had been waiting on the north side of the passing track for 20 or 25 minutes, to cross to the south side, where his home was with his parents. He was a boy 13 years of age. At about the time the east-bound train passed, he had started to go around the rear end of the freight train. The west-bound passenger train had backed onto the main line, and was proceeding west, with its steam cocks open, emitting a cloud of steam, as the boy attempted to pass the rear end of the way car of the freight train. The freight train then commenced backing, without any signal by bell or whistle, and without any guard on the rear end of the train, striking the boy, and dragging him for a considerable distance along the track, killing him almost instantly. It appears that these crossings were frequently blocked by the defendant's trains for considerable periods of time; that persons desiring to cross were in the habit of climbing over, crawling under, and going around the trains; and that the employes of the company in charge of this particular train knew that they were accustomed to do so.

It is insisted on behalf of the railroad company that its demurrer to the testimony offered by the plaintiffs should have been sustained, and that there can be no recovery on the facts disclosed. It is urged that Elmer Cross was a trespasser on the grounds of the company, because the place where he was killed was not a street crossing or other place where he had a right to cross the defendant's right of way; that there is no evi-

dence indicating a willful or wanton injury; and that the defendant owed him no duty which it did not perform. Under the facts disclosed in this case, we think the question was properly submitted to the jury as to whether there was not a license given to the public to pass around its trains while the street crossings were obstructed. It was certainly unreasonable for the defendant to keep its trains standing across all the streets of the town for so long a time, and deny the public any opportunity to cross. It being known by the employes on the train that people were in the habit of going around its trains, it was incumbent on them to move the train with reference to such known practice, to give proper signals when starting, and to have some one at the read end of the backing train, to guard against accident. The testimony of the train hands discloses that it was understood by them to be the duty of the rear brakeman to be on the hind end of the way car when the train backed. There is testimony showing that no one was there. It is said that the evidence offered by the plaintiff does not show how Elmer Cross came to his death. None of the plaintiffs' witnesses saw him when he was struck by the way car. The first they knew of the casualty was when he was being taken out from under the cars, after several cars had passed over him. Whether the plaintiffs' testimony was sufficient to take the case to the jury it is unnecessary to decide, for any lack of proof on that point was afterwards supplied by the defendant. A brakeman on the west-bound passenger train testified that he saw Elmer on the track before the way car struck him, and that there was no one standing on the rear end of the way car.

On the merits of the case, we think there was ample proof showing negligence on the part of the company, and that it cannot be said, as a matter of law, that the boy was guilty of contributory negligence, but that the question was one for the jury.

The averments of the petition with reference to the blocking of the streets by the defendant at this particular time, and also its custom of doing so, and the custom of people to cross its tracks, over, under, and around its trains, were proper, and the court did not err in refusing to strike them out. Evidence in support of them was also proper.

Instructions were asked by the defendant limiting the amount of the recovery of the plaintiffs, who were the parents of the boy who was killed, to the net earnings of the boy during his minority. The instructions asked are erroneous. While the plaintiffs would have no right to take the boy's earnings after he should reach his majority without his consent, it might well be that the ties of natural affection would be sufficiently strong to cause him to do them even more service after his majority than before. A recovery by parents for the death of a son after his majority is not at all uncommon.

In the case of *Railway Co. v. French*, 53 Kan. 581, 44 Pac. 12, a judgment for \$4,500 in favor of a widowed mother, 59 years of age, for the death of a son, 34 years of age, was affirmed by this court. The judgment in this case is for \$4,000, \$500 less than in the case cited. We think the substance of the ninth and twelfth instructions was included in those given by the court, although in different language. The eighth instruction is criticised; and the part singled out, in which it is stated that "I instruct you that the defendant was negligent in blocking up the street for such an unreasonable time," is objectionable. The language which immediately follows it, however, shows that the court did not intend to convey the idea that a verdict against the company might rest on this act of negligence. The whole instruction reads as follows: "(8) If you believe from the evidence that the defendant blocked the street crossings—its tracks—by its standing trains; that such blocking prevented the crossing of its streets for an unreasonable period, taking into consideration the place, time, and situation; that the deceased came to one of the blocked-up streets, and, after waiting a reasonable time, under the circumstances, to cross, that he then went eastward to cross the tracks, by going around the hind end of the train, and that attempting to go around the rear end on the side track, and while in that immediate vicinity, a passenger train went west on the main line or track, passing the hind end of the train on the side track, at the time making escaping steam from its cylinder cocks; that the deceased's attention was drawn or attracted by such passenger engine, and, in endeavoring to escape, he stepped out or remained on the side track; that it had been the frequent practice of the defendant to block up these streets, immediately and just before he was killed, so that the travel had been in the habit of crossing its cars, going under its cars, or around the ends of its trains, in order to cross; that such habit had been so frequent and long continued for the defendant to know it, or it had reasonable opportunity to know of it; that the deceased was hit by the hind end of the train on the side track as it backed east; that there was no sufficient or efficient warning or notice given, by whistle, bell, or otherwise, of such backing; and that the deceased was in the exercise of care, and was without fault,—then I instruct you that the defendant was negligent in blocking up the streets for such unreasonable time; that the deceased had the right to take any way to cross the tracks that would have been prudent, proper, for an ordinary person of his years to have taken; and if the habit of travel across these tracks in a similar way had, by reason of the conduct of the defendant in the management of its trains, been long continued, you have the right to consider such testimony, for the one and only

reason or purpose of determining whether the defendant should have been aware of and moved its trains with reference to such a condition of travel, and whether in this case it was negligent or not in moving its train without warning or notice, and it is for you to say, from all the facts and circumstances, who, if any one, was chargeable with negligence." The answer of the jury to the last special question submitted to them shows that they had a clear understanding of the issues involved, and the objectionable expression evidently did not affect the verdict. The question and answer are as follows: "Q. 9. If you find for the plaintiff, state what act of negligence the defendant or its employees was guilty of which caused the death of the deceased, Elmer Cross. A. First, blocking the streets for an unreasonable length of time; second, not giving proper signal when backing train No. 41; third, also neglect to have rear brakeman of same at his proper place." We find no merit in the claim of error in the instructions as to the measure of damages, nor that the sum awarded is excessive. The judgment is affirmed. All the justices concurring.

(58 Kan. 445)

BAYHA et al. v. MUNFORD et al.

(Supreme Court of Kansas. July 10, 1897.)

IMPEACHMENT OF WITNESS—CONVICTION OF FELONY
—PROOF OF IDENTITY—APPEAL—REVIEW.

1. For the purpose of affecting the credibility of a witness produced by the plaintiffs, it is competent for the defendants to introduce an authenticated record showing a conviction for felony of a person of the same name as the witness without other proof that the person convicted was the same one who testified as a witness in the case.

2. Ordinarily, identity of name is prima facie evidence of identity of person, and it devolves upon those who deny the identity to overcome the presumption by proof.

3. Evidence examined, and held to be sufficient to support the findings and judgment of the court. (Syllabus by the Court.)

Error from district court, Barton county; **J. H. Bailey**, Judge.

Action by Bayha, Barber & List against Morrison Munford and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

William Osmond, for plaintiffs in error. Karnes, Holmes & Krauthoff and E. C. Cole, for defendants in error. James Scammon and Samuel Maher, for certain cross petitioners in error.

JOHNSTON, J. This was an action in the nature of a creditors' bill, in which the honesty and validity of certain transactions and transfers had and made between the Kansas City Times Company, Morrison Munford, Charles E. Hasbrook, J. K. McLain, and others incidentally connected with the same, challenged. The trial court found the transactions to be free from fraud, and the transfers to be valid. It is argued here that the findings are without support, but, after reading the tes-

timony, we readily conclude that there is some testimony—indeed, considerable testimony—tending to sustain the findings of the court, and the controversy on this point is therefore finally settled.

It is contended that the court erred in the admission of evidence. The testimony of Alexander Belford was introduced in behalf of the plaintiffs, and for the purpose of impeachment the defendants offered a record showing the conviction of Alexander Belford in 1874, in the district court of Shawnee county, Kan., upon a charge of embezzlement; and, further, that the punishment adjudged was imprisonment in the state penitentiary for a term of two years. The proof offered was in form a duly-authenticated copy of the record of conviction, but it is contended by plaintiffs that the testimony was not admissible without other proof showing that the Alexander Belford who was convicted and sentenced to the penitentiary was the same Alexander Belford who testified as a witness in the case. Belford having been introduced as a witness, his credibility became a legitimate subject of inquiry, and it was competent for the defendants to introduce the record of conviction for the purpose of affecting his credibility. It is a well-established rule that identity of name is prima facie evidence of identity of person, and it devolves upon those who deny the identity to overcome the presumption by proof. *Flournoy v. Warden*, 17 Mo. 435; *State v. Moore*, 61 Mo. 276; *State v. McGuire*, 87 Mo. 642; *Hatcher v. Rocheleau*, 18 N. Y. 86; *Wilson v. Holt*, 83 Ala. 528, 3 South. 321; *Campbell v. Wallace*, 46 Mich. 320, 9 N. W. 432; 9 Am. & Eng. Enc. Law, 863. The point argued concerning the burden of proof is not fairly presented in the record, and, so far as appears, furnishes the plaintiffs no ground of complaint. We find no error in the record, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(58 Kan. 447)

ATCHISON, T. & S F R. CO. v. MATHEWS et al.

(Supreme Court of Kansas. July 10, 1897.)

FIRE SET BY LOCOMOTIVES — ATTORNEY'S FEE — CONSTITUTIONAL LAW — EVIDENCE — NEW TRIAL.

1. Claims of error in the admission of testimony considered, and *held* insufficient to warrant a reversal of the judgment.

2. Section 2 of chapter 155 of the Laws of 1885, which authorizes the allowance of an attorney's fee in actions against railroad companies to recover damages caused by fire in the operation of the railroads, does not violate the first and eighteenth sections of the bill of rights of the constitution of this state, or section 1 of article 14 of the constitution of the United States, but is a valid law.

3. In an action against a railroad company to recover damages for the destruction of an elevator by fire, alleged to have been negligently caused by the company in the operation of its railroad, it is not indispensable to prove by direct evidence that the fire escaped from an engine on the defendant's road, but, if the circumstances shown

are adequate to convince reasonable men that the fire was so caused, the jury may properly base a verdict thereon; and, *held*, that there was sufficient testimony in this case to uphold a verdict against the company.

4. While it is the imperative duty of the trial court to sustain a motion for a new trial in all cases where there is an utter failure to prove any essential fact necessary to support the verdict, and also where the judge is of the opinion that the verdict is clearly opposed to the weight of the testimony, in cases of doubt, where there is sufficient testimony to support the verdict, if the court, after a full consideration of it, approves the verdict, and enters judgment thereon, this court will not reverse his action merely because he states that he doubts the correctness of the verdict, and would not have found as the jury did if the case had been submitted to him as a trier of the facts. In doubtful cases, where the jury have acted fairly and conscientiously on conflicting evidence, the trial court may properly defer to the judgment of the jury, and approve a verdict, even though, acting on his own judgment alone, he would have reached the opposite result.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Action by W. T. Mathews and another against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. J. W. Sheafor, for defendants in error.

ALLEN, J. This action was commenced by W. T. Mathews and M. L. Trudell against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the destruction of their elevator building in Miltonvale, which they alleged was burned by fire negligently, permitted to escape from one of the defendant's locomotives. The trial in the district court resulted in a verdict and judgment in favor of the plaintiffs for \$2,004 damages and \$225 attorney's fees. The building was situated on the right of way of the Union Pacific Railway Company, about 88 feet north from the track of the defendant. The fire was first discovered between half past 6 and 7 o'clock. The evidence favorable to the plaintiffs, which seems to have been accepted by the jury, tends to show that the elevator had been operated on the day of the fire, which occurred April 17, 1893; that some dust and trash was necessarily scattered around the outside of the building from a spout through which corncocks were discharged; that at about 6 o'clock a freight train passed along the defendant's road, going west, without stopping; that, as the train came in, steam was shut off for a time, but that before it passed the elevator steam was put on again, and that as it passed the elevator office, located a short distance east of the elevator building, cinders were thrown from the smokestack to the office building; that the wind was then blowing from the southwest; that about a week before this fire another one had been started in that vicinity by the same engine; that the fire originated on the outside of

the south side of the engine and boiler room, which were located at the west end of the elevator, and that, while there was a fire in the furnace in the boiler room of the elevator, it had been safely fixed, so that there was no danger of its escaping and burning the building. Some of the evidence on the part of the defendant tended to show that the fire originated inside the boiler room. While the evidence in this case was wholly circumstantial, the defendant's contention that there is no proof to support the verdict cannot be sustained. The proof with reference to fires caused by locomotive engines is nearly always of the same character, though of different degrees of convincing force. Numerous objections were raised to the testimony. Proof was allowed as to the cost of the building, but as the verdict is for an amount below the lowest estimate of any witness of the value of it, the error in the admission of the testimony is of no importance. Testimony was also allowed with reference to other fires that originated from engines on the defendant's road, without identifying the engine attached to this freight train, or the engineer in charge of it, as the one causing the fires. We think the identification should have preceded the admission of such testimony, but the court, in the progress of the trial, remarked: "Unless you can connect this engine with those fires, I will instruct the jury that this evidence is not to be considered." In view of all the testimony in the case, the special findings, and this remark from the court in the presence of the jury, the error in the admission of this testimony does not appear to be sufficient to warrant a reversal of the judgment. We think the instructions were very full, clear, and fair. We do not regard the decision of the supreme court of the United States in the case of *Railroad Co. v. Ellis*, 17 Sup. Ct. 255, as conclusive against the validity of our statute authorizing the recovery of attorney's fees in cases of this kind. The statute of Texas under consideration in that case was quite different in principle from the one on which the judgment in this case was rendered. Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court, which we see no reason for changing. *Railway Co. v. Snaveley*, 47 Kan. 637, 28 Pac. 615; *Railway Co. v. Curtis*, 48 Kan. 179, 29 Pac. 146; *Railway Co. v. McMullen*, 48 Kan. 281, 29 Pac. 147; *Railroad Co. v. Henning*, 48 Kan. 465, 29 Pac. 597.

We find no substantial error in the refusal of the court to require the jury to answer certain special questions. If all of them had been answered favorably to the defendant,

they would not have necessitated a reversal of the judgment. There was no error in overruling the plaintiffs' motion for judgment on the special findings, although it was found that the engine was properly constructed, and equipped with the best known appliances for the prevention of the escape of fire. Liability was based on the unskillful manner in which the engine was operated, and there was proof tending to show that cinders were thrown from the engine as a result of "working steam too hard."

The most difficult question in the case arises from the language used by the court in overruling the motion for a new trial. The colloquy between court and counsel at the time the motion was passed on is incorporated in the record. Among other things, the judge said: "This evidence does not carry any conviction to my mind either way. You say it is quite evident the fire originated from the building itself, from the engine or boiler or machinery; while Mr. Sheafor says it is equally as clear that they had nothing to do with it; that the fire could not have originated in that manner. * * * I think, and what I have thought about this case from the beginning is, that there is no certainty as to who set the fire, and it is not clear to my mind yet; and you might offer this evidence twenty times, and I should never be satisfied as to the origin of that fire,—whether it arose from the railroad, or whether it arose from the engine and boiler. * * * I will say this, as I have said: If I had been on that jury, I should not have found that verdict; not that I would have been positive that the road didn't set it afire, but because I could not have had evidence enough to satisfy my mind that the road did set it afire. * * * If the court should grant a new trial in every case where he would not have found the same verdict as the jury, why, then, I should grant a new trial in this case, because I would not have found that verdict, because I could not have found that the defendant set the fire; but then, if the court is to be the sole judge and arbitrator, what is the duty and object of the jury? I take it the jury were a fair average jury, men of good judgment, just as good as the court, if not better, in matters of this kind, and just as honest and conscientious. * * * It comes down to that, as you very properly say,—that is, there are two possible causes, and a fair statement is that the probabilities are about equal. You claim the probabilities are that the road set the fire. They claim that the probabilities are that the engine set it afire. Now, the possibilities are equal, and the probabilities are not far apart; you each claim to suit your theory. That is just the condition of this case, and the case was submitted to a jury, and the jury found for the plaintiff and against the railroad. Now, the question is, ought the court to put itself and its judgment against that of the jury, and find the other way? * * * Well, the case

has been tried, and two theories have been submitted. I take it there has been some evidence in support of each theory, and possibly enough to justify a verdict on whichever theory the jury saw fit to find; and the object and purpose—the duty—of the jury being, as I understand it, to pass upon such questions, I will let the judgment stand, although, to my mind, the evidence is not convincing.” There are other statements made by the judge, some of which are slightly stronger in opposition to the verdict than those quoted, but the parts extracted seem to be fairly expressive of the view taken by the court of the case, and of his duties in passing on the motion. It has often been held that, if the verdict does not meet the approval of the court, it should be set aside. *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772; *Railroad Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108, and cases cited. On the other hand, the verdict of a jury has some force, and it is not for the trial court in every doubtful case to set his judgment against that of the jury. As was well said in the case of *Johnson v. Leggett*, 28 Kan. 590: “We do not understand that it is the duty of the trial court where a doubtful question of fact exists to disturb the verdict of the jury, simply because its judgment inclines the other way. The case of *Williams v. Townsend*, 15 Kan. 564, carries no such intimation. The jury are the triors of the fact; and while it is the duty of the district court to interfere, yet, as stated in that case, it is only when they have manifestly mistaken the evidence, and where the verdict is manifestly erroneous. Where the question is absolutely doubtful, where some men would naturally come to one conclusion and others to the opposite, then the verdict of the jury is conclusive. They are the triors of the fact, and, although the judgment of the court may incline against the verdict of the jury, yet it ought not to interfere.” In this case it clearly appears that the court regarded the case as a doubtful one,—that the jury were good men, against whom the court entertained no suspicion of bias or unfairness. The evidence was very full, and probably as well presented, and as fairly considered, as it would have been on a second trial. The remarks of the court indicate no disposition to shirk responsibility, or to act hastily, and, after a full consideration of all the questions involved, although himself inclined to find for the defendant on the facts, he yet approved the verdict in deference to the judgment of the triors of fact. Although, in his remarks, he expressed some uncertainty as to what his duties were under the circumstances, we think he entertained a correct judgment as to what the trial court should do under the circumstances, and that this court would not be warranted in reversing his ruling on the motion for a new trial. The judgment is affirmed. All the justices concurring.

(58 Kan. 480)

COALE et al. v. CAMPBELL.

(Supreme Court of Kansas. July 10, 1897.)

TAX DEED—ENFORCEMENT—LIMITATIONS.

A party who seeks to recover lands sold for taxes, claiming under a tax deed duly recorded, must bring his action within two years after his cause of action accrues; and where the land remains vacant for more than five years after the tax deed is recorded, and the holder of the original title then takes and holds possession thereof for more than two years before suit is brought by the holder of the tax title, the action of the latter is barred, by the third subdivision of section 16 of the Code of Civil Procedure.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by James R. Campbell against W. T. Coale and others. Judgment for plaintiff. Defendants bring error. Reversed.

E. W. Cunningham, for plaintiffs in error.
L. B. & J. M. Kellogg and J. G. Hutchison, for defendant in error.

ALLEN, J. James R. Campbell brought suit in the district court of Lyon county to recover possession of a quarter section of land from the plaintiffs in error. The defendants' answer was a general denial. In support of his claim, the plaintiff offered a tax deed to John C. Douglass, issued on the 11th of March, 1878, and based on a sale made in May, 1865, for the taxes of 1864. This deed was recorded on the day of its date. Douglass conveyed his title under the tax deed to the plaintiff. Neither the plaintiff nor Douglass was ever in the actual possession of the land, nor did either of them ever pay any taxes thereon, except those for which the land was sold. The defendant Coale derives title from a patent from the United States and mesne conveyances from the original patentee to himself, and was in the actual possession of the land, by his tenant, for seven years prior to the commencement of this action. For more than five years after the tax deed was recorded, the land was vacant prairie.

Both parties invoke the aid of the statute of limitations. On the part of Campbell it is contended that the tax deed, being valid in form, and duly recorded, carried the constructive possession of the land to the grantee; that, as it remained unchallenged for more than five years, any action attacking its validity became barred; and that, after the expiration of the period of limitation, the title of Douglass under the tax deed became a perfect, absolute title, not subject to attack; and that subsequent possession by the holder of the original title must continue 15 years in order to constitute a bar to an action brought by the holder of the tax title. On behalf of the plaintiffs in error various claims are made, but we deem it necessary to consider only one of them, namely, that the plaintiff's action was barred by the statute of limitations in two years after Coale

took possession of the land. Section 141 of the tax law now in force provides: "Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter." Laws 1876, c. 34. Section 57 of chapter 197 of the Compiled Laws of 1862, under which the sale was made, differs from the section quoted in that it does not contain the words "to defeat or avoid a sale or conveyance of lands for taxes," and also that the period of limitation is there fixed at three years. Under the section quoted, it has been held that, where the land is vacant, the holder of the original title cannot maintain an action to avoid or defeat the tax deed, unless he commences his suit within five years after it is placed on record. *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044. In this case the holder of the tax title is not merely defending an action brought to recover possession of the land from him, or to declare his deed invalid, but is seeking to recover land in the possession of another. The defendant below invokes the third subdivision of section 16 of the Code of Civil Procedure, providing: "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter. * * * Third. An action for the recovery of real property sold for taxes within two years after the date of the recording of the tax deed." In *Case v. Frazier*, 30 Kan. 343, 2 Pac. 519 (which followed and extended the rule declared in *Myers v. Coonradt*, 28 Kan. 212), it was held that, where the land is vacant, the holder of the tax deed has two years from the time the original owner takes possession in which to commence his action to recover it. In *Walker v. Boh*, 32 Kan. 354, 4 Pac. 272, it was held that where the holder of a tax deed on record more than five years commences an action to quiet his title against the original owner, the land having been vacant, and the holder of the tax deed absent from the state, section 141 of the tax law will not prevent the defendant from showing the invalidity of the tax deed, and thereby defeating the plaintiff's action. The decision is rested on the ground that the holder of the tax deed may invoke section 141 for purposes of defense, but not of attack. In this case, Campbell, as plaintiff, invoked this section, for the purpose of building a title, and aiding him in recovering possession of the land. We are inclined to think that the statute protects his deed, even in this action, from any attack on the ground of irregularity, and that the deed, being valid on its face, as we shall assume it to be, was

sufficient to convey the title to Douglass, and that its sufficiency for that purpose may not now be questioned. But the plaintiff in this action relies on a sale of the land for taxes. Without resorting to the tax deed, he has no title nor right of possession. His case falls strictly within the letter of the third subdivision of section 16 of the Code. The defendant had been in possession more than seven years. During all that time the plaintiff had asserted no claim to the land. We perceive no valid ground for varying by interpretation the express language of the law. No cause of action accrued in his favor under his tax deed until possession of the land was taken by the defendant, but one did then accrue; and the statute, as construed in the cases cited, then gave him two years in which to commence his action. Having failed to do so for much more than two years, his cause of action was barred. The cases cited on behalf of the defendant in error from Iowa and Wisconsin were decided under statutes quite dissimilar from our own, and have little, if any, bearing here. But it is urged that the defendant has been a nonresident of this state during all the time he has been in the possession of the land by his tenant. The agreed facts show that "the defendant W. T. Coale is now, and always has been, a nonresident of the state of Kansas." The exception contained in section 21, preventing the statute from running, is where the defendant is personally absent from the state, and there is nothing in the case showing whether he was so or not. The mere fact of nonresidence is insufficient to bring the case within the exception, and prevent the statute from running. The judgment is reversed, and the case remanded, with directions to enter judgment on the agreed facts in favor of the defendants below, against the plaintiff. All the justices concurring.

(58 Kan. 475)

MARTIN v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. July 10, 1897.)

DEATH BY WRONGFUL ACT—ACTION BY PERSONAL REPRESENTATIVE.

An action for personal injuries not resulting in death survives to the personal representatives under section 420 of the Civil Code, where the injured person dies from other causes. If death results from the injuries, an action cannot be maintained by the personal representative of the deceased for the benefit of the estate, but may be brought, under section 422 of the Civil Code, for the benefit of the next of kin. *McCarthy v. Railroad Co.*, 18 Kan. 46; *City of Eureka v. Merrifield*, 37 Pac. 113, 53 Kan. 794.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Action by Theodore Martin against the Missouri Pacific Railway Company. From a judgment dismissing the action, plaintiff brings error. Affirmed.

L. J. Crans, for plaintiff in error. Waggener, Horton & Orr, for defendant in error.

JOHNSTON, J. On September 18, 1893, Lucy Bennett was struck and injured at a street crossing in Concordia by a moving train of the Missouri Pacific Railway Company. On the following day she brought an action against the company to recover for injuries sustained by her, alleging that they were caused by the negligence of the company. On December 7, 1893, she died, leaving a husband, L. D. Bennett, but no children. Some time before she had made a will, in which Theodore Martin was named as executor. The will was admitted to probate, and letters testamentary issued thereon. Subsequently an attempt was made to revive the action begun by Lucy Bennett, and an order was made reviving the same in the name of Theodore Martin, as executor, but the order was made over the objection of the surviving husband. In an amended petition filed by Martin he averred that the injuries to Lucy Bennett were caused by the wrongful act and neglect of the company, and specifically alleged that her death resulted wholly from such injuries. Several defenses were set up by the company, and among them was one that the letters testamentary and appointment of Theodore Martin were wholly void, because at the time of her death she left no property or estate whatsoever subject to administration or distribution under the law. When the case was called for trial the plaintiff restated that the injuries for which a recovery was sought were caused by the wrongful act and neglect of the railway company, and that the injuries so inflicted resulted in the death of Lucy Bennett. The company conceded that the death was the result of the injuries sustained, but it denied that the injuries were caused by the neglect of the company. On the part of the plaintiff it was claimed that the action was brought for the benefit of the estate, and that under section 420 of the Civil Code it survived, and might be continued by the personal representative. On the part of the company it was contended that, the plaintiff having pleaded and stated that the death of Lucy Bennett resulted from injuries wrongfully inflicted by the company, the action did not survive, and could not be maintained for the benefit of the estate; that in such a case there was a cause of action in favor of the next of kin, under section 422 of the Code. It being conceded that the action was not brought for the benefit of the next of kin, under section 422, the court excluded the evidence offered by plaintiff, and dismissed the action.

The ruling of the court must be sustained. In an early case an interpretation was given to these provisions, where it was held that, having been enacted at the same time, they must be construed in *pari materia*. It was there contended that a cause of action for

injury to the person survived, and that an action might be brought by the personal representative for the benefit of the estate, although the injury resulted in death. The court held, however, that: "The purpose of section 422 is evidently not only to fix the amount of damages, and limit them to the use of the widow and children or next of kin, but to take away the right of the administrator to sue for the benefit of the estate generally, where death resulted from the injuries. Section 420, as construed with section 422, only causes the actions to survive for injury to the person when the death does not result from such injury, but does occur from other circumstances. The right of action under section 422 is exclusive, and an administrator could not maintain an action under sections 420 and 422 for the same injury. When death results from wrongful acts, section 422 is intended solely to apply." *McCarthy v. Railroad Co.*, 18 Kan. 46. Since that time the *McCarthy* Case has generally been regarded as a controlling decision by the courts of the state, and the construction there placed upon these provisions a correct one. Quite recently the same question was re-examined, and the ruling then made reaffirmed. *City of Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113. It was held that section 420 only permits actions to survive for injury to the person when death does not result from the injury, but occurs from other causes. Where, however, death results from the wrongful act or omission of another, section 422 is exclusive. As tending to sustain that view, the following cases are cited: *Andrews v. Railroad Co.*, 34 Conn. 57; *Reed v. Railway Co.*, L. R. 3 Q. B. 555; *Railroad Co. v. O'Connor*, 19 Ill. App. 591; *Holton v. Daly*, 106 Ill. 131; *Railroad Co. v. O'Connor*, 119 Ill. 536, 9 N. E. 263; *Tiff. Death Wrongt. Act*, § 119. The correctness of this interpretation is again challenged, but we think the view so early taken, and which has been generally accepted and acted upon ever since, should be upheld. It is to be noted that, although the rule was announced more than 20 years ago, and has been followed by the courts ever since that time, the legislature has not amended the law, nor attempted to modify the rule which the court announced. We think the rule should be upheld, and do not feel warranted in entering anew upon a discussion of its correctness. The judgment of the district court will be affirmed. All the justices concurring.

(58 Kan. 499)

MISSOURI PAC. RY. CO. v. BENNETT'S ESTATE.

(Supreme Court of Kansas. July 10, 1897.)

APPEALABLE ORDER.

While a railroad company may suggest to the probate court the invalidity of the appointment of an executor or administrator who proposes to prosecute a claim against the company,

it is not entitled to an appeal from the decision of the court refusing to revoke such appointment. (Syllabus by the Court.)

Error from court of appeals, Northern department, Central division.

Proceedings by the Missouri Pacific Railway Company in the matter of the estate of Lucy Bennett to secure the revocation of the appointment of an executor. From a judgment of the court of appeals (47 Pac. 183) affirming the judgment of the district court dismissing the proceedings, the railroad company brings error. Affirmed.

Waggener, Horton & Orr, for plaintiff in error. L. J. Crans, for defendant in error.

JOHNSTON, J. The probate court of Cloud county appointed Theodore Martin as executor of the estate of Lucy Bennett, deceased. Several months prior to her death she had brought an action against the Missouri Pacific Railway Company to recover damages for personal injuries alleged to have been caused by the negligence of the company. Shortly after Martin's appointment as executor, the railway company filed an application in the probate court to vacate the appointment upon the ground that there was no estate to be administered, and therefore the court had no jurisdiction to make the appointment. The application of the railway company was denied, and from that ruling the company undertook to appeal. When the matter was reached in the district court, the appeal was dismissed. The railway company claimed the right to intervene because of the action brought against it by Lucy Bennett in her lifetime, and the fact that Martin claimed the right to further prosecute the action as executor against the company. The court of appeals held that a claim for damages on account of personal injuries from which death resulted is assets of the estate, and warrants the appointment of an executor or administrator, and as the action survived to the personal representative it was unnecessary to decide whether the company had a standing in court to contest the validity of the appointment. The position taken by the court of appeals is contrary to the decisions of this court, and cannot be sustained. *Martin v. Railway Co.*, 58 Kan. 475, 49 Pac. 605. The question remains, however, whether the railway company may be heard to challenge the validity of the appointment of the executor, and whether it was entitled to an appeal from the ruling of the probate court refusing to revoke the appointment. The testamentary letters and order making the appointment are prima facie evidence of all facts necessary to the validity of such appointment. If there was no estate to be administered, there was no jurisdiction to issue letters testamentary, or to make an appointment, and where the probate court is without jurisdiction its acts in that respect are void for all purposes. *Perry v. Railroad Co.*, 29 Kan. 420. Where the letters are absolutely void, any one, however re-

mote his interest, may suggest the invalidity to the court. In such a case the court issuing the letters may, upon its own motion, institute proceedings to set them aside, or it may be done on the suggestion of an *amicus curiæ*. *Mallory's Estate v. Railroad Co.*, 53 Kan. 557, 36 Pac. 1050. It does not follow from the fact that the company may suggest the invalidity of the letters that it has an appealable interest. The general rule is that an appeal can only be taken by a party to a controversy, or by one who has a direct interest in it. A stranger to the record, or a mere volunteer, may not appeal, unless expressly authorized by statute. So it has been held that an *amicus curiæ* cannot appeal from a decision of a court, although it may have allowed him to introduce evidence for his own benefit. 2 Enc. Pl. & Prac. 159, and cases cited. The company is not one of those named in the act respecting executors and administrators as being entitled to control the administration of the estate. It is not a creditor, and has no claim upon nor interest in the estate. The only interest it has is based upon an anticipated claim which it has been informed the estate will make against the company. It cannot be said to be a party aggrieved, and we think has no appealable interest. Nor does an appeal appear to be necessary for the protection of the rights of the company. When an action is brought against the company it has a right to put in issue the appointment and authority of the executor, and if it is shown that the probate court was without jurisdiction, and the appointment void, the action would necessarily fail. *City of Atchison v. Twine*, 9 Kan. 350; *Perry v. Railroad Co.*, 29 Kan. 420; *Railway Co. v. Dundan*, 37 Kan. 1, 14 Pac. 501. We think the district court reached a correct conclusion, and its judgment dismissing the appeal will be affirmed. All the justices concurring.

(58 Kan. 463)

MULVANE v. O'BRIEN.

(Supreme Court of Kansas. July 10, 1897.)

CORPORATIONS — SALE OF STOCK BY PRESIDENT — ACCOUNTING AS TRUSTEE.

Where the stockholders of a corporation, being ignorant of the selling value of their stock, authorize the president of the company to find a purchaser and effect a sale of their shares at par, and such president, at and before such time, was in secret correspondence and negotiation for the sale of the stock, with a view to a large profit to himself, and, by affirmative acts and misrepresentations, concealed his transactions from the stockholders, and effected a sale of their stock for a sum largely in excess of par, he cannot retain such excess, but must account to the stockholders for the profits made, notwithstanding he had stated to them that he would retain for his services as agent any sum realized above that for which he was authorized to sell.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Michael O'Brien against Joab Mulvane. On the death of plaintiff, Mary

Ann O'Brien, administratrix, was substituted. Judgment for plaintiff. Defendant brings error. Affirmed.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Rossington, Smith & Dallas and Clifford Histed, for defendant in error.

DOSTER, C. J. This was an action brought by Michael O'Brien against the plaintiff in error, Joab Mulvane, to recover damages for fraudulent misrepresentations and concealments, made in connection with the sale of shares of stock in a corporation, for O'Brien, through the plaintiff in error. Upon the trial the court below found the following facts:

"(1) In the year 1881 there was organized under the laws of the state of Kansas a corporation known as the Topeka Water-Supply Company, which company subsequently acquired certain franchises from the city of Topeka, and thereafter was engaged in the business of supplying the city of Topeka and the inhabitants thereof with water; that the capital stock of said corporation was four hundred thousand dollars, divided into four thousand shares, of the par value of one hundred dollars each.

"(2) That in September, 1884, defendant was elected president of said corporation, and entered upon the discharge of his duties as such, receiving a salary of five hundred dollars per year; that at the same time plaintiff was elected secretary of said corporation, and entered upon the discharge of his duties as such, receiving a salary of fifteen hundred dollars per year, both plaintiff and defendant at that time being stockholders in said corporation; that plaintiff and defendant held their respective offices until the year 1890.

"(3) Said corporation had a committee known as the 'executive committee,' and plaintiff and defendant were both members of that committee, said committee having general charge and control of the affairs of the company; that it was usual and customary for the directors of said corporation to meet monthly, and at such meetings both plaintiff and defendant were usually present.

"(4) A majority of the stock of said corporation was owned by persons residing in the city of Topeka and the vicinity thereof, but the general management and control of the company was left to the officers and executive committee; that during the period from 1884 to 1890 plaintiff and defendant were brought into frequent communication in relation to the business of said corporation by reason of their respective positions as secretary and president of said company.

"(5) On account of the business transactions between plaintiff and defendant, in connection with their respective positions, they became intimately acquainted, each having great confidence in the honesty, integrity, and business qualifications of the other.

"(6) During the spring and summer of 1889 plaintiff desired to dispose of the stock of

said company, and had several interviews with defendant in relation thereto; that at such interviews defendant opposed the selling of the stock of this corporation, and continued to oppose it until October, 1889, when he expressed a willingness on his part that the plant of the Topeka Water-Supply Company and its stock should be sold.

"(7) During the year 1889 there was outstanding one hundred and twenty thousand dollars of first mortgage bonds upon the property of said corporation, which was secured by a mortgage upon its plant and franchises. On July 22, 1889, it was resolved by this corporation that the board of directors be authorized to take up the outstanding bonds of one hundred and twenty thousand dollars, and to place as many new bonds as might be necessary, not to exceed in amount the sum of four hundred thousand dollars, said corporation at that time contemplating the extension of its mains, and making other valuable improvements pertaining to its plant. It was resolved by said company that the president, Joab Mulvane, be authorized to negotiate for the redemption of the \$120,000 of bonds without delay, and for the issuing of other bonds.

"(8) About the middle of October, 1889, a man by the name of Hanson called at the office of the Topeka Water-Supply Company, where plaintiff was engaged in the discharge of his duties as secretary, and inquired whether the water plant of said corporation was for sale, and thereupon was referred by plaintiff to defendant, as president of the company, for information; that thereafter plaintiff inquired of defendant the purpose of said Hanson in visiting Topeka, and inspecting the plant, but defendant gave plaintiff no information with reference to the interviews had with said Hanson, but led the plaintiff to believe that no importance was to be attached to such visit and inspection; that at the monthly meeting of said board of directors held in the month of November, 1889, at which meeting defendant was present, he made no mention of the fact that said Hanson had visited the city, and inspected said water plant; that on November 12, 1889, said Hanson, accompanied by one Westcott and the defendant, president of the Topeka Water-Supply Company, appeared at the office of said company, and there made an examination of the books and affairs of said company, at which time defendant gave plaintiff to understand that these parties might be useful to the company in taking up the old bonds of \$120,000, and replacing new bonds to be issued; that at that time Westcott and Hanson examined the books and records of the company, ascertaining its expenditures and income, and were driven over the city, and shown the location of the mains of said company, which was done at the expense of said company.

"(9) Afterwards, and on the 13th day of November, 1889, Westcott and Hanson again returned to the office of the Topeka Water-Supply Company, and obtained additional infor-

mation with reference to the expenses and income of operating said plant; that at that time said Westcott and Hanson were making a careful examination of the receipts and expenditures of said company, for the purpose of buying the same, which fact was known to the defendant, who was then endeavoring to sell said plant to said parties, but, when defendant was asked by plaintiff in reference to it, he withheld all such information from the plaintiff and all other persons interested in said corporation.

"(10) On November 13, 1889, Westcott and Hanson submitted a proposition in writing to defendant to pay the sum of \$500,000 for the capital stock of said corporation, which proposition is in words and figures as follows, to wit: 'Topeka Water-Supply Company, Office 111 East Seventh Street. Topeka, Kansas, Nov. 13, 1889. Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his associates, own the stock of the Topeka Water-Supply Company, said Mulvane owning in his own right a majority thereof, and being disposed to sell his stock, and to advise his associates to sell their stock, in said company, on the terms and conditions hereinafter stated; and, whereas, Geo. R. Westcott, of Portland, and Samuel Hanson, and associates desire to purchase the capital stock and property of the said the Topeka Water-Supply Company: It is hereby agreed that said Westcott and Hanson will pay said Mulvane and associates par for said stock, and to pay Joab Mulvane, Esq., the further sum of \$100,000 for the control and the carrying out of the above sale and transfer of said stock to said Westcott and Hanson, delivery thereof to be made in New York or Boston, as the said Mulvane may elect. Said Mulvane on his part agrees to deliver the stock, amounting to \$400,000 par value, on or before January 1, 1890; also to perform such services in the formation of a new company, if one is required to be formed, as such Westcott and Hanson may require to be done. (Geo. R. Westcott. Sam'l Hanson.'

"(11) Defendant withheld from plaintiff and the other stockholders and officers of said corporation the fact that the proposition above set out had been made, and withheld from plaintiff and the other stockholders and persons interested in said corporation the fact that Westcott and Hanson were contemplating the purchase of said plant.

"(12) On November 23, 1889, defendant wrote to plaintiff, at Hot Springs, Arkansas, where he had previously gone for his health, that he was going East, in the interest of the Topeka Water-Supply Company, and, if he (the plaintiff) wanted to sell his stock, he had better transfer it to defendant for that purpose; that plaintiff did transfer his stock to defendant at par value.

"(13) Shortly after plaintiff went to Hot Springs, Arkansas, for his health, an expert engineer was sent to the city of Topeka by Coffin & Stanton, of New York City, to make a personal examination of this plant, for the

purpose of purchasing the same, the defendant having previously had correspondence with said Coffin & Stanton in relation thereto; that thereafter, and while plaintiff was at Hot Springs, defendant wrote to plaintiff that he was having an expert water engineer examine the plant, and give his judgment as to what ought to be done in the future in reference to extensions, and as to any defect in said plant, representing that this examination was being made to be sure that the company was building broad enough.

"(14) On November 23, 1889, defendant addressed a general letter to the stockholders of said company, one of which was received by plaintiff, being then at Hot Springs, Arkansas, in which was the following: 'Together with other stockholders, I believe the time has come to sell our Topeka Water-Supply Company stock, and, thinking that you might also desire to sell, I write you this letter. I shall go East soon, and, while there, will endeavor to find a buyer for the stock of those parties wishing to sell. If you desire to sell, put a price upon your stock, said price good for ninety days, after delivery to me, and send me your stock indorsed in blank. If you choose to do this, I will at the end of ninety days either return you your stock, or pay you for it at the price you put upon it.' That, at the time of writing this letter, defendant held in his possession the written proposition of Westcott and Hanson, hereinbefore set out. That, at the time of receiving the letter last above quoted, plaintiff received also another letter from defendant, which contained the following: 'Inclosed I send you a letter as I have sent to stockholders, and, from the responses already received and stock turned over, it looks as though all would turn their stock over. I have given them a receipt such as inclosed, which gives me absolute ability to deliver if we can effect a sale within the limit named, ninety days, and the price named by various owners is from 90 to 100. This gives me an option on the stock at the price named for the time named, and any sum I can get over that I shall want to keep for my services in hunting a buyer and effecting a sale. If you wish to put your seventy-five shares on this basis, I wish you to so write me, and fill out the form of receipt inclosed, returning it to me, and also return to me the receipt you now hold, and I will sign the new one, and return it to you. Meantime this letter is an acknowledgment that I hold seventy-five shares of your stock. I expect to go East next week, and will make as thorough an effort as I can. Will go to New York, Philadelphia, and Boston. I have filled out the receipt at par. You can write a new one if that does not suit you. Please answer promptly.'

"(15) Upon the receipt of the foregoing letter, plaintiff, believing that no negotiations for the sale of said plant or stock had been entered into by defendant with any person or persons whomsoever, and that no proposition of purchase had been made, and relying up-

on the statements made by defendant, and having no knowledge of the written proposition in the possession of defendant, signed the receipt heretofore referred to, and forwarded the same to defendant; that said letters were written by defendant for the purpose of inducing plaintiff to part with his stock in said corporation; that plaintiff would not have parted with his stock at par value had he been advised of the proposition of purchase made by Westcott and Hanson, and of the other information then within the possession of defendant, which information was obtained by defendant by reason of his being president of said corporation.

"(16) Plaintiff was the owner of seventy-five shares of stock, of \$100 each, the par value being \$7,500, and defendant has paid plaintiff upon said stock the sum of \$7,500.

"(17) On December 4, 1889, the defendant wrote to Westcott and Hanson that he would be in Boston in about ten days from that date, and would then be prepared to talk with them definitely with reference to the sale of the entire stock of said company. That on the 4th day of December, 1889, defendant wrote to plaintiff, at Hot Springs, Arkansas, as follows: 'Inclosed please find receipt. The other one you can destroy when you get home. I have all the stock now but a few shares. I expect now to go East Monday or Tuesday. No business of moment at last meeting. Money is very close East, and I have some fears that my trip will be fruitless, but will try and may lead to some results further on.'

"(18) On December 14, 1889, defendant made to Westcott and Hanson the following proposition: 'I will sell you the entire stock of the Topeka Water-Supply Company, which consists of four thousand shares, of par value of \$100 per share, for the sum of \$500,000, on the following terms of payment, viz.: The sum of \$60,000 to be paid in cash on the signing of the contract to be made and entered into as of this date, the consideration named in said contract to be \$440,000, to be paid as follows, namely: The sum of \$200,000 to be paid February 10, 1890; \$140,000 to be paid February 20, 1890; \$100,000 to be paid March 20, 1890,—provided that final payment of the last-named sum of \$100,000 may be made on February 20, 1890, if said Westcott & Hanson may elect so to do by giving me five days' notice of such intention; payments to be made for and delivery of stock to be made at the National Bank of North America, in the city of Boston, Massachusetts. Joab Mulvane.' That the foregoing proposition was accepted by Westcott and Hanson. Shortly after the acceptance of the above proposition, defendant received from Coffin & Stanton a more favorable proposition for the purchase of the entire capital stock of the Topeka Water-Supply Company, and thereupon defendant abandoned the contract entered into between

himself and Westcott and Hanson, and entered into a new contract, whereby he sold to Coffin & Stanton the entire capital stock of said company for the sum of \$550,000, being \$150,000 more than par for said stock, and has received from said Coffin & Stanton the sum of \$550,000 therefor.

"(19) After defendant had made said sale, and returned to Topeka, he withheld from plaintiff and other persons interested in said corporation knowledge of the fact that a sale had been made, and plaintiff did not learn of the amount for which said stock had been sold until on or about the 5th day of February, 1890; that at that time defendant had acquired all the capital stock of the Topeka Water-Supply Company, and had transferred all its property and assets to a corporation formed by Coffin & Stanton, in pursuance to said purchase by them.

"(20) Defendant has expended in completing and carrying out the sale of said stock, and expenses connected therewith, the sum of about \$50,000."

From the above facts the court concluded, as matter of law, that the plaintiff was entitled to recover from defendant the sum of \$2,367, and rendered judgment accordingly for such amount. From these findings and judgment the defendant prosecutes error to this court. The plaintiff having died, the action was revived in the name of his administratrix, as defendant in error.

The evidence upon which these findings of fact are based, justifies much severer strictures upon the conduct of plaintiff in error than those in which the court below indulged. It discloses a course of duplicity, unfaithfulness, and falsehood, which can only be characterized in the strongest terms of censure. However, we need concern ourselves with nothing but the questions of law which arise upon the findings made, and the evidence upon which such findings rest. Briefly, such facts and findings are that plaintiff in error and the intestate of defendant in error were stockholders in an incorporated water-supply company. The plaintiff in error was president, and the deceased secretary, of the company. For simplicity of statement, we will speak of the deceased as though living, and will also speak of the parties as they were entitled in the court below, naming the deceased as plaintiff, and the plaintiff in error as defendant. The plaintiff desired to dispose of the company's stock, but the defendant opposed the sale until October, 1889, when he expressed a willingness to have it made. In this month an intending purchaser came from the East, and went to the company's office, and inquired of the plaintiff whether its plant was for sale. He was referred to the defendant, as president, for information. The visitor disclosed to defendant a desire to buy, and made an inspection of the company's property, books, and affairs, with that object in view. The defendant gave no information

either to plaintiff or the board of directors as to the desire of this person to purchase, but, when asked concerning the same, withheld the information he possessed, and led them to believe that the visit and inspection possessed no importance, but that the visitor might be of use to the company in taking up certain outstanding bonds upon its property, and placing thereon a new and additional amount of securities. In November, 1889, and as a result of the visit and examination of the company's property and negotiations with defendant, a written offer was made to him for the purchase of the company's stock of \$400,000 at par, and \$100,000 additional to him, "for the control and carrying out of the sale and transfer of the said stock." Defendant withheld information of this offer from plaintiff and the other interested parties, and, soon after it had been made, wrote the plaintiff, who was then in a distant state, that he thought the time had come to sell the company's stock; that he was going East soon, and would endeavor to find a buyer, and if plaintiff and other stockholders would name a price for their stock, not exceeding par, and would empower him to do so, he would sell it for them in the event a buyer could be found; and that he would want to keep any amount realized above the prices named for his services in finding a buyer and effecting a sale. About this time, and in pursuance to correspondence previously had between defendant and other prospective buyers of the company's property or stock, such persons sent an expert, as their agent, to examine the property, with a view to its purchase. Of this correspondence, and the purpose of this visit and examination, defendant gave no information to plaintiff or any one else in interest, but, on the contrary, wrote to plaintiff that he was having an expert examine the water plant, with a view to the discovery of possible defects in it, and as to the advisability of extending the system, and determining whether the company was building broad enough. The plaintiff and other stockholders turned their shares over to defendant for sale, as suggested by him, without any knowledge of the fact that negotiations for a sale were pending between defendant and others, or that a written proposition of sale had been made, at a large advance above par, which advance had been covered under the form of a bonus for defendant's services in effecting the transaction. In December following defendant went East, and on the 14th of that month accepted in writing the offer of purchase which had been made, with some modifications as to details, which were agreed to, but soon thereafter received a proposition from the other parties with whom he had been negotiating, and who had shortly before sent the expert out to examine the company's plant. This proposition was for the purchase of the company's stock at

\$350,000, which was \$50,000 more than he had already bargained to sell it for, and \$150,000 more than par for the stock. This last proposition was likewise accepted, and the contract first entered into rescinded. The one last mentioned was carried out. Upon returning, defendant withheld from plaintiff and other stockholders all knowledge of the terms of the sale, by which he had secured to himself a profit of nearly 40 per cent. upon the sale of the stock with which he had been intrusted.

The claimed errors consist in overruling a demurrer to the petition, in refusing to render judgment for defendant upon the findings of fact, and in rendering judgment for plaintiff on such findings. It is conceded that the findings of fact embrace the material allegations of the petition. Therefore the demurrer to the petition, the motion of defendant for judgment on the findings, and the sufficiency of the findings to uphold the judgment in favor of plaintiff, may be discussed as a single proposition. We have no hesitation in affirming the judgment of the court below and the other rulings made by it.

The case is viewed by the plaintiff in error as though it were a purchase by a director or other officer in a corporation of the shares owned by fellow stockholders. It is contended that in such cases the director or officer stands in no fiduciary relation to the stockholder, and is therefore privileged to buy, and under no obligation to disclose information peculiarly within his knowledge as to the value of the stock. His view of the facts of this case and the law applicable thereto is paralleled by the decision of *Carpenter v. Danforth*, 52 Barb. 581, and *Commissioners v. Reynolds*, 44 Ind. 509. In the first of these cases it was said: "Hence a sale of stock by a shareholder to a director, or the stock itself, is not so far connected with or the subject of the trust or trust relation which is admitted to exist as to subject the director to, or give the seller the benefit of, the principle of equity applicable to the dealings and contracts of parties between whom there is a trust or confidential relation, and to require the purchaser to prove not only that he paid a full and fair price for the stock, but also that he disclosed to the seller every fact or circumstance known to him, and not known to the seller, material on the question of the value of the stock." In the *Indiana* case it was likewise said: "The president of a railroad company, who was also one of its directors, having knowledge, by reason of his official position, that the true value of the stock of the company was very largely in excess of its nominal market value, purchased, at much less than its real worth, the stock of a non-official stockholder, who was ignorant of the company's financial condition, and of facts giving an extraordinary value to the stock, without disclosing to the seller the facts and circumstances within his knowledge as to its

real value. Held, that the relation of trustee and cestui que trust did not exist between the parties, and that, in the absence of actual fraud, the purchase was valid. The purchaser was not bound to communicate to the seller his knowledge of the worth of the stock, although the same was obtained by reason of his official relation to the company, nor was the purchaser required, in order to make a valid purchase, to pay a fair and adequate price for the stock." These and other like decisions do not apply to the facts before us. The evidence and findings in this case do not show a sale of stock by a shareholder to a director or other officer. They show an agency for sale in the officer for the stockholder. The plaintiff in error did not buy for himself the stock of defendant in error. He undertook to sell it in behalf of the stockholder to other parties. Doing so, he took upon himself all the obligations of good faith and fair dealing which are involved in the trust relation of principal and agent. But, if the findings were otherwise,—if it were that plaintiff and defendant in error were simply seller and buyer of stock,—the transaction, under the circumstances of concealment and misrepresentation by the plaintiff in error, as disclosed by the record of the case, could not stand. The very authorities upon which plaintiff in error principally relies exclude, from the purview of the decisions made, such cases as the one before us. In *Carpenter v. Danforth*, supra, it was held: "Where there was no evidence to show that, on a sale of stock by a stockholder to a director of the corporation, the purchaser made any material representation as to the affairs or condition of the company, or of any fact material to the question of the value of the stock, or any false representation of a material fact, that induced the sale; or that he either did or said anything to mislead the seller, or to divert or prevent him from ascertaining all that could then be known of the affairs, condition, and prospects of the company, or from making any inquiry as to any fact material on the question of the value of the stock; or that the purchaser did anything which misled or deceived the plaintiff, or was likely to mislead or deceive him, or which diverted or was likely to divert or prevent him from learning all that he (the purchaser) knew about the value of the stock, or any fact material to the question of value,—held that, under these circumstances, the sale could not be declared void, on the ground of fraudulent representations of material facts, or fraudulent concealment of material facts, by the purchaser."

It is not true, as argued by plaintiff in error, that the directors and officers of a corporation are trustees only in relation to the corporate entity and the corporate property. They are also trustees in some respects and to some extent of the corporate shareholders as well. Perhaps no general rule comprehensive of all the instances in which their trusteeship exists can be laid down, but it is safe to say that

cases in which the officer, by virtue of his position as such, with the superior opportunities it affords of acquiring information not possessed by the stockholder, but vital to his interests, acquires such information, are cases which, upon grounds of trust and confidence, preclude all artifice and deception upon his part when conscience and fair dealing require a disclosure. Mr. Pomeroy, in his work on *Equity Jurisprudence* (section 1090), states in general terms the dual relation of trust which the officer occupies to the corporation and its shareholders also: "Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property. He obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement. Shares of stock, however, are regarded by courts of law and of equity as a species of property, as vendible in the market, as having a pecuniary value, and as clothing their owner with proprietary rights which will be protected and enforced. From this analysis it is obvious that, so far as the trust embraces or is concerned with the corporate property, the directors and managing officers occupy the position of quasi trustees towards the corporation only. There is no relation of beneficiary and trustee, having the corporate property for its subject-matter, between the stockholders and the directors. The directors are also agents for the corporation, but that fact does not prevent them from being in a partial sense trustees for the corporation. The important conclusion I repeat: That this phase of their trust is concerned with and confined to the corporate property. From it arise their fiduciary duties towards the corporation in dealing with such property, and the equitable remedies of the corporation for a violation of those duties. On the other hand, the directors and managing officers occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders. From it arise the fiduciary duties of the directors towards the stockholders in dealings which may affect the stock and the rights of the stockholders therein, and their equitable remedies for a violation of those duties. To sum up: Directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust. They are quasi or sub modo trustees for the corporation with respect to the corporate property, and they are quasi or sub modo trustees for the stockholders with respect to

their shares of stock." To the same effect, see *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Forbes v. McDonald*, 54 Cal. 100; *Oil Co. v. Marbury*, 91 U. S. 589.

But the consideration of this case may be divorced entirely from the fact of the special relationship of corporate officer and corporate shareholder, and centered upon the fact of the special agency for the sale of the stock, conferred upon plaintiff in error. He was specially authorized to find a purchaser and negotiate a sale. At the very time the correspondence and other communications leading up to the contract of agency were in progress, he was in receipt of a proposition of purchase. At that time, also, he was in correspondence with other parties looking to a sale to them. The proposition already made was of a sum largely in excess of what the shareholders were offering their stock for. The correspondence with the other parties eventuated in a still more advantageous offer. The plaintiff in error not only withheld information of these offers, but, by affirmative misrepresentations, concealed all knowledge of the same. He said that the visit of the first person who came to inspect the company's property possessed no importance to the stockholders, when he knew that it was with a view to the purchase of the corporate stock. He said that he was having the corporate property examined by an expert, with a view to the promotion of the corporate interests, when, as a fact well known to him, such expert made his examination as the representative of prospective buyers, with whom a deal was presently closed. It is no answer to say that plaintiff in error, during the correspondence which led up to the contract of agency, stated to defendant in error that he would retain for his services any sum above par realized upon a sale of the stock, and that defendant in error assented to the same by not objecting thereto. By most disingenuous practices, plaintiff in error had concealed the fact that a large profit could be realized on a sale of the stock, but he cannot be allowed to trammel up the legal consequences of his deception by a mere show of candor and honest dealing. The judgment of the court below is affirmed. All the justices concurring.

(58 Kan. 486)

PEAK v. LENORA STATE BANK.

(Supreme Court of Kansas. July 10, 1897.)

HOMESTEAD—EXTENT OF CLAIM—ELECTION BY APPLICANT.

A homestead claimant, owning more than 160 acres of land, who attempts, under the statute (section 2, c. 38, 1 Gen. St. 1889), to select as his exemption 160 acres, upon which he does not reside, but a portion of which is connected by contiguous tracts with the one upon which he does reside, is not to be denied an exemption in such portion as is thus connected, merely because he omits to claim it in connection with the tract upon which he lives; and in such case, on a motion by him to vacate a sheriff's sale of the land claimed as exempt, the court should put him to his election between such parts of the claimed land as can be so connected with the tract upon

which his dwelling house is situated, and should sustain his motion to vacate as to such portion.

(Syllabus by the Court.)

Error from court of appeals, Northern department, Western division.

Action by the Lenora State Bank against J. S. Peak. Judgment for plaintiff. From an order setting aside a sale under the judgment, plaintiff brought error, and from a judgment of the court of appeals (44 Pac. 900) reversing such order, defendant brings error. Reversed.

L. H. Thompson, for plaintiff in error. L. H. Wilder and J. R. Hamilton & Son, for defendant in error.

DOSTER, C. J. This case involves questions of homestead exemption and selection. September 28, 1892, the Lenora State Bank, defendant in error, recovered a money judgment against J. S. Peak, plaintiff in error, in the district court of Norton county. At that time, and until after the levy of execution hereafter mentioned, plaintiff in error was the owner of a number of contiguous tracts of land, amounting to 760 acres, of which that in question was a part. These lands embraced the N. E. and S. W. $\frac{1}{4}$ of section 17, the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 20, all in township 5, range 24 W., being a contiguous body of tracts one mile and three-quarters in length from north to south, and one-half mile in width. All the lands owned by Mr. Peak were mortgaged. January 9, 1894, the defendant in error caused execution on its judgment to be issued and levied upon the N. E. $\frac{1}{4}$ of section 17, and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 20. The intervening tracts—the S. E. $\frac{1}{4}$ of section 17 and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 20—were not levied upon. January 30, 1894, the plaintiff in error, in pursuance of the law relating to exemptions, being section 2, c. 38, 1 Gen. St. 1889, served written notice upon the sheriff making the levy that he claimed the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 20 as his homestead. This notice was disregarded, and on February 10th following, the lands levied upon were sold. The defendant in error, as judgment creditor, became the purchaser. At the succeeding term of court the plaintiff in error moved to set aside the sale of the lands claimed to be exempt. Upon the hearing of this motion the court vacated the sale, upon the claim of homestead exemption, and from the order of vacation the bank prosecuted error to the court of appeals. Upon consideration of the case by that court, the order setting aside the sale was reversed. *Bank v. Peak*, 3 Kan. App. 698, 44 Pac. 900. From this order of reversal the plaintiff in error, Peak, in turn prosecutes error to this court.

The evidence in the case, which was almost entirely that of the plaintiff in error, and which in one or two particulars is somewhat lacking in clearness and precision of state-

ment, shows that in 1873 the plaintiff in error settled upon and entered the lands now claimed by him as a homestead, under the pre-emption laws of the United States. This tract is the most valuable and the best adapted to farming purposes of all the lands owned by him, having thereon a stream of water and a considerable body of timber. It is fenced, and has about 70 acres broken to cultivation. After residing upon such tract for about three years, the plaintiff in error entered the neighboring tract, the S. E. $\frac{1}{4}$ of section 17, a quarter of a mile distant from his pre-emption claim, under the homestead laws of the United States, and, after making final proof of five years' residence, continued to reside upon it until the latter part of September, 1893, about one year after the recovery of the judgment in question. During the period of his residence upon this last-mentioned tract, he built a stone house and made other improvements thereon, at a cost of about \$2,000. He, however, always claimed the lands in section 20 as his homestead, or, as he denominated it at one point in his testimony, his "regular home." He always intended to sell the land upon which he resided, if he could do so, and move back on the lands in section 20. However, after becoming financially embarrassed, he offered to sell the tract claimed as a homestead, for the purpose of enabling him to pay his indebtedness, but, failing to secure the price asked, did not do so. Using the language of his testimony in one particular, he said: "I expected to save some property to shelter me, but if I had to come down to one piece of land, I always intended to hold that piece of land in twenty." At the time of the creation of the indebtedness to the bank, upon which the judgment in question was rendered, he told the managing bank officials that he claimed the land in section 20 as his homestead, and he intended to make that his home; that he thought more of it than he did of the rest of his land, and intended to keep it as a home, and not part with it, if he could help himself. At what time a definitely formed intention to abandon his residence in section 17, and occupy the claimed homestead in section 20, arose in his mind does not appear; inferentially not until after the recovery against him of the judgment in question, and the perception by him of the fact that he could not discharge his indebtedness, so as to hold more than his constitutional exemption of 160 acres. September 28 or 29, 1893, he moved out of the stone building in section 17, into a cheap, illy-constructed house on the claimed homestead in section 20, with his family, consisting of his wife and father-in-law, a very aged and infirm old man, leaving, however, part of his household furniture in the vacated building. As the cold weather of the succeeding winter came on, he went back into the stone house in section 17, on account of the inability of his wife's father to live in the poor and illy-constructed building on section 20. They remained in the old home until after

the sale in question, moving back upon the claimed homestead only a few days before the hearing of the motion to set aside the sale. In the meantime, however, an additional building, costing about \$60, had been erected on the land in section 20. The removal from one place to another was made under the advice of counsel, and to save the land as a homestead.

Upon this state of facts, the question arises whether the claim of homestead exemption of the land in section 20 can be sustained. Our judgment is that the legal principles forming the basis of the decision of the court of appeals, and much of its reasoning in elucidation of the same, are sound, but that, while plaintiff in error was not entitled to all the land claimed by him as a homestead, he was entitled to a portion of it, and that opportunity should have been given the district court to set it aside to him. The vaguely-formed, indefinite, and conditional intention by the plaintiff in error to occupy the claimed homestead cannot avail to impart to it the homestead character, in the face of the claimant's long-continued residence elsewhere. The homestead character must attach to land before it becomes impressed with a judgment lien. *Bullene v. Hlatt*, 12 Kan. 98; *Ashton v. Ingle*, 20 Kan. 670. A homestead can only exist in a single tract or contiguous tracts. *Randal v. Elder*, 12 Kan. 257; *Bank v. Hopkins*, 47 Kan. 580, 28 Pac. 606. The dwelling house upon the homestead is an inseparable part of it. There can be no homestead without a place of family dwelling, either actual, or in such contemplation as amounts to the same thing. The dwelling house is the nucleus of all the homestead interests and affections, and hence whatever homestead selection is made must include the family roof tree. We do not know that such fact has been specifically so remarked in any of the decisions, but it results as a principle from the nature of the homestead exemption, and is implied in all the cases. Hence the plaintiff in error was not entitled to make a homestead selection which did not include the house in which he lived. He was entitled, however, to select a homestead of such contiguous tracts as would include the one upon which he resided. He lived upon the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 17. The N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 20, one-fourth of a mile in width, intervenes between that and the claimed homestead. At the time of the levy by the sheriff and the attempted homestead selection, this intervening tract belonged to the plaintiff in error. He could have made a selection to include the 40-acre tract upon which his dwelling house in section 17 stood, also the 40-acre tract immediately south, in the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 20, and, in addition thereto, 80 acres of contiguous 40-acre tracts out of the 160 acres which he did claim. However, he did not do this. He made claim to more than he was entitled to, and, in doing so, appeared to renounce his

claim to what he was entitled to. We think this unwarranted claim in the one particular, and renunciation of a valid claim in the other, proceed from a mistake of his legal rights, which does not justify the courts in refusing to him what he is entitled to. Homestead interests are subjects of special favor by the courts, and claims of homestead exemption are to be liberally viewed. On the hearing of the motion to vacate the sale, the district court should have put the plaintiff in error to his election between the different tracts composing the homestead selection he had made, and of which he had notified the sheriff, and should have vacated the sale as to the part finally selected; in fact should have vacated it as to the whole of the tract in question, so as to permit a resale of the remainder.

Of course we have no knowledge of the complications which may have occurred since the case arose, caused by the shifting of titles to the various tracts out of which the homestead selection might have been made; but we apprehend none have occurred which can operate to prevent the selection of an 80 acres out of the larger tract originally claimed as a whole, and its occupancy in a reasonable time hereafter, by the homestead claimant.

The judgment of the court of appeals is reversed, and likewise that of the district court, with instructions to such courts to proceed in conformity with this opinion. All the justices concurring.

(6 Kan.App. 635)

HANLEN v. BADEN.

(Court of Appeals of Kansas, Southern Department, C. D. July 27, 1897.)

APPEAL—REVIVOR—NOTICE—TIME—SURVIVAL OF ACTIONS—PARTIES—PROVINCE OF JURY.

1. A notice for an order of revivor in an action in the court of appeals may be served upon the adverse party or his attorney of record by delivering a copy of the notice to either of them personally, or by leaving such copy at the usual place of residence of either of them, or by securing an acknowledgment of service from either of them; or such party or his attorney may waive, in writing, the issuing or service of the notice.

2. Ten days is all the notice required to be given of an application for an order of revivor in the court of appeals.

3. There is no necessity of, or provision for, an amended petition to show the authority of the parties brought into this court by revivor. The way to raise this question in this court is upon the hearing of the application for the order of revivor, or upon a motion to dismiss.

4. The administrator or executor of a deceased person is the proper party to maintain an action for damages which accrue to the real estate of the deceased during his life-time.

5. Where the evidence of the plaintiff tends to show his right to recover, and is sufficient to sustain a judgment except for the conflicting evidence of the defendant, it is error for the court to direct the jury to return a verdict for the defendant.

(Syllabus by the Court.)

Error from district court, Cowley county.

Action by John Ireton against J. P. Baden for damages to land. From a judgment for defendant, plaintiff appealed, and on his death

John W. Hanlen, administrator, was substituted. Motion to dismiss overruled, and judgment reversed.

John C. Pollock, for plaintiff in error.

DENNISON, P. J. A motion has been filed in this court by the defendant in error to dismiss this action for the following reasons: (1) That the supreme court had no jurisdiction to make an order of revivor in this case for the want of a sufficient notice. (2) No amendment has been made to the petition in error. (3) The failure of the heirs at law to revive this action within one year after the death of John Ireton. The notice of the motion for an order of revivor was served upon Madden and Buckman, and they acknowledged service of the notice on March 19, 1894. The time fixed in the notice for a hearing was April 3, 1894, and the supreme court made the order of revivor. This motion to dismiss was filed in the supreme court, and the hearing of the motion was continued until the case was submitted upon its merits. The contention of the defendant in error is that the notice was not legally served, because served upon the attorney for defendant in error, and did not give 20 days' notice of the time when the motion would be heard. Paragraph 4525, Gen. St. 1889, provides that, if revivor is not made by consent, "notice of the application for such order shall be served in the same manner, and returned within the same time as a summons upon the party adverse to the one making the motion." It will not be necessary to consider the manner of serving or the time of returning a summons in either justice or district court when the revivor is made in the court of appeals. In this court "a summons shall be issued and served, or publication made as in the commencement of an action. A service on the attorney of record in the original case shall be sufficient, * * * and shall be made returnable on or before the first day of the term of the court, if issued in vacation, and ten days before the commencement of the term. If issued in term time or within ten days of the first day of the term, it shall be returnable on a day therein named. If the last publication or service of the summons shall be made ten days before the end of the term, the case shall stand for hearing at that term." Id. par. 4644. "The defendant in error or his attorney may waive the issuing or service of the summons." Id. par. 4645. A notice for an order of revivor in an action in the court of appeals may be served upon the adverse party or his attorney of record by delivering a copy of the notice to either of them personally, or by leaving such copy at the usual place of residence of either of them, or by securing an acknowledgment of service from either of them; or such party or his attorney may waive, in writing, the issuing or service of the notice. Ten days is all the notice required to be given of an

application for an order of revivor in the court of appeals.

It is also contended that the petition in error should be amended so as to allege the representative capacity of the administrator. The cases of *City of Atchison v. Twine*, 9 Kan. 350, and *Railroad Co. v. Andrews*, 34 Kan. 563, 9 Pac. 213, are cited, which hold that in the trial court the fact of whether the person in whose name the action is revived is the personal representative of the deceased must be tendered in an amended petition as an issue, and sustained by proof. No issues are tried in this court, and there is no necessity of, nor provision for, an amended petition to show the authority of the parties brought into this court by revivor. The way to raise this question in this court is upon the hearing of the application for the order of revivor or upon a motion to dismiss.

The question is also raised as to whether the administrator or the heirs at law are the proper parties to prosecute this case in this court. Ireton claimed to be the owner of certain real estate, and that the defendant had damaged it by raising his dam higher than he had the right to do, thereby causing water to overflow portions of said real estate. The action was brought for the permanent damages to the land, and it is probable that under the mill-dam act such an action must have been brought within two years after the erection of the addition to the dam which caused the damage, or not at all. Upon the death of John Ireton, his real estate would descend to his heirs, and his choses in action and claims for damages or trespass would go to his administrator or executor. If the damage accrued in his lifetime, the administrator or executor must have maintained the action to recover, but, if after his death, his heirs must have maintained the action. The motion to dismiss will be overruled.

This brings us to a consideration of the case upon its merits. The plaintiff introduced evidence tending to show title in himself, and that the defendant had raised the dam, and the amount of his damages, and rested. The defendant introduced evidence tending to show that the land belonged to Henry S. Ireton, the son of plaintiff, and also tending to prove that he had not raised the dam. The evidence introduced to show that the son was the owner consisted of a deed which had been filed for record by John Ireton and wife some 17 years prior to that time, and also the petition in a prior action brought by Henry S. Ireton against Charles A. Bliss for damages to the same land, and a cost bond in the same case, signed by Henry S. Ireton as principal, and John Ireton, who signed by his mark as surety. Henry S. Ireton testified that he had no interest in the land, and claimed none; had paid no consideration for it, and that his father had been in possession of it for about 19 years. During the progress of the trial, and over the objection of the plaintiff, the court directed the jury to re-

turn a verdict in favor of the defendant because the plaintiff had failed to show that he is the owner of the land for which he claims damages. The plaintiff's evidence tended to show that he was the owner of the land, and such evidence was sufficient, in the absence of the evidence of the defendant to sustain a judgment for the damages claimed. The defendant's evidence tended to show that plaintiff was not the owner of the land. This conflicting evidence should have been submitted to the jury, and the court erred in assuming to decide these controverted questions for them. This question is ably argued in *Sullivan v. Insurance Co.*, 34 Kan., on pages 177, 178, 8 Pac. 112. The judgment of the district court is reversed, and the case remanded for a new trial. All the judges concurring.

(6 Kan.App. 5)

CITY OF ATCHISON v. RIGGLE.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

PLEADING—MOTION TO MAKE MORE DEFINITE—POVERTY AFFIDAVIT—AMENDMENT—EVIDENCE.

1. Where it does not appear from the record that any material evidence was offered or received tending to show any defect in the sidewalk or injury received by the person, other than those specifically set up in the petition, there is no reversible error in the court below overruling a motion to make the petition more definite and certain in these respects.

2. There is no error in the trial court permitting the plaintiff below to file an amended poverty affidavit, under sections 581 and 582 of the Civil Code, when his attention was called to the fact that the affidavit filed at the commencement of the case did not comply with the requirements of said sections.

3. There was no material error in the admission of the evidence complained of, and an examination of testimony offered shows that there was sufficient evidence to justify the verdict of the jury.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by John Riggle against the city of Atchison. Judgment for plaintiff. Defendant brings error. Affirmed.

W. D. Gilbert, for plaintiff in error. H. C. Solomon, for defendant in error.

WELLS, J. This was an action originally brought in the district court of Atchison county on the 22d day of November, 1890, for the recovery of damages for a personal injury, claimed to have been sustained by the defendant in error, the plaintiff below, on account of a defective sidewalk, negligently permitted by said defendant, whereby the plaintiff below fell, and broke his finger. The case was tried to a jury on March 1, 1892, and a verdict found in favor of the plaintiff, and against the defendant, the city, for \$300. A motion for a new trial was duly made, overruled, and excepted to, and the case brought here for review. The plaintiff in error assigned five errors in the

district court, as follows: "(1) The court erred in overruling defendant's motion to make plaintiff's petition more definite and certain. (2) The court erred in permitting plaintiff to file an amended poverty affidavit, and in overruling defendant's motion to strike plaintiff's petition from the files, and dismiss said action. (3) The court erred in admitting testimony offered by plaintiff over the objections of defendant, and excepted to by defendant at the time. (4) The court erred in overruling defendant's demurrer to the evidence. (5) The court erred in overruling defendant's motion for a new trial, and in rendering judgment for plaintiff." We shall consider these errors in the order in which they are set up in plaintiff's brief.

First, in overruling the defendant's motion to make the petition more definite and certain. The petition, after charging the specific defects in the sidewalk, added that it was otherwise in a dangerous condition. We have not been able to find that any evidence was offered except upon the specific defects pointed out in the petition, and consequently the error, if such it was, in refusing to require the petition to be made more specific, is immaterial, and this applies likewise to the other question upon which they ask that the petition should be made more definite, to wit, how he was injured other than the breaking of his finger.

The second ground of error alleged is in permitting plaintiff to file an amended poverty affidavit, and in overruling defendant's motion to strike petition from the files, and dismiss said action. We do not think this was error. Section 140 of the Civil Code says: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Also, see *Cole v. Hoeburg*, 36 Kan. 263, 13 Pac. 275; *Hardesty v. Ball*, 46 Kan. 555, 26 Pac. 959; and *Dennis v. Benfer*, 54 Kan. 527, 38 Pac. 806,—all bearing more or less directly upon this question.

The third ground of error is in admitting testimony offered by plaintiff, over the objection of defendant. The first error assigned under this head was in overruling the defendant's objection to the introduction of any evidence, on the ground that the petition does not state facts sufficient to constitute a cause of action, and because the date of the accident was changed in his petition from "17" to "19." There was no error in this. Serious complaint is made of the admission of evidence of information of the defective condition of the sidewalk given to a man employed by the city to repair its sidewalks. We see no error in this.

The fourth assignment of error is that the court should have sustained the demurrer to the evidence. We do not think so. We have carefully read the record, and are of

the opinion that there was plenty of testimony upon which the jury were justified in finding the verdict they did.

There being no merit in the grounds presented for a new trial, the motion therefor was properly denied. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan. App. 919)

REPSTINE v. NETTLETON.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

RES JUDICATA—EVIDENCE—APPEAL—REVIEW.

1. The pleadings and evidence in this case show that there was a former adjudication of all the questions involved in this action, and that the court properly instructed the jury to return a verdict in favor of the defendant, and against the plaintiff.

2. Where a defendant relies upon a proceeding and judgment of the district court as *res judicata*, and not upon an arbitration, the court properly refused to allow one of the arbitrators to testify that the subject-matter was not considered by such arbitrators.

3. The journal entry shows that the jury returned their verdict in accordance with the instructions of the court. There was a motion filed to correct this journal entry, and in the notice of the motion the plaintiff stated "that he would use affidavits and oral evidence in support of his motion." The record fails to show that the oral evidence and affidavits are preserved in the record. The finding of the trial court upon this motion is conclusive.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Lewis Repstine against C. P. Nettleton. Judgment for defendant, and plaintiff brings error. Affirmed.

W. D. Gilbert, for plaintiff in error. J. T. Allensworth, for defendant in error.

McELROY, J. This was an action brought by Lewis Repstine, as plaintiff, against C. P. Nettleton, as defendant, in justice's court, February 3, 1890, to recover from the defendant \$261.51. An appeal was taken, and the case was tried in the district court of Atchison county. At the trial in the district court, the defendant obtained a judgment for costs, and the plaintiff brings the case to this court for review.

The record discloses that prior to July, 1885, plaintiff and defendant were engaged, as co-partners, in the "lumber and grain" business. On about July, 1885, the business was changed to that of "grain, hardware, and seed." At the time this change in the business of the co-partnership was brought about, there was something over \$500 worth of lumber on hand, which was left in the possession of the defendant, Nettleton. It is claimed that Nettleton sold this lumber, and from such sales owed to the plaintiff the amount claimed in his bill of particulars. The case was tried before a jury, and at the close of the trial, the court instructed the jury as follows: "The subject-matter of this action having been determined by the judg-

ment of this court in a former action between the same parties, and it being admitted that no appeal or proceeding in error was taken therefrom, you are instructed to return a verdict herein in favor of the defendant, C. P. Nettleton, and against the plaintiff, Repstine." Lewis Repstine commenced an action against C. P. Nettleton on November 4, 1880, alleging the formation of a co-partnership on February, 1885, and the formation of another co-partnership on the 26th day of November, 1886, and asked for an accounting, and judgment for the amount which should be found due him. The defendant, Nettleton, filed an answer,—"general denial"; second, "pleading that the matters in dispute had been settled by mutual agreement by arbitration, and that this included all matters in dispute between the parties." To this answer the plaintiff filed a reply, in which he admitted the matters in dispute had been submitted to arbitration. Afterwards judgment was rendered upon the pleadings for the defendant, Nettleton, and against plaintiff. The pleadings and judgment in that case were in evidence in the case under consideration, and show a former adjudication of all the questions involved in this case. Therefore the court properly instructed the jury to return a verdict in favor of the defendant, and against the plaintiff. The undisputed facts show that by a suit in the district court, at the instance of this plaintiff in error, all the matters connected with the co-partnership affairs between plaintiff and defendant were adjudicated.

Complaint is made that the court erred in not permitting the plaintiff to show by one of the arbitrators that the lumber account was not settled in the arbitration. This position might be tenable if Nettleton was relying upon the arbitration as a defense to plaintiff's suit. Such is not the case. Nettleton is relying upon the proceedings and judgment of the district court, and not upon the arbitration. The pleadings and judgment show that the subject-matter of this action was settled by the suit for an accounting.

Again, complaint is made that the jury did not actually sign the verdict. This position is not well taken. The journal entry shows that the jury returned their verdict in accordance with the instructions of the court. There was a motion filed to correct this journal entry, and in the notice of the motion the plaintiff stated "that he would use affidavits and oral evidence in support of his motion." The record falls to show that the evidence and affidavits are preserved in the record. The finding of the trial court upon this question is conclusive. It follows, therefore, from what we have said, that the trial court committed no error in overruling the motion of the plaintiff for a new trial. The judgment of the trial court will be affirmed. All the judges concurring.

HURSH v. STARR. (6 Kan.App. 8)

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

REPLEVIN—PLEADING AND PROOF.

1. In an action of replevin against an officer to recover cattle levied upon by him, wherein the defendant answers, admitting possession, and justifies under a writ of execution, and denies the ownership of the plaintiff, it is error to permit him to prove that he was not in possession of the property at the commencement of the suit.

2. In such case, where the evidence of the plaintiff proves prima facie that he is the owner of the property, that he demanded possession of the property from the defendant before bringing the suit, but it is incidentally developed by cross-examination that, at the time the levy was made, the plaintiff gave a receipt to the defendant, by which he undertook to safely keep the property for the defendant, it is error to sustain a demurrer thereto, on the ground that the defendant did not, at the commencement of the suit, have or detain the property from the plaintiff.

3. The defendant, in his answer, admitted the detention, and justified the same by levy of execution thereon; and, when plaintiff rested, he demurred to the evidence, on the sole ground that, by the receipt of the plaintiff, it appeared he did not detain the property, and the demurrer was sustained upon that contention. *Held*, it was error to render a judgment in his favor for a return of the property or its value.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by B. F. Hursh against J. W. Starr. Judgment for defendant. Plaintiff brings error. Reversed.

W. D. Gilbert, for plaintiff in error. Ellsworth Ingalls, for defendant in error.

MAHAN, P. J. Action of replevin to recover the possession of 20 head of cattle, claiming absolute ownership. Defendant admits possession; justifies under a writ of execution; denies ownership of plaintiff. Upon the trial, plaintiff offered evidence tending to show, and it does in fact show, prima facie that he is the owner of the property; that he demanded it from the plaintiff before bringing the action. It was developed, however, upon cross-examination, that, at the time the levy was made in the first instance, the plaintiff gave to the defendant a receipt, promising to safely keep the property. A demurrer was sustained to the evidence, and the case taken from the jury, and a judgment entered for the defendant, ordering a return to him of the property, or, in case the property could not be returned, a personal judgment of \$300 against the plaintiff. In addition to the answer of the defendant, admitting possession in himself and justifying under the writ, there is a stipulation at the beginning of the hearing to the effect that the property was levied upon by the defendant in the case recited in his answer, and, in effect, that he was in possession of the property. The value of the property was likewise fixed by the stipulation. The plaintiff saved an exception to the ruling of the court sustaining the de-

murrer to his evidence, made a motion for a new trial, specifying that action of the court as one ground of error, and asks a reversal of the judgment upon the assignment of errors—First, that the court erred in sustaining the demurrer; second, that the court erred in rendering the judgment in favor of the defendant, and against the plaintiff, for costs; and, third, that the court erred in rendering judgment in favor of the defendant, and against the plaintiff, for a return to the defendant of the property, or the value thereof, in the sum of \$300, in case a return could not be had; and that the court erred in overruling the plaintiff's motion for a new trial.

We think all the assignments of error should be sustained. The evidence was abundant to sustain the ownership of the plaintiff. The evidence was clear that he demanded possession before the bringing of the suit, and was refused. Possession of the defendant is admitted by the pleadings, and by the stipulation of facts. So that the matter of the receipt being given by the plaintiff in the first instance became irrelevant and immaterial under the issues. It was not proper to permit the defendant, as an officer, to say, first, that he had possession under his writ, by his answer and by his stipulation, and then ask the court to hold that he had not possession, upon his demurrer. And even conceding that he had this right, that he might insist on possession under his answer and stipulation, and, upon the evidence, insist that he did not have the possession of the property, and did not detain it from the plaintiff at the beginning of the suit, yet it would be error in such a case to render judgment that the plaintiff should return to him the property that he never had, and did not claim to have,—that he denied having,—in order to get a judgment against the plaintiff. If he did not have it, did not detain it at the beginning of the action, the court did not have authority to restore him something he never had. The motion for a new trial should have been granted. The judgment is reversed, and the case remanded to the district court, with instruction to grant a new trial. All the judges concurring.

(6 Kan. A. 11)

BALDWIN v. LETSON et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

KICKAPOO INDIANS—CITIZENSHIP—ALLOTMENT OF LANDS—CONVEYANCE.

1. Under article 3 of the treaty of the United States with the Kickapoo Indians, proclaimed May 28, 1863, the lands allotted to a member of the said tribe of Indians became alienable, and said Indian ceased to be a member of said tribe, and became a citizen of the United States, when his application was acted upon by the president and a patent issued therefor, and not at the time he appeared before the district court, made the required proof, and took the oath of allegiance, as provided for in said article.

2. A conveyance of land so allotted, made by such allottee on the same day that he appeared before said court, made the required proof, and took said oath, and before his application was acted upon by the president, and a patent issued therefor, is void, and conveyed no title, either directly or by estoppel, to the grantee therein.

Mahan, P. J., dissenting.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by William W. Letson and others against Melvina A. Baldwin. Judgment for plaintiffs. Defendant brings error. Affirmed.

Seneca Heath, for plaintiff in error. H. M. Jackson, for defendants in error.

WELLS, J. This is an action to quiet title, begun by Briggs and Letson in the Atchison district court against the plaintiff in error. There was judgment for the plaintiff, quieting the title, and the defendant brings the case here for review.

The case involves the construction of the treaty of 1863 between the United States and the Kickapoo Indians, and the subsequent acts of congress in reference thereto. Both parties trace their claim of right from Peter Cadue, a Kickapoo Indian, to whom was allotted the land in controversy under the treaty of 1863. Articles 2 and 3 of the treaty of 1863 are as follows:

"Art. 2. It shall be the duty of the secretary of the interior to cause to be made an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and heads of families respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind and otherwise incompetent, as to which of these classes they will belong. And thereupon shall be assigned, under the direction of the commissioner of Indian affairs, to each chief, at the signing of the treaty, one half section; to each other head of a family, one quarter section; and to each other person, forty acres of land; to include in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignment shall have been completed, certificates shall be issued by the commissioners of Indian affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being mem-

bers of the Kickapoo tribe, and of Indian blood, with the permission of the president, and under such rules and regulations as the secretary of the interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person[s] to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

"Art. 3. At any time hereafter, when the president of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may at the same time, cause to be set apart and placed to their credit severally, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the president, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: Provided, that before making any such application to the president, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for a least five years, themselves and families."

The act of congress in 1886 extended the provisions of article 3 of this treaty to all allottees, adults, whether male or female, and whether heads of families or not. Peter Cadue was a male adult, but not the head of a family. Under the treaty he was allotted the 40 acres in controversy. On the 20th of October, 1886, he appeared before the district court of the United States for the district of Kansas, and made the proof, as required by article 3 of the treaty, took the oath of allegiance, and on the same day conveyed the land to Martin and Cole, who subsequently conveyed to Saunders, who afterwards conveyed to Sample, and Sample and his wife made the mortgage set up by the

plaintiff in error, Melvina Baldwin, in her answer. January 19, 1888, a patent was issued by the United States to Peter Cadue for this land, and on the 25th of the same month, Peter Cadue gave a warranty deed to Letson and Briggs, one of the plaintiffs, and the ancestor of the other plaintiffs, now defendants in error. The deed by Cadue to Martin and Cole was likewise a warranty deed, and was duly recorded at the time it was made; and the question arising in this case is, by which of the deeds did Peter Cadue part with his title to the land?

There are nine assignments of error by counsel for plaintiff in error. The first assignment of error is that the court erred in admitting in evidence the opinion of Judge Foster of the United States circuit court in the case of Briggs v. Sample, in the circuit court of the United States for the district of Kansas, 43 Fed. 102. This was a bill in equity of the same plaintiffs against Sample, the grantee of Cole and Martin, to quiet their title against the defendants. The plaintiff in error was not a party, although her mortgage was made and recorded long prior to the commencement of that suit. The second assignment of error is that the court erred in admitting in evidence a copy of the decree of the United States circuit court in the same case, and the same remarks apply to this assignment as to the first; but, inasmuch as the case was tried to the court without the intervention of a jury, no reversal can be had on account of the admission of this testimony. The third assignment of error is the admission in evidence of the testimony of one of the plaintiffs (defendants in error), in rebuttal, as to the value of the lands in controversy in 1888. The defendant, plaintiff in error, offered evidence upon this fact, and, while it is immaterial, it cannot be said to be prejudicial, and cannot be reversible error in this case. The fourth and fifth assignments of error are that the court refused to admit in evidence the deed of the Kickapoo Indian Cadue to Martin and Cole on October 20, 1886, and the subsequent conveyances to the mortgagor of the plaintiff in error. The sixth and seventh assignments are practically the same,—that the court rendered the wrong judgment. The eighth assignment of error is that the court below erred in overruling the motion of the plaintiff in error for a new trial, and the ninth, which is, in substance, the same as the seventh and eighth, but more specific in form, is that the court erred in adjudging that the title acquired by Cadue to the land in controversy under the provisions of the treaty between the United States and the Kickapoo Indians did not, by the warranty deed made by him in October, 1886, pass to and vest in J. A. G. Sample, by the mesne conveyances, a valid title to said land.

The first contention of the plaintiff in error under these last assignments (4 to 9 inclu-

sive) is that the Indian title acquired by the Kickapoos under these various treaties was a fee-simple title. We do not think it necessary to decide this question as to whether the title was a fee simple or not, as, under the decision of the supreme court of the United States (which court is the final arbitrator of this case in any event), it is held that a restriction upon alienation in these Indian titles is not inconsistent with the fee-simple title. See, also, *Stevens v. Smith*, 2 Kan. 247.

It is contended by the plaintiff in error that when Cadue appeared before the United States district court, and made the proofs required by article 3 of the treaty of 1863, took the oath of allegiance as a citizen of the United States, and renounced his allegiance to the Kickapoo tribe of Indians, he became a citizen of the United States, and his disability then ceased, and that he was from that time empowered to act in his own behalf as to any property he owned, as any other citizen of the United States could act; and that by making that proof, and thus becoming a citizen of the United States under provisions of article 3 of the treaty, he acquired a right to the patent, with power of alienation, and that when that patent issued it related back to the date of this proof, being the first moment of time when he could, by right, claim the patent; and, being no longer incapacitated, that, under his conveyance of warranty, by the deed of October, 1886, the after-acquired legal title conveyed to him by the patent inured to the benefit of Martin and Cole and their grantees by such relation and estoppel.

It is contended, on the other hand, that he did not become a citizen by making the proof and taking the oath of allegiance, as required of aliens, under the provisions of this article 3; that he did not cease to be under the guardianship of the United States; that he was still incapacitated to convey the land, and any deed he might make would be void until such time as the president acted upon his application, and caused the patent to issue; and this is the pivotal question in the controversy.

If the restriction upon the alienation of Cadue as an allottee was not removed by the proceedings in the district court, then his deed of October 20, 1886, was void, conveyed no title, nor could the plaintiff in error claim title under her mortgage by way of estoppel. This is expressly decided in *Sheldon v. Donahoe*, 40 Kan. 349, 19 Pac. 901, and a number of cases therein cited, as well as by the supreme court of the United States in a number of cases. A deed made in express violation of an inhibition provided by law is a void deed, and conveys no title, nor can it create one by way of equitable estoppel.

Article 2 of the treaty of 1863, under which this land was allotted to Cadue, provided as follows: "Until otherwise provided by law, such tracts shall be exempt from levy, taxa-

tion, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being members of the Kickapoo tribe, and of Indian blood, with the permission of the president, and under such rules and regulations as the secretary of the interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person[s] to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to any portion of the tribe in common, and to the proceeds of the sale of the same whensoever made."

Article 3 of the treaty, under the provisions and amendments provided by the act of congress of 1886, has a provision by which the land may become alienable by the allottees. The allottee was to apply to the president, and, when he became satisfied that the allottee was sufficiently intelligent and prudent to control his own affairs and interests, he should cause the land to be conveyed to the allottee by a patent in fee simple, with power of alienation. But it was further provided that, before applying to the president, the allottee should appear before the United States district court for the district of Kansas, and make proof of the facts upon which the president was authorized to issue the patent making the lands alienable. Cadue, in this case, did everything that was required of him to be done. He had made the necessary proof and taken the oath of allegiance. There was nothing left to be done but for the application to go through the ordinary routine of the executive departments of the government, receive the approval of the president, and a patent to issue, and payment to be made to him of his share of the money belonging to said tribe. There is a further provision in this article 3 as follows: "And on such patents being issued, and such payments ordered to be made by the president, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens." But it will be noticed that in this clause of the article all mention of the power of alienation is omitted, and if, by the proceedings in the court he became a competent person to convey his land, then the deed was not void, notwithstanding no patent was issued on his application until January 19, 1888. Being competent to deed his own property, and having made a warranty deed, the subsequently acquired legal title under the patent inured to the benefit of the grantee named in the deed of October 20, 1886, by way of relation of estoppel.

Now it may be assumed to be true that the public authorities were not authorized to tax this land until after the patent issued, and the land could not be subject to the levy of

execution or other legal process until after the patent issued; and yet the Indian who had shown his competency—who had been adjudged competent—could nevertheless make a valid conveyance. If he had done everything that he had to do under the law, and was entitled to a patent for this land, giving him full dominion over it, without any exercise of discretion by the president, the mere fact that there was a delay in issuing the patent would not affect his rights, or make his act with respect to the property to which he was entitled a void act. A majority of this court are of the opinion that Cadue became a citizen of the United States under the section quoted only when the president acted upon the application, and caused the patent to issue; and while they are willing to concede that the opinion of Judge Foster in *Briggs v. Sample*, 43 Fed. 102, is not conclusive upon them as authority, yet they are glad to find that the result of their own judgment, reached without the assistance of that authority, coincides with that of so distinguished and able a jurist. He says: "It will be observed that, under the provisions of article 2 of said treaty, this land could not be sold to any person other than a member of the United States. Article 3 provides the mode by which the president shall act in giving his permission to the allottee to alienate his land. Being satisfied of the intelligence and prudence of the Indian to control his own affairs and interests, the president may cause the land to be conveyed to him by patent in fee simple, with power of alienation; * * * and such patents being issued, and such payments ordered to be made by the president, such persons shall cease to be members of said tribe, and shall become citizens of the United States, and thereafter the lands so patented to them shall be subject to levy, taxation, and sale in like manner with the property of other citizens." The article further provides that, before making application to the president, the Indian shall appear before the United States district court, and make certain proofs establishing his intelligence, ability to support himself and family, etc., and take the oath of allegiance. This proof and oath of allegiance before the court does not, of itself, make the Indian a citizen, or sever his tribal relations, or procure him his patent, or make his land alienable. It is simply a preliminary proceeding to his making application to the president, and thereafter the president may act in the matter; and not until his patent is issued, and payment of his interest in the trust fund has been ordered, does he cease to be a member of the tribe, and become a citizen, and possess the power to alienate his land. It is clear that at the time this allottee made his deed to Cole and Martin, October 20, 1886, he was not a citizen, but still held his tribal relations, and was incompetent to contract, or to be contracted with, for the sale of his land, and his deed to said parties was illegal and void. Under the

plain words of the treaty, it would seem no citation of cases is necessary; but, touching on this subject, see the following cases: *Pennock v. Monroe*, 5 Kan. 586; *Libby v. Clark*, 118 U. S. 250, 6 Sup. Ct. 1045; *Smith v. Stevens*, 10 Wall. 327; *Sheldon v. Donahoe*, 40 Kan. 346, 19 Pac. 901; *Maynes v. Veale*, 20 Kan. 374. They cannot see that justice demands the application of the rule of relation in this case to give the plaintiff in error a title any more than in any other case where land has been bought from a person incapable of conveying a title, or of contracting in relation thereto, and fully accept the principle laid down in *Oliver v. Forbes*, 17 Kan. 113, that it is a general rule of law that when a patent is issued it relates back to the earliest moment when it ought to have been issued, and hold that this patent ought first to have been issued when the president acted upon the application of Cadue and issued it; as the issuing of the patent, under the section in controversy, is the thing itself that fixes the status of the Indian as a citizen of the United States. The issues in the last-cited case are entirely dissimilar from those in the case at bar. They also think that there is a very plain distinction between *Jenkins v. Collard*, 145 U. S. 552, 12 Sup. Ct. 868, and the case at bar. In that case the landowner was under no general disability. As far as other property or future acquisitions were concerned, he was at full liberty to contract; and, having entered into a deed, with covenants of seisin and warranty, while the disability existed, the court held "that warranty estopped him, and all persons claiming under him, from asserting title to the premises against the grantee and his heirs and assigns, or conveying it to any other parties"; the distinction being the difference between the acts of a person totally incapable of contracting and a person forbidden to convey certain specific property only, after the respective disabilities are removed.

We are also referred to the case of *Supervisors v. U. S.*, 4 Wall. 435, as being in point, but we do not see its relevancy, as the section under consideration says: "When the president shall have become satisfied," etc., he may exercise the powers conferred. His becoming satisfied was the necessary preliminary to his final action, and we do not think it is a fact that it was intended that he should act solely upon the determination of the district court. The judgment of the court below will be affirmed.

McELROY, J., concurs.

MAHAN, P. J. (dissenting). I cannot agree with the majority of the court in the conclusions they arrive at in this case. There is no contention that the conveyance by the Kickapoo Indian Cadue was other than a fair transaction for a full consideration. Indeed, by the recitals in the two deeds of conveyance, the deed made to Mar-

tin and Cole was for a consideration of \$200 more than the later deed. The provision of the treaty is that the Indian shall apply to the president for a patent, but, before making application to the president for his patent, he shall appear before the United States district court for the district of Kansas, and prove to the satisfaction of that court that he is a competent person; that he no longer requires the guardianship of the government for his protection. Cadue had done this before he made the deed to Martin and Cole. That court, given special jurisdiction for that purpose, had adjudged him to be a competent citizen,—a competent person,—and entitled to citizenship of the United States, and administered the oath thereof to him. The treaty conferred upon this Indian, and all of the Indians in like situation, a right,—the absolute right,—the liberty of conveying his property as he saw fit, as a material right. He had shown his capacity to become a citizen. He had been adjudged to have the capacity to manage his own affairs. Conferring citizenship is a judicial act, and not a ministerial one. The president could not confer citizenship. It will scarcely be contended that it was optional with the president to recognize the judgment of the court. The language of the treaty is no stronger than the language of the homestead law, that land acquired under it shall be inalienable until the patent issues; and the only question in this case is the competency of the Indian to make the deed. If he was competent, if he had a right to the title, if he had been adjudged to have the right, he was capable of making such a contract as would raise an estoppel against him. The treaty itself and the action of the departments of the government treat him as a competent citizen after the judicial determination. I say he had a right to have that patent upon showing to the court his competency. It was not intended by congress or by the Indians entering into this treaty that the president should have power to annul the action of the court. The Indian had done everything that was necessary for him to do to establish that right. The decree of the court was the only evidence contemplated by the act of congress or by the treaty upon which the president should act. Being competent to make the deed, having acquired by his act a right to the patent, the title thereunder passed to his grantees, Martin and Cole, by way of relation and estoppel.

I am not unmindful of the fact that Judge Foster, of the United States district court, sitting upon the circuit bench, decided to the contrary; and, while I have high regard for his ability, I do not think he gave to the case that careful consideration which is usual with him. The authorities cited at the conclusion of his opinion, and copied in the opinion of the majority of this court, when examined, are to the effect that an Indian, while under the inhibition of the act of con-

gress or the treaty to alienate his land, cannot make a valid deed; that any deed made by him is absolutely void, and cannot be the foundation of an estoppel. Mr. Justice Field, in the case of *Gibson v. Chouteau*, 13 Wall. 101, referring to this doctrine of relation and estoppel, in connection with the ruling of the supreme court of the state of Missouri in that case, says: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title." In this case Martin and Cole purchased this land, and, under the evidence contained in the record, paid a full value therefor. Their deed was recorded. Cadue had initiated proceedings for the land, and acquired the equitable claim and right to the title; so that they were in privity with him by reason of the deed, and justice demands the application of this rule of relation in this case, if in any case it were possible. This is not a controversy between the Indian allottee and his grantee before restriction of alienation had been removed. Nor can this allottee be in any manner benefited by holding that his first deed was invalid. A decision to that effect can only result in benefit to the subsequent purchasers with notice of the rights of Martin and Cole and their grantees, and of the plaintiff in error in this case, whose mortgage was recorded at the time they took the deed from Cadue. The supreme court of this state, in *Oliver v. Forbes*, 17 Kan. 130, says: "And it is a general rule of law that when a patent is issued it relates back to the earliest moment when it ought to have been issued." Now the earliest moment when this patent ought to have been issued was when the allottee complied with the provisions of the treaty and the act of congress of October 20, 1886, prior to the making of the deed to Martin and Cole. The case of *Oliver v. Forbes* arose under the provisions of the treaty between the government and the Pottawatomie Indians, which is almost, if not verbatim, the same as the treaty under consideration.

Counsel for defendants in error refer to the case of *Jenkins v. Collard*, 145 U. S. 552 et seq., 12 Sup. Ct. 868. This case grew out of a case of confiscation under the act of congress of July 17, 1862. It was held that a person whose estate was confiscated under this act was without power of alienation of any interest in the land confiscated. The inhibition against alienation was just as binding in this case as that of the Kickapoo, or any other Indian. The person was an incompetent person, by reason of having taken part in the rebellion against the government. The inhibition was for a differ-

ent reason only. The court held, however, that a deed made while Jenkins was laboring under this disability, imposed by the act of congress, could estop himself and his heirs from claiming or asserting any title to the confiscated estate by covenants of seizin and title.

Upon the question of the right of the Kickapoo Indian Cadue to this patent, upon making this proof and taking the oath of allegiance, see *Supervisors v. U. S.*, 4 Wall. 435. Under the rule laid down in this case, the president was by law required absolutely to issue this patent when Cadue appeared before the judge of the United States district court for the district, and made the proof provided for in article 3 of the treaty. It is evident from this provision of the article that it was intended that he should act, and act solely, upon the determination of the district court. *Newkirk v. Marshall*, 35 Kan. 83, 10 Pac. 571.

It follows that the court erred in rejecting the deed of Cadue to Martin and Cole, and the subsequent conveyances down to the mortgagor of the plaintiff in error, and erred in holding that the deed made by Cadue on October 20, 1886, passed no title, and was a void deed.

(6 Kan. App. 24)

DEMPSTER MILL MANUF'G CO. v. FITZWATER et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

ACTION FOR GOODS SOLD—DEFENSES—BREACH OF WARRANTY—DAMAGES—CONTINUANCE—EVIDENCE.

1. In an action upon a written order for the purchase of machinery signed by the defendants, to which is attached a printed form of warranty without signature, an answer denying that the writing set out constitutes the entire contract, denying that the printed form of warranty attached to the order was any part of the contract, and alleging a verbal warranty and a breach thereof, states a defense good against an attack by demurrer for want of facts.

2. It is not error to permit the defendant, under such an issue, to offer evidence of the verbal warranty, evidence having first been given tending to show that the printed warranty was not a part of the original contract.

3. Under an answer by three defendants jointly, claiming damages by reason of breach of warranty, damages accruing to a defendant individually, and in which the other defendants have no joint interest, cannot be recovered.

4. An affidavit for a continuance cannot be read as evidence in a case, unless under a condition to admit it as the deposition of the absent witness, upon the refusal of such application.

5. It is competent for the defendants in such case to show that other machines of the same kind, made by the plaintiff, and handled by competent parties in the same vicinity, and under similar circumstances, failed to do the work for which said machines were designed, and for which the defendants purchased the same.

(Syllabus by the Court.)

Error from district court, Nemaha county; J. F. Thompson, Judge.

Action by the Dempster Mill Manufacturing Company against S. H. Fitzwater and others.

Judgment for defendants. Plaintiff brings error. Reversed.

Wells & Wells and F. N. Prout, for plaintiff in error. S. K. Woodworth, for defendants in error.

MAHAN, P. J. It is difficult in this case to determine what action or actions of the court the plaintiff in error complains of. It is an action brought in the court below to recover the price of certain machinery which the plaintiff claims to have sold to the defendants upon a written contract set out in their petition, and for the time and expense of an expert furnished under another written contract set out in the petition. The first writing is, in substance and effect, an order by one of the defendants, in behalf of all, for a well-boring machine. There is appended to this a guaranty. The other writing is an order addressed to the plaintiff company to send along with the machine an expert to run it. The answer denies that the writing constituted the contract of purchase of the machinery, and denies that there was any written or printed guaranty whatever, but avers a verbal contract and verbal representations, amounting to a warranty, that the machinery would perform a certain character of service; that it had failed and was totally worthless; that the defendants had been put to loss and damage by reason of the breach of warranty; set up a counterclaim therefor; and asked for judgment for \$376.

By an examination of the record, it seems that the first contention of counsel for plaintiff in error is that this answer stated no defense upon the ground that it was an attempt to vary and extend the terms of a written agreement by parol evidence. To be sure, if there was an express warranty in writing or printing agreed upon by the parties, there could be no other or additional warranty proven except that expressed in the writing. But the answer squarely presents the issue, was that any part of the contract? The other part of the writing is simply an order for the machinery, expressing the price for which it was sold and the terms of payment, and the court had a right to assume that the parties did not intend this document to be a complete and final statement of the whole transaction between them. This is the effect of the answer, and there is no question but that it stated a good defense.

The second contention is that the court erroneously admitted parol evidence under this answer of a verbal agreement differing from the warranty set out in the plaintiff's petition, and covering matters not expressed in the other documents, but not in any way modifying or changing the tenor or effect or terms of these writings. In this there was no error. 1 Greenl. Ev. § 284a; 7 Am. & Eng. Enc. Law, p. 92, subd. 2; *Dodge v. Otis*, 27 Kan. 762; *Weeks v. Medler*, 20 Kan. 57; *Babcock v. Deford*, 14 Kan. 408.

The next contention seems to be that the court erred in refusing to instruct the jury as requested by the plaintiff. The first and third instructions proposed, about which complaint is made, are based upon the proposition that the defendants were concluded by the writings. This contention is untenable, as we have heretofore shown.

The second paragraph of the instructions requested by the plaintiff should have been given. The evidence showed that the defendants were each to be liable and bear the burden of the expense while the machine was being operated upon their respective farms, and in which neither of the other defendants had any interest or right. So that, in an action against them jointly, where they set up a joint counterclaim, damages accruing to them individually could not be recovered, and the court should have instructed the jury so. As suggested by counsel, this might be cured by a modification of the judgment by direction to enter a remittitur, if this were all.

The next contention is that the court erred in refusing to submit to the jury, and require them to answer, two special interrogatories concerning this same matter, as to the amount of the separate claim of one of the defendants. These interrogatories, for the same reasons, should have been submitted to the jury.

The next contention is that instructions 7 and 8 given by the court to the jury are erroneous and prejudicial to the plaintiff. This contention is likewise based upon the proposition that it was incompetent to permit the defendants to show that there was a parol warranty, and, being in error in that regard, their contention about these instructions is without merit.

The next contention is that the court erroneously permitted the defendants to read in evidence an affidavit of one of the defendants which appears to have been made in support of an application for continuance. The record purports to contain a complete record of all of the proceedings of the court. It so says in express terms, and there is nothing in the record that would justify the court in admitting in evidence this affidavit for continuance, as the deposition of the witness upon whose absence the application seems to be based. The record nowhere shows that an application was made for a continuance. It nowhere shows that the continuance was denied upon the submission of the plaintiff to the use of this affidavit as the deposition of the witness. It is offered as a deposition. The defendants had the deposition, and read the deposition of the witness mentioned in this affidavit upon the trial. If the record disclosed that a continuance had been denied upon the condition that the affidavit should be treated as the deposition of the witness, it would be competent; but the record nowhere discloses anything of the kind; and it is incompetent evidence, and, being objected to and excepted to by the plaintiff, con-

stitutes such prejudicial error as will necessitate a reversal of the judgment and the awarding of a new trial.

There is another contention, and that is that the court erroneously admitted proof that other machines of the same kind made by the plaintiff, and handled by competent parties in the same vicinity, failed to do the work for which they were designed, and for which the defendants purchased this machine, as they allege in their answer. This evidence was admissible, under the rule laid down in *Lyon v. Martin*, 31 Kan. 411, 2 Pac. 700.

The final contention is that the court erred in denying the plaintiff's motion for a new trial. In this we are of the opinion that it is correct, and that the judgment should be reversed, and a new trial awarded, for the reasons heretofore stated.

WELLS, J., having been of counsel, not sitting. McELROY, J., concurring.

(6 Kan. A. 31)

PROVIDENT LOAN TRUST CO. v. MARKS.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

RES JUDICATA—PARTIES SERVED WITH PROCESS—FORECLOSURE—ADVERSE TITLES.

1. In an action to foreclose a mortgage, in which the petition alleges that one "Burt S. Dolloff has or claims to have some interest in or lien upon said premises, which lien or interest, if any such exists, has accrued subsequently, and is subject to the plaintiff's lien" under his mortgage, and in which the defendant Dolloff is served by publication only, and makes default, and a judgment is therein entered barring such claim, the judgment does not bar a claim of Dolloff, amounting to an adverse and paramount title to such land, acquired long before the making of the mortgage.

2. A judgment in an action to recover specific real property operates as an estoppel or res judicata as to all defendants in the cause served with process of the court therein, and as to all parties claiming under them, who acquired their interest subsequently to the bringing of such suit.

(Syllabus by the Court.)

Error from district court, Morris county; James Humphrey, Judge.

Action by the Provident Loan Trust Company against E. J. Marks and others. From a judgment for defendant Marks, plaintiff brings error. Affirmed.

James D. Humphrey, for plaintiff in error. D. H. Brown, for defendant in error.

MAHAN, P. J. Action to foreclose a mortgage made by defendants Martin McCleery and wife. Marks denies the title of the mortgagors, McCleery and wife, and asserts title to the land in himself. He also pleads, in bar, judgment in an action in the same district court, by Gale, his grantor, against McCleery and the Kansas Central Loan & Investment Company, the assignee of the plaintiff. The plaintiff replies, denying the title of Marks, and pleads, in bar, a decree of foreclosure, respecting the same land, of a mortgage made by Daniel Jackson and

wife to Caroline Matthews, to which action of foreclosure Burt S. Dolloff, the grantor of Gale, and under whose title defendant claims, was a party defendant. The allegation of Caroline Matthews in her petition of foreclosure as against Dolloff is that "defendant Burt S. Dolloff has or claims to have some interest in or lien upon said premises or part thereof, which lien or interest, if any such exists, has accrued subsequently, and is subject to the plaintiff's lien thereon under said mortgage." Jackson and wife were served personally, and Dolloff by publication. Dolloff made default, and there was a decree of foreclosure against him, as well as the other defendants, and sale to McCleery under the decree, confirmation, and sheriff's deed. McCleery and wife made the mortgage sought to be foreclosed in this suit to the Kansas Central Loan & Investment Company, who assigned to Blodgett, and Blodgett to the plaintiff. The contention of the plaintiff in error is that Martin McCleery, the mortgagor, and the Kansas Central Loan & Investment Company, mortgagee, and the plaintiff under it, are innocent purchasers, for value, under the decree of foreclosure, and that Burt S. Dolloff, and the defendant in error, and Gale, claiming under Dolloff, are estopped by said decree of foreclosure from asserting any right to the premises. Judgment was rendered for the defendant Marks, quieting his title against the plaintiff's mortgage.

The defendant in error contends that McCleery and wife, the mortgagors, and the plaintiff, claiming under the Kansas Central Loan & Investment Company, are estopped from asserting title, by reason of the judgment in the action of Gale to recover the property in controversy. Gale's petition in the action to recover the land set out all the conveyances from the state of Kansas under the grant by the government to aid certain public improvements, down to himself, setting out the deeds, and claiming title in fee. He recovered judgment upon this petition, and there can be no question under the decisions of the courts and the text writers, that this decree works an estoppel against both McCleery and the plaintiff. And, even if this were not so, the decree of foreclosure in the case of Matthews against Jackson, could not be more comprehensive than the petition, could not and did not determine any rights of Dolloff that were prior and superior to Jackson's mortgage, but only such rights as accrued to Dolloff, if any, after the mortgage. It is admitted by the parties that, but for this decree of foreclosure and sale, Dolloff would have the paramount title; that he acquired it long before the Jackson mortgage. The decree of foreclosure in the Matthews Case, under the allegations of the petition, would not bar him of this right; so that the judgment of the district court is right in any event.

The question is argued of the right of a mortgagee or holder of a mortgage to make parties, persons claiming adverse titles, for the purpose of determining the adverse titles in the foreclosure proceedings. We have said in the case of *Busenbark v. Park*, 49 Pac. 682, upon the authority of *Bradley v. Parkhurst*, 20 Kan. 462, that the holder of an adverse title could be made a party defendant, and that the paramount title could be litigated and determined in an action to foreclose a mortgage. We believe that, under a liberal interpretation (for which our Code provides) of that Code, this can be done. We believe it was the intention of the legislature to have all controversies respecting a piece of property settled in one suit. That was one of the reforms contemplated by the framers of the Code. However, this question is immaterial to the decision of this case, as it is conceded by the parties that, unless Dolloff was barred of his prior and paramount right by the decree of foreclosure, the judgment is correct, or that if the judgment in ejectment in the case of Gale against McCleery et al. barred the mortgagors and mortgagee, who were parties, and personally served in that case, the judgment of the district court is correct. We hold that the judgment in ejectment was a bar, and that the judgment of foreclosure only barred Dolloff of any rights that may have accrued to him after the making of the Jackson mortgage, and not any prior and superior title thereto. Judgment affirmed. All the judges concurring.

(6 Kan. A. 29)

AVERY PLANTER CO. v. MURPHY et al.
(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

**SALES—REPRESENTATIONS—PRINCIPAL AND AGENT
—GUARANTY—VALUE—EVIDENCE.**

1. Where one of the principal issues in the case is whether the plaintiff made the sale in question upon the representations of the buyer certified by the agent, or upon the result of a personal investigation made by the traveling agent who closed up the sale, said traveling agent, when upon the witness stand for the plaintiff, should have been allowed to answer the following question: "In making that settlement with Mr. McCarthy (the purchaser), will you please state whether or not you relied on the property statement contained in the order, and sent in by the Murphys?"—over an objection by the defendant that "it is incompetent, irrelevant, and immaterial, the witness shown to be only a traveling man for the company, the plaintiff, and it makes no difference whether he relied or did not rely upon it, not binding upon these defendants, nor within the issues of this case."

2. Where an engine was delivered to the purchaser July 1, 1890, and retaken by the vendor upon a chattel mortgage for a part of the purchase price November 1, 1890, a question as to its market value on September 20, 1890, was incompetent and irrelevant, and objection thereto should have been sustained.

3. Where the defendant agreed to verify from the record, and guaranty to be correct, the property statement of the purchaser, and certifies on the statement as follows: "We learn from per-

sonal examination of the record the statements made herein are reliable,"—and signs the same as agents, said agents were bound to make a personal examination of the record; and, if they fail to do so, they cannot plead ignorance of what the record contains.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by the Avery Planter Company against Dennis Murphy and M. Murphy, partners, as Dennis Murphy & Son. From a judgment for defendants, plaintiff brings error. Reversed.

Bailey & Bailey and Rafter & Robinson, for plaintiff in error. Henry C. Solomon, for defendants in error.

WELLS, J. This action was brought in the district court of Atchison county on the 23d day of July, 1891, by the plaintiff in error (the plaintiff below) against the defendants in error (the defendants below), for damages which plaintiff claims to have sustained by reason of a certain contract of agency, and certain statements and representations made by the defendants, as agents of the plaintiff, in relation to the financial standing and responsibility of one Frank D. McCarthy, whereby plaintiff was induced to sell said McCarthy one eight horse power traction engine, at an agreed price of \$1,025, to the damage of said plaintiff \$1,000, and praying judgment therefor. To this petition the defendants answered—First, by a general denial; and, second, that the sale of engine and property referred to was consummated and closed after said plaintiff had full knowledge and information of the financial status and condition of said Frank D. McCarthy, by the authorized agent of plaintiff, one J. J. O'Connell, and denying that they had any knowledge at the time of making said representations of the untruthfulness thereof or of the insolvency of said purchaser, and asserting several other statements not necessary to be referred to in the consideration hereof. The matter was tried to a jury, who found a verdict for the defendants, and answered several special questions of fact, asked both by the plaintiff and the defendants. A motion for a new trial was duly made, overruled, and excepted to, the judgment entered for the defendants, and the case brought here for review upon a case-made.

The alleged errors complained of are: (1) In sustaining objections to testimony offered by plaintiff. (2) In overruling plaintiff's objections to testimony offered by defendants. (3) In giving improper instructions to the jury. (4) In refusing to give proper instructions asked by the plaintiff. (5) In overruling plaintiff's motion for a new trial.

We think the first error alleged is such, and entitles the plaintiff in error to a new trial. The defendants claimed that the plaintiff did not rely upon the property statement of McCarthy certified to by the defendants, but

sent its special agent, J. J. O'Connell, to investigate the truthfulness of the statement and the financial standing of the said purchaser, and as the result of such investigation, and not upon the statement itself, the said J. J. O'Connell made the sale. Upon this contention, defendants refer us to pages 120 to 123 of the record in proof thereof. We have carefully examined these pages, and do not find any evidence as claimed, but, on the contrary, the witness positively testified to the contrary. However, with this issue squarely made by the pleadings, the agent J. J. O'Connell, being upon the witness stand, was asked this question by the plaintiff: "In making that settlement with Mr. McCarthy, will you please state whether or not you relied on the property statement contained in the order, and sent in by the Murphys?" This was objected to by defendants, for the reason "that it is incompetent, irrelevant, and immaterial; the witness shown to be only a traveling man for the company, the plaintiff, and it makes no difference whether he relied or did not rely upon it; not binding upon these defendants, nor within the issues of this case." This objection was sustained, plaintiff excepting. The question asked was clearly within the issues of the case, and the objections made should not have been sustained.

The next error complained of is in overruling the objection of the plaintiff to certain portions of the testimony of J. J. Mooney, a witness for the defendants. These questions asked about the market value of the engine about September 20, 1890. This objection should have been sustained, as the property was bought about the 1st of July, and the plaintiff had nothing to do with it afterwards until about November 1, 1890, and its market value at any given period of time during that interval has nothing whatever to do with the merits of this case. The defendants in their brief, on page 13, say that September 20, 1890, was about the time that the plaintiff in error took possession of this engine after having sold it to McCarthy. We do not find any evidence of that statement being correct. On the contrary, the defendants, in their answer, fix the date at which the plaintiff took possession as on or about November, 1890; while the witness O'Connell, who took possession of it for the plaintiff, testifies that it was about the last of October or first of November that he first learned of the financial embarrassment of the purchaser. But defendants in error, in their brief, say: "A further fact which made this testimony competent was that the property was taken by the Avery Planter Company about the 1st of November, 1890, and was not sold until January 3, 1891." We fail to see from this statement what relevancy the market value of the property on September 20th had to the case.

We do not consider it necessary to examine all of the errors alleged in detail, as a new trial of this case will have to be ordered, and

the same errors are not likely to occur again. But we desire to say that, in our opinion, the trial court erred both in giving and refusing instructions as to the duties of the defendants in error in relation to ascertaining the truthfulness of the statement of the purchaser. In the defendants' contract of agency, they agreed "to verify from the record, and guaranty to be correct, the property statements of the would-be purchaser"; and we do not think this contract is fulfilled by an inquiry of the register of deeds or some deputy of his, as stated by instruction No. 7 given by the court. Neither do we think that their obligations under such contract were complied with by remaining in ignorance, and not seeking to find out the facts, as indicated in instruction No. 3. On the contrary, an active duty was enjoined upon them thereby, not only to make a personal examination of the record, as they expressly agreed to do, but to use all other reasonable means to find out the facts, and then truthfully report them. The judgment of the court below will be reversed, and a new trial of the issues herein ordered. All the judges concurring.

(6 Kan. A. 33)

CAMPDORAS v. BROOKS et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

APPEAL—DEFECT OF PARTIES.

The principal debtors, Lucy H. Hopkins and George W. Hopkins, are not made parties to the petition in error. They have not been served with summons, and do not appear in this court. They are necessary parties. A long line of decisions of this court and of the supreme court established the law to be that all parties to a judgment who may be prejudicially affected by a reversal or modification thereof must be made parties to the proceedings in error, and brought into court, before this court can obtain jurisdiction to review the case.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. I. Hazen, Judge.

Action by T. B. Brooks and another against Lucy H. Hopkins and others. Judgment for plaintiffs, and defendant Eliza M. Campdorcas brings error. Dismissed.

H. C. Root and R. E. Heller, for plaintiff in error. Wheeler & Switzer and H. C. Sanford, for defendants in error.

McELROY, J. This was an action brought by T. B. Brooks and W. I. Miller against Lucy H. Hopkins et al., for the foreclosure of a mechanic's lien. The principal debtors, Lucy H. Hopkins and George W. Hopkins, are not made parties to the petition in error. They have not been served with summons, and do not appear in this court. They are necessary parties. A long line of decisions of this court and of the supreme court establish the law to be that all parties to a judgment who may be prejudicially affected by a reversal or modification thereof must be made parties to the proceedings in error,

and be brought into court, before this court can obtain jurisdiction to review the case. *Central Kansas Loan & Inv. Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *Paving Co. v. Botsford*, 50 Kan. 331, 31 Pac. 1106; *Trust Co. v. Prescott* (not yet officially reported) 48 Pac. 926. The petition in error will be dismissed. All the judges concurring.

(6 Kan. A. 38)

R. T. DAVIS MILL CO. v. BANGS et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

GARNISHMENT LIEN—ATTACHMENT—PRIORITY.

1. A. gave a chattel mortgage to B., to secure an indebtedness upon a stock of goods of value largely in excess of the amount of the debt, and B. takes possession of the same upon a failure to perform the obligations of the mortgage on the part of A. C., another creditor of A., brings an action of garnishment on his claim, and serves a garnishment summons upon B., while in the possession of said goods. D., still another creditor, brings an action of attachment, under which the sheriff takes the goods. *Held*, that the lien of the garnishment is prior and superior to that of the later attachment.

2. A garnishment attaches a lien on the property of the debtor in the hands of the garnishee from the time of the service of the same.

3. An attachment creates a lien on the property attached from the time of the service of the order of attachment.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; T. P. Anderson, Judge.

Action by C. W. Bangs and others against the R. T. Davis Mill Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Getty & Hutchings, for plaintiff in error. Geo. W. Littick, for defendants in error.

WELLS, J. On the 29th day of June, 1891, R. J. Dunning was the owner of a chattel mortgage given to him by Alexander Collins, to secure an indebtedness due him from said Collins, and took possession of the stock of goods mentioned in his chattel mortgage at about 12 o'clock of that day, by reason of said Collins failing to comply with the conditions thereof. On the same day, various other creditors of the said Collins, among which was C. W. Bangs & Son, the plaintiff below, brought action upon their indebtedness, and caused garnishee processes to issue thereon against the said Dunning. Said garnishee summonses were duly served on the said R. J. Dunning during that afternoon, at various times from 4:50 o'clock p. m. to 6:50 p. m. During the afternoon of the same day, the plaintiff in error, the R. T. Davis Mill Company, to whom the said Alexander Collins was indebted, and one Henry Albers, to whom he was also indebted, brought actions in the court of common pleas of Wyandotte county, Kan., and caused attachments to be issued against the property of the said Alexander Collins, which orders of attachment were delivered to the sheriff of said

county at 5:50 p. m. of said day, and were served by the said sheriff at 7 p. m. of that day by taking the property described in the chattel mortgage given to R. J. Dunning into his possession. Under agreement of the parties, the same was sold by the sheriff of said county, the Dunning mortgage paid from the proceeds thereof, and the balance brought into court to await its final decision therein. Said sale of said property was had on the 21st day of July, 1891. One of the garnishing creditors, to wit, C. W. Bangs and W. K. Bangs, partners, doing business as C. W. Bangs & Son, having procured judgment upon their claim, and said garnishee having answered that the property had been taken from him by the sheriff under said orders of attachment on the 20th day of July, 1892, they commenced this action in the court of common pleas of Wyandotte county, asking that said sheriff and his deputies be restrained and enjoined from disposing of the proceeds of the sale of said goods, or applying the same on any judgment or judgments until the final hearing of said cause; that he be required to hold all such money as the property of Alexander Collins, as a receiver, until the further order of said court and the final hearing of said cause; that, on the final hearing of said cause, plaintiff may have a personal judgment against said T. B. Bowling, sheriff, as aforesaid, for the sum of \$232.50, with interest on the same from July 6, 1891, together with the costs of said case; and that said judgment be a first lien upon the said property taken by the said sheriff; and that, out of the proceeds of the sale thereof, said judgment be first paid. An injunction was granted as prayed for. A motion to discharge the same was overruled and excepted to. The matter was tried by the court, who made his findings of fact and conclusions of law, and rendered judgment thereon accordingly, in substance holding that the liens under said garnishment proceedings were prior to the liens of said attachments. Exceptions were duly taken, and the case brought here for review by the R. T. Davis Mill Company, one of the said attaching creditors.

There are eight assignments of error made by the plaintiff in error, but we shall not attempt to review them in order, but shall consider them as somewhat consolidated. The only real question in this case is whether the surplus in value of personal property in the hands of a mortgagee can be held by another creditor of the mortgagor by garnishment of the mortgagee in possession, as against attaching creditors of the mortgagor; and, if this question is answered in the affirmative, then does the lien of the garnishment accrue upon the surplus in the hands of the garnishee at the time of the service of the summons, so as to make it prior to an attachment then in the hands of the sheriff, and afterwards levied upon the property?

We think that both these questions must be answered in the affirmative. That garnishment is a species of attachment is admitted, but it is claimed, in substance, by the plaintiff in error, that it only constitutes a personal liability against the garnishee, and is not a specific lien upon the property in his hands. This is probably true. As stated by Drake in his work on Attachments (section 453), "The plaintiff does not acquire a clear and full lien upon the specific property"; but he does acquire such a lien as entitles him to have it protected and enforced by the courts, and that was what was done in this case.

Complaint is made that the court erred in granting a temporary injunction without notice, and in refusing to dissolve the same upon motion of the plaintiff in error. The question of requiring notice before granting injunctions in cases like this is one that appeals to the discretion of the court before whom the application is made, and we see no abuse of that discretion in this case.

Since this case was submitted, our attention has been called by plaintiff in error to the Rock Island Lumber & Manufg Co. v. Equitable Trust & Inv. Co., 54 Kan. 124, 37 Pac. 983, and Bradley v. Byerley, 3 Kan. App. 357, 42 Pac. 930, as decisive of this case in their favor. We do not think either or both of these cases decides the law to be as claimed by plaintiff in error; this contention being that a mortgagee in possession of property under his mortgage cannot be garnished as a debtor, or as having property of the mortgagor, before he has sold the property and satisfied his debt. In the first case cited (54 Kan. 124, 37 Pac. 983), the court says: "A garnishment proceeding is no more than a substitution of the plaintiff for the defendant debtor in the enforcement of any liability against the garnishee, and therefore the plaintiff can acquire no greater rights against the garnishee than the debtor himself possessed or could enforce." Accepting this statement of the law as correct, let us inquire if the debtor had no rights in this case to the property in question, that he could protect in case it was about to be misapplied. Is not the same property reached by garnishment in this case as by the attachment? It is conceded that the mortgagee is entitled to have his interest in the property fully protected, but we cannot admit that he shall also have the privilege of dictating the disposition of the surplus in his hands, so as to defeat the rights of a diligent creditor in favor of a less diligent one. The other case cited (Bradley v. Byerley, 3 Kan. App. 357, 42 Pac. 930) is no stronger. In that case the court held that the "trustee is not liable in proceedings in garnishment unless it appears that at the time of service of the notice in garnishment a surplus remained in his hands belonging to the debtor." There was no question but what there was a large surplus in this case,

and in that there was none. We see no material error in this case. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan. App. 919)

ROLLER v. JAMES.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

APPEAL—WEIGHT OF EVIDENCE—HARMLESS ERROR—WAIVER OF OBJECTIONS—INSTRUCTIONS.

1. A general verdict by a jury upon conflicting evidence, approved by the trial court, will not be disturbed by this court. This court cannot review evidence, except to ascertain whether there is evidence to sustain the verdict.

2. It is not reversible error for a witness to give testimony, in the presence of the jury, upon an application for a continuance, where no objection is offered, no motion made to strike out, and the court is not asked to instruct the jury to disregard the same.

3. Where a plaintiff in an action takes testimony by deposition, and much of such testimony is hearsay, and incompetent, and the defendant offers and reads such deposition to the jury, he cannot be heard to complain of the testimony which he himself offers.

4. Section 275, subd. 6, Civ. Code, provides that if a party desires a jury to be specially instructed, such instructions must be prepared and submitted to the court.

(Syllabus by the Court.)

Error from district court, Jackson county; Louis A. Myers, Judge.

Action by L. M. James against M. H. Roller. From a judgment for plaintiff, defendant brings error. Affirmed.

Waters & Waters, for plaintiff in error. R. G. Robinson and Hayden & Hayden, for defendant in error.

McELROY, J. This was an action brought by L. M. James, as plaintiff, against M. H. Roller, as defendant, for the recovery of \$555.70. The defendant admitted the plaintiff's account as stated, but denied any indebtedness on his part to the plaintiff, and averred that he had paid the plaintiff in full; and by way of counterclaim he alleged that the plaintiff was indebted to the defendant on account of apples purchased by plaintiff of and from defendant. The plaintiff filed a reply, denying that he purchased apples of and from the defendant, and alleged that the charges in Roller's account of apples are erroneous. The case was tried before the court and jury. It was agreed by the parties that if the plaintiff was entitled to recover any amount whatever, he was entitled to recover \$576.55. The only issue of fact in this case was upon the counterclaim set out in the answer of the defendant charging plaintiff with the purchase of apples to the amount of \$586.32. The jury returned a general verdict for the plaintiff, and against the defendant, for \$576.95. Motion for new trial was filed, overruled, exceptions taken, and the case is presented to this court for review.

We will examine the alleged errors of the

trial court in the order in which they are set out:

First. That the verdict of the jury is against the weight of the evidence. We have examined the evidence very carefully, and find that the evidence is very conflicting. The defendant testified to the sale of apples to the plaintiff. The plaintiff, with equal firmness and apparent truthfulness, denied the purchase of apples from the defendant. The burden of proof was on the defendant. The jury, who had an opportunity of seeing the witnesses and observing their conduct and demeanor, found in favor of the plaintiff, and against the defendant, which verdict was approved by the trial court. A general verdict by a jury upon conflicting evidence, approved by the trial court, will not be disturbed by this court. This court cannot review evidence, except to ascertain whether there is some evidence to sustain the verdict.

Second. That the court permitted incompetent testimony on the part of the plaintiff to be admitted. During the trial, in the presence of the jury, on the hearing of an application for a continuance, Charles Hayden testified. Complaint is made that this testimony was incompetent to go to the jury, and that the court failed to instruct the jury that said testimony was incompetent. No objection was made to the testimony, no motion was made to strike it out, and no such instruction was asked; therefore the court committed no error in this matter.

Complaint is made of the action of the trial court in allowing the deposition of Daniel Perry to be read in evidence, and that there was reversible error in permitting him to testify from his letter book as to certain letters having been sent to Roller with reference to the apple consignment, for the reason that the letters, if received, were in the possession of Roller, uncalled for and undemanded; that the letterpress copies were not attached to the deposition, but only copies of such press copies; and in permitting the witness Perry to testify concerning the custom prevailing among commission men relative to allowing a consignor to withdraw goods which had been consigned for sale, upon which the commission merchant had paid the freight. There was much of this testimony hearsay and incompetent, and the testimony may have been prejudicial to the defendant; but this testimony was taken by deposition, at the instance of the plaintiff, and the deposition was offered and read in evidence by the defendant. The defendant cannot be heard to complain of the testimony which he himself offered.

Third. That the court misdirected the jury on matters of law. The plaintiff in error says: "The jury should have been instructed that they must look upon it as an apple venture, instead of an apple purchase, as James knew it to be; that if there was a loss, James must bear it, if he made the contract; if there was a profit, Roller should pay to James the amount of the profit. If he had got any of this

money by reason of drafts or advances, that too would have to be repaid." It is enough to say that no such instruction was asked. The pleadings would not authorize such an instruction. The instructions, as given, fairly presented the triable issue to the jury, and really there is no question of law presented worthy of serious consideration.

The court committed no error in overruling the motion for a new trial. The judgment will be affirmed. All the judges concurring.

(6 Kan.App. 45)

RASDELL et al. v. SHUMWAY.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

ADVERSE POSSESSION—NOTICE OF CLAIM.

Where by mistake the line fence between two lots is put about four feet over the line on one lot, and the lots are thereafter occupied up to said fence by the respective parties, the statute of limitations will not begin to run to bar a recovery of said strip until the occupant makes some claim of ownership thereto beyond the naked possession, and notice of said claim is brought to the knowledge of the owner of the legal title thereto.

(Syllabus by the Court.)

Error from district court, Atchison county; W. D. Webb, Judge.

Action by H. E. Shumway against Maggie Rasdell and John Rasdell. Judgment for plaintiff. Defendants bring error. Affirmed.

B. F. Hudson, for plaintiffs in error. Waggener, Horton & Orr, for defendant in error.

WELLS, J. On the 14th day of March, 1873, Maggie Rasdell, the plaintiff in error, bought lots 10 and 11 in block 23 in the city of Atchison, according to the record plat of said city. On the 2d day of November, 1874, Nettie Gould, the grantor of the defendant in error, bought lot 12 in the same block, so that at the last-mentioned date the said parties were the respective owners,—the first of lots 10 and 11, and the latter of lot 12, in said block; the same being shown by the recorded plat of the city to be 45 feet east and west, and 150 north and south, each. Some time previous to the last-mentioned date, a fence was built by the former owners around lots 11 and 12, and also a fence was intended to be built between said lots, but by mistake said fence was built off the true line, and over on lot 12 on the north end 4 feet and 2 inches, and on the south end 4 feet and 1 inch; so that there was included in the one inclosure lot 11, and at the south end 4 feet and 1 inch of lot 12, and at the north end 4 feet and 2 inches of said lot 12, and said fence was so built with no intention in any one of changing the true line between said lots. The said plaintiff in error did not know that said fence was not upon the true line between said lots, or, if she did know the same, she did not convey the knowledge to any other person. About the 26th day of March, 1891, Nettie Gould sold lot 12 to the defendant in error,

and at the time this action was brought the record showed a perfect title to lot 11 in said Maggie Rasdell and to lot 12 in the defendant in error, H. E. Shumway. The said Maggie Rasdell has been in the continuous possession of said lot 11 and to the said strip off from lot 12 ever since she purchased said lot 11 on March 14, 1873. This action was brought in the court below by the defendant in error, H. E. Shumway, to recover possession of the strip of land herein-before described. The case was tried to the court, a jury being waived, and the court made its findings of fact, from which the foregoing statement of the case is extracted, and also found its conclusions of law that the plaintiff below, the defendant in error, was entitled to the possession of said strip. The defendant below excepted to the findings of fact and the conclusions of law, asked for additional findings of fact, which were refused, and also asked to set aside certain findings of fact, which was also overruled. A motion for a new trial was likewise made and overruled, and the case brought here for review.

The plaintiff in error alleges various errors in the proceedings of the court below, but the principal question before us is, can a party in the possession of land under mistake as to the boundary line between two lots, without any right or equity thereto except the naked possession, hold the same, as against the lawful and rightful owner, by proving 20 years of actual and open possession thereof? The plaintiff in error contends that the evidence shows that the possession was continued and under a claim of ownership; but, as the evidence was conflicting upon this point, and the court found otherwise, under the well-settled practice, we cannot weigh the evidence, but must take the findings of fact as conclusive. We have examined with great care all the evidence in the case, and if the plaintiff can recover, it is purely and simply because there was originally a mistake as to the boundary line under which she and her grantors took possession, and have ever since held the strip of land in question. The plaintiff in error in the court below testified that she had always claimed to own to the fence and beyond the boundary line of lot 11. But the court found that she had made no such claim, and, if she had any purpose to do so, she had never communicated it until a very short time previous to the beginning of this action. We think the true rule in this case, and the one that appeals to our judgment and conscience, is correctly stated in 1 Am. & Eng. Enc. Law, p. 251, as follows: "Where the entry is permissive, the statute will not begin to run against the legal owner until an adverse holding is declared, and notice of such is brought to the knowledge of the holder of the legal title." Under this rule, if Mrs. Rasdell had formed the intention to permanently hold that part of the said land of Mr. Shumway in question, and even communicated such intention to her husband and other intimate friends,

but did not communicate it to the owner of the legal title, she cannot claim it by reason of her possession only. The judgment of the court below is affirmed. All the judges concurring.

MCCORMICK HARVESTING MACH. CO. v. HAYES.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

RELIEF ON THE GROUND OF FRAUD—LIMITATIONS.

Subdivision 3, § 18, Civ. Code, among other things, says, "An action for relief on the ground of fraud can only be brought within two years after the cause of action shall have accrued," and "the cause of action in such case shall not be deemed to have accrued until after the discovery of the fraud." In the case at bar the cause of action accrued at the time the plaintiff, Hayes, discovered the fraud. He discovered the fraud July 14, 1890, and demanded relief therefrom August 17, 1892, which was more than two years after he discovered the fraud. His action for relief was therefore barred by the statute of limitations.

(Syllabus by the Court.)

Error from district court, Atchison county: W. D. Webb, Judge.

Action by Perry Hayes against the McCormick Harvesting Machine Company. Judgment for plaintiff. Defendant brings error. Reversed.

B. F. Hudson, for plaintiff in error. C. D. Walker, for defendant in error.

McELROY, J. This was an action begun on the 20th day of January, 1892, by Perry Hayes against the McCormick Harvesting Machine Company. Plaintiff alleges in his petition two causes of action: As a first cause of action, that on or about February 1, 1890, the defendant employed him to work for it as special salesman from February 1, 1890, for one year, in consideration of \$750 payable monthly; that he worked as such salesman until July 8, 1890, when the defendant wrongfully discharged him; and that there was due him from the defendant under said contract the sum of \$3.20. As a second cause of action, he alleged that on July 8, 1890, the defendant wrongfully discharged him; that he made reasonable efforts to obtain employment elsewhere, which were unsuccessful; and that, by reason of the wrongful acts of the defendant, plaintiff was damaged in the sum of \$437.50. On motion of the defendant, the court required the plaintiff to make his petition more definite and certain, by stating whether said contract was in writing or was a verbal contract. Afterwards, on May 7, 1892, plaintiff filed his amended petition, alleging that the contract was verbal. On July 2, 1892, the defendant filed its answer of general denial, and denying the verbal contract set out, and alleging the fact to be that both plaintiff and defendant duly executed on the 25th of January, 1890, a written contract, a copy of which was attached to the answer.

On August 17, 1892, plaintiff filed his verified reply, consisting of general denial, and admitting that he signed the contract, and alleging that he did not read it, and did not know what he was signing; that the same was signed because of the fraud and false representations made by one Wogan, the agent of defendant, and that he did not discover the fraud until he was discharged; that the written contract was procured through fraud. During the trial, when the plaintiff had rested his case, the defendant filed a demurrer to the evidence, which was overruled. Thereupon the plaintiff asked leave, and filed his second amended petition. The plaintiff again rested, and the defendant demurred to the evidence, which demurrer was overruled. Jury returned a general verdict for the plaintiff. Motion for new trial filed and overruled, and the case is presented to this court for review.

There are several assignments of error presented to this court, only one of which we deem it necessary to examine. The plaintiff commenced a law action based upon a verbal contract. Before the trial was concluded, the action was changed to one upon a written contract, and plaintiff asked to have the contract reformed, and for relief on account of the fraud of the defendant. As to this cause of action the last petition was founded entirely upon fraud, and was filed March 6, 1893. The petition alleges that the fraud was perpetrated on about the 1st day of February, 1890; that plaintiff did not discover the fraud until defendant had discharged him. The record shows that Hayes read the contract when he was discharged, which was July 14, 1890. It appears from the plaintiff's last amended petition that the action was barred by the statute of limitations before the filing of that petition. There is no allegation in his petition that the fraud was not discovered until within two years prior to the commencement of the suit for relief. The suit was commenced for relief March 6, 1893. There could be no pretense that this action was pending, so far as it relates to the relief demanded on account of the fraud of the defendant, until the 17th day of August, 1892, the date on which the plaintiff filed his reply, in which he attempted to plead the fraud, and asked relief therefrom. This was more than two years after the discovery of the fraud. Our supreme court, in *Young v. Whittenhall*, 15 Kan. 580, says: "The first question raised and to be considered by this court is whether said supposed causes of action are not barred by the statute of limitations. Subdivision 3 of section 18 of the Civil Code provides, among other things, that 'an action for relief on the ground of fraud' can only be brought within two years after the cause shall have accrued, and 'the cause of action in such case shall not be deemed to have accrued until after the discovery of the fraud.' It is contended by plaintiff that this statute does not

apply to the case at bar, because this statute applies only to actions for 'relief,' while the plaintiff claims that this action is not for relief, but for damages. The claim of the plaintiff is not tenable. This is an action for relief in the nature of damages, and for such relief as comes within such statute. If this action is not for relief, and such an action as may be barred by such statute of limitations, then there is no statute of limitations for this class of actions. The claim of the plaintiff is substantially this: An action for equitable relief founded on fraud comes within the statute, and is barred in two years; but an action for legal relief founded on fraud does not come within the statute, and is therefore never barred. In other words, all the entrances to a court of equity are closed in two years for all actions founded on fraud; but courts of law are kept open for such actions forever. This claim is not tenable."

In the case before the court the cause of action accrued at the time the plaintiff, Hayes, discovered the fraud. He discovered the fraud July 14, 1892. It was more than two years after the discovery before he demanded relief by reason of such fraud. His action for relief was therefore barred by the statute of limitations. The petition showed upon its face that the fraud upon which the cause of action was founded was consummated more than two years before the commencement of this action, and the petition does not show that the plaintiff did not discover this fraud until within less than two years before the commencement of this action. The petition is defective in stating a cause of action which appears to be barred by the statute of limitations. If the plaintiff came within any exception which would prevent the statute of limitations from running, it would be his duty to plead the same. The judgment of the trial court will be reversed, and the cause remanded, with instructions that the trial court proceed in accordance with the views herein expressed. All the judges concurring.

(6 Kan. App. 48)

TARR v. FRIEND et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

MARRIED WOMAN—LIEN OF MORTGAGE.

1. A personal judgment of the district court against a married woman upon a note and mortgage, and a judgment therein foreclosing said mortgage, and directing a sale thereof, operate as a lien upon the other real estate owned by such married woman to the same extent and effect as would a like judgment against a married man.

2. The specific appropriation of one or more tracts of real estate by way of mortgage by a married woman, to secure her personal obligation, does not operate to exclude her other real estate from the lien of a personal judgment against her for such obligation.

(Syllabus by the Court.)

Error from district court, Jackson county; Louis A. Myers, Judge.

Action by William Friend against W. H. Tarr and others. Judgment for plaintiff, and defendant Tarr brings error. Reversed.

J. H. Keller, for plaintiff in error. James H. Lowell, for defendants in error.

MAHAN, P. J. This case involves the proper construction of section 2 of chapter 62 of the General Statutes of 1889, in relation to married women. The defendant in error Annie E. Wiggins and her husband, in his lifetime, made a note and mortgage to the plaintiff in error, Tarr, to secure the sum of \$1,400 and interest. The money was borrowed, and used—First, to pay off an existing incumbrance upon the property, which was the homestead; and, second, to be used, and it was used, in making improvements upon the property. The mortgage was foreclosed by Tarr after the decease of the husband, and a personal judgment taken against the wife, Annie E. Wiggins. The property was sold, and the proceeds of the sale applied towards the satisfaction of the judgment, after the payment of costs and taxes, leaving a balance due upon the personal judgment of \$610. At the time this judgment was taken, Annie E. Wiggins owned 27 acres of land of her own separate property, inherited from her father's estate, which she and other owners of the 80 acres, of which the 27 acres was a part, mortgaged to Friend. This action was begun by Friend to foreclose his mortgage, in which Tarr was made a party, and sought to establish a lien upon the 27 acres for the balance of his judgment, which was rendered after the making of the Friend mortgage. The court decreed that he had no lien upon the 27 acres of the separate property of Annie E. Wiggins, from which judgment he now appeals; and the only question in the case is: Does the old rule apply under our statute that where the feme covert specially pledges property in a mortgage for the joint debt of herself and her husband, executing the contract for the repayment jointly, the specially setting apart of the mortgaged property raises a presumption that all other of her separate property is to be excluded, and not pledged for such indebtedness?

Our supreme court, in the case of *Deering v. Boyle*, 8 Kan. 530, appears to recognize this rule, and says: "Another class of cases is where a married woman, at the time she makes the contract, appropriates a certain piece of property (either her's or her husband's) for the payment of her obligation, by way of mortgage or pledge or the like. In such cases it has been held that no other property was intended to be appropriated or charged, upon the maxim that the express mention of one thing is the exclusion of another,"—and refers to the case of *Johnson Co. v. Rugg*, 18 Iowa, 137. But in the case

of *Deering v. Boyle* the court says that that case does not come within the rule. Again, in *Wicks v. Mitchell*, 9 Kan. 88, the defendant Fannie A. Wicks pleaded her coverture as a defense to an action upon a contract made jointly with her husband, and she further averred that she refused at the time of the execution of these notes to charge her separate property. The court says: "She admits the execution of the notes. Now, whether thereby she charged her separate property is a question of law; for there is no claim in the petitions that she ever executed any mortgage or other instrument specifically appropriating certain property to the payment of these notes." This allegation that she refused at the time of the execution of the notes to charge her separate property may be considered, says the court, as simply an allegation that she refused, by mortgage or otherwise, to make any specific appropriation of any of her separate property to the payment of these notes; in other words, she did nothing further than execute these notes towards charging her separate property. There was a demurrer to her answer, which was sustained, and counsel contended that it was error to sustain the demurrer to her answer wherein she specifically alleged that she refused to charge her separate property for the payment of this debt. The court goes on to say: "In this view, the question raised by the learned counsel for the plaintiff in error is not in the cases, and they fall within the letter as well as the spirit and reasoning of the rule laid down in *Deering v. Boyle*," 8 Kan. 530, heretofore alluded to. So the exact question has never been presented to the supreme court as to whether, in an action against a married woman to enforce a contract made by her under the provisions of section 2 of chapter 62, they would apply this rule; yet they seem to have recognized the rule. The language of the section of the statute is: "A married woman, while the marriage relation subsists, may * * * enter into any contract with reference to the same [her real and personal property] in the same manner, to the same extent and with like effect as a married man may in relation to his real and personal property." In 8 Kan., on the succeeding pages, Justice Valentine, who delivered the opinion of the court, proceeds with the consideration of this statute, and illustrates that the real intention of the statute was to permit a married woman to contract the same as a man, and, in doing so, to incur the same obligations and penalties that a man would in making a contract; and the language of the statute is sufficiently broad to sustain this latter interpretation, and exclude the rule heretofore alluded to. We are inclined to the opinion that the proper construction of the statute would exclude the operation of this rule contended for by the defendant in error. In the case of *Lisle v. Cheney*, 36

Kan. 578, 13 Pac. 816, the facts are almost verbatim the same as in this case. However, the exact question was not specifically raised, and the court held, upon the opinion of Commissioner Simpson, that a lien was created for the entire judgment at the date of its rendition upon all the property owned by the defendant, who was a married woman, and upon property thereafter acquired by her. In that case there had been a specific pledge of property by way of mortgage, as in the case under consideration. Section 399, Code Civ. Proc., provides "that in actions to enforce a mortgage a personal judgment shall be rendered for the amount due." Section 419 provides "that judgments of courts of record shall be liens on the real estate of the debtor, within the county in which the judgment is rendered, from the first day of the term of the court at which the judgment is rendered." Section 517 provides "that when a judgment for any specified amount, and also for the sale of specific real or personal property, shall have been rendered, and an amount, sufficient to satisfy the amount of the debt, damages and costs, be not made from the sale of the property specified, an execution may issue for the balance as in other cases." Considering these provisions of the Code of Civil Procedure in connection with the act in relation to married women, in which it says, "She may enter into any contract with reference to her real and personal property in the same manner and to the same extent and with like effect as a married man may in relation to his real and personal property," the conclusion seems to us inevitable that this judgment became a lien upon the property of Mrs. Wiggins at the time it was rendered, and from the first day of the term of court at which it was rendered, the same as though she had been a married man, and that the language of this statute, taken in connection with the provisions of the Code referred to, excludes all idea of the operation of the rule contended for. If we are correct in this conclusion, the judgment of the district court is erroneous, and ought to be reversed. The judgment is reversed, with directions to the court below to proceed in said case in accordance with this opinion. All the judges concurring.

TWITCHELL v. WEIL et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

APPEAL—NECESSARY PARTIES—DEATH—REVIVAL.

1. A receiver appointed to take charge of the property of an insolvent debtor, who was a necessary party herein, since the institution of these proceedings in error, must be made a party in this court, or there is a defect of parties.

2. Where a receiver who was a necessary party herein dies during the pendency of proceedings in error, the action must be revived in the name of

his successor, or the petition in error will be dismissed.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by Jerome Twitchell against Charles Weil and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Mills, Smith & Hobbs, for plaintiff in error. McGrew, Watson & Watson, for defendants in error.

WELLS, J. The first matter for consideration in this case is the motion of defendants in error to dismiss these proceedings for several reasons, as therein stated, the first two of which must be sustained. The facts appear substantially as follows: (1) J. W. Lord was appointed by the court below receiver for the property of the Consolidated Iron-Works Company, the principal defendant and debtor in said action, and one of the necessary parties in this court. He died November 20, 1896, and the action has not been revived in the name of his successor, if one has been appointed. (2) The Northrup Banking Company intervened in said cause in the court below, and was a necessary party in this court, as its interests would be materially affected by a reversal herein. Said company became insolvent about July 15, 1893, and A. B. Hovey has been duly appointed and is acting as receiver thereof, and is a necessary party herein, and said cause has not been revived in his name.

Under the authority of *Scannell v. Felton*, 57 Kan. 468, 46 Pac. 948, these receivers are necessary parties in this court, and, in their absence, the petition in error must be dismissed. In this view of the case, it is not necessary to consider the other grounds for dismissal alleged, nor the merits of the petition in error. The petition in error is dismissed. All the judges concurring.

(6 Kan.App. 54)

WARD v. MORRISON.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

NEW TRIAL—NEGLECT OF PARTY.

1. When a party takes an appeal from a justice of the peace to the district court, and then fails to give it any further attention, and the case is decided against him in his absence, and without his knowledge, and he files his motion for a new trial more than three days after said trial and judgment thereon, he is not entitled, as a matter of right, to have said motion allowed.

2. Although the district court, in the exercise of that sound discretion which the law ascribes to it, may grant a new trial in such cases, yet it is not, as a matter of law, bound to do so, and should not, except upon a showing that the party asking it had used reasonable diligence in the prosecution of his appeal.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by Cornelius Morrison against

Michael Ward. Judgment for plaintiff, and defendant appeals to the district court. From an order refusing to set aside a judgment for plaintiff, defendant brings error. Affirmed.

J. W. Fitzgerald & Son and A. H. Case, for plaintiff in error. Vance & Campbell and T. H. Bain, for defendant in error.

WELLS, J. On the 21st day of February, 1891, Cornelius Morrison recovered a judgment against Michael Ward, before a justice of the peace in the city of Topeka, for the sum of \$120 and costs, which said judgment was appealed to the district court of Shawnee county, and a transcript filed therein on the 4th day of March, 1891, by the defendant, Michael Ward (the plaintiff in error herein). Nothing further appears in the record of said case until the 27th day of October, 1892, when the action came on for trial in the district court of Shawnee county, and the defendant (the appellant) failed to appear, and made default. The action was tried to the court, and judgment rendered for the plaintiff in the sum of \$132. On the 14th day of November, 1892, the defendant (the plaintiff in error) filed a motion for a new trial, alleging, as grounds therefor: First, the mistake, neglect, and omission of the clerk of said court, and irregularity in the obtaining of said judgment; second, fraud practiced by the plaintiff in obtaining judgment herein; and, third, that neither the defendant nor his attorney had any knowledge of the setting of the cause for trial, having received no notice thereof, nor a bar docket of the court, and that they had no knowledge of the obtaining of the judgment until after the expiration of more than three days from the rendition thereof. This motion was supported by affidavits showing, in substance, that the defendant had a meritorious defense to said action; that he was a resident of Pottawatomie county; that his only attorneys were the firm of J. W. Fitzgerald & Son, of St. Mary's, Kan.; and that neither said defendant nor his attorneys received any notice, or knew that said case was set for hearing during said term, nor did they know that said judgment was rendered until more than three days after the rendition thereof. The court below overruled said motion for a new trial, and the case is brought here for review.

The only real question in this case is whether, after an appellant has taken his appeal from the judgment of a justice of the peace, and filed his transcript in the district court, he may give no further attention to it until he is notified that the case is set for trial; and, in case the matter is called up and disposed of by the court without his presence or knowledge, he is entitled to come in at any reasonable time afterwards, and show his lack of knowledge, and be granted a new trial therein. As said by the supreme court in the case of *Hemme v. School Dist.*, 30 Kan. 377, 1 Pac. 104: "A trial court, for the purpose of administering justice, has a

very wide and extended discretion in setting aside and modifying proceedings had in its own court." This discretion that is granted to the trial court does not belong to the appellate court. If the trial court in this case had awarded a new trial, we do not think we would be justified in reversing the same; but, in reversing it now, we would be required to say that the trial court had no discretion in the matter, but should have granted a new trial as a right. This is surely not the law. When a party files a case either by original petition or transcript in a court, it is his duty to watch that case until after it has been tried; and unless he has been imposed upon by some fraudulent proceeding, and thus kept from appearing when it was set for hearing, he cannot complain. There is no law nor rule of court shown requiring clerks of the district court to notify attorneys or litigants of the time when their cases are set for trial, and there is no showing of such a universal custom as would make such a notice obligatory upon the clerk. If he usually does it, as a matter of accommodation to litigants and attorneys, that would not entitle them to demand it as a right. In this case there is no showing that the plaintiff in error made any effort whatever, either by himself or attorneys, to know when the case would probably be put upon the docket or set for trial. "The facts must be so stated as to make it appear that no reasonable or proper diligence or care could have prevented the trial or judgment; that is, that the party complaining is not himself guilty of any laches." *Hill v. Williams*, 6 Kan. 17. "The negligence of the party is not ground for a new trial." *Holderman v. Jones*, 52 Kan. 743, 34 Pac. 352. We are referred to the cases of *Fudge v. Railway Co.*, 31 Kan. 146, 1 Pac. 141, and *Henne v. School Dist.*, 30 Kan. 377, 1 Pac. 104, as authority for the plaintiff in error, but both of these decisions are in harmony with the law as herein stated, as in each a new trial was ordered in the reasonable discretion of the trial court. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan. A. 57)

MACKEY et al. v. PETTYJOHN et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 10, 1897.)

CHATTEL MORTGAGE—LAW OF PLACE—COMITY.

1. A chattel mortgage made in Missouri by a person domiciled there to a citizen of this state, upon property situated in this state, is governed by the law of Kansas, and not by the law of Missouri, as the place of the contract.

2. The laws of another state will not be given force in this state in such case as a matter of comity, where it would be, in effect, to overturn the policy of this state with respect to such cases, or be in violation of our express statute.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by J. L. Pettyjohn and George W. Pettyjohn, partners, under the name of J. L. Pettyjohn & Co., against S. E. Mackey and J. T. Nichols. Judgment for plaintiffs. Defendants bring error. Reversed.

A. Smith Devenney, for plaintiffs in error.
F. R. Ogg and S. T. Seaton, for defendants in error.

MAHAN, P. J. This is an action begun in the district court of Johnson county by the defendants in error, in the nature of a bill in equity, in which they seek to have the plaintiffs in error declared trustees of a fund arising from the sale of personal property for their use. It appears that Clark owned and ran a dairy in Johnson county, Kan., shipping milk therefrom to Kansas City, and, while there, became indebted to both the plaintiffs and defendants. He subsequently moved to Kansas City, and established his domicile in the state of Missouri; and, being so domiciled, he made and delivered to the plaintiffs in error, at Kansas City, Mo., a mortgage upon his dairystock, comprising cows, fixtures, grain, and other personal property, to secure a valid bona fide indebtedness to them. There is no question made of the bona fides of the transaction between the parties. The property was situated on the farm of Clark, in Johnson county, Kan., where it had been prior to the removal of Clark to Missouri. The defendants in error proceeded, and the court held with them, on the ground that the chattel mortgage was a Missouri contract, to be construed in all respects by the laws of Missouri; that inasmuch as the circuit court of the United States had established a rule of decision respecting mortgages of the character of this one, in the United States circuit court for the district of Missouri, that mortgages made under certain circumstances in that state were, in contemplation of the laws of Missouri, general assignments for the benefit of creditors; that the mortgage came within the purview of these decisions, and was a general assignment. The allegation in the petition is that the laws of Missouri make such a mortgage as this one is claimed to be a general assignment. The district court overruled a demurrer on behalf of the plaintiffs in error (defendants below) to the petition of the defendants in error, and to their evidence in support thereof. The plaintiffs in error stood upon their demurrer, and judgment was rendered against them, the court making certain findings of fact and conclusions of law thereon at the request of the parties.

There are a number of questions raised by brief of counsel upon several assignments of error, but it is only necessary to consider two of them. The first is: Was this such a contract as claimed by the defendants in error and found by the court,—that is, a contract to be governed by the laws of Missouri as its place, or was the contract made with respect to the laws of Kansas, to be governed by the

laws of Kansas? And, second, even though the contract might be said to be a Missouri contract, is there such a conflict between the laws of Missouri and our statutory law, and does the law of Missouri, as claimed by the plaintiffs and found by the court below, contravene the policy of the state of Kansas or its express statute, so that the rule of comity must give way thereto?

We are clearly of the opinion, in the first place, that under the law as it exists, as declared by the law writers and the courts, this is a Kansas contract; that the parties had expressly in view the laws of Kansas in respect thereto at the time of its execution and delivery; and that the law is well settled that where a chattel mortgage or other contract is made in one state by a person domiciled there, to one domiciled in a different state, where the property mortgaged or with respect to which the contract is made is situated, and is to be enforced and performed in such other state, the law of the state in which such property is situated governs in all respects. In support of this proposition, vide *Jones, Chat. Mortg.* § 805; 3 Am. & Eng. Enc. Law, 561, under title of "Contracts Made in One State to be Performed in Another," and authorities cited in note 5; *Green v. Van Buskirk*, 7 Wall. 145; *Scudder v. Bank*, 91 U. S. 406; *Prichard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102; *McDaniel v. Railway Co.*, 24 Iowa. 416; *Boyd v. Ellis*, 11 Iowa, 97; 2 Kent, Comm. p. 459; *Denny v. Faulkner*, 22 Kan. 100; 2 Pars. Cont. § 5, p. 582; *Cox v. U. S.*, 6 Pet. 172; *Andrews v. Pond*, 13 Pet. 65; *Bell v. Bruen*, 1 How. 169.

It is further apparent that this rule of decision in the state of Missouri cannot be permitted to have application to this contract in the state of Kansas, because it does contravene the policy of the state of Kansas with respect to the property mortgaged, and is in conflict with the express statute of the state, which is, in effect, that a chattel mortgage made by a resident of another state (the property situated in this state), filed in the office of the register of deeds in the county in which the property is situated, is a valid mortgage, and gives notice, when properly filed, to all the world with respect thereto. Our supreme court has held that even though a chattel mortgage does cover all, or practically all, of the property of the mortgagor, and even though he is insolvent, if the mortgage is made in good faith to secure a valid debt, as the court found this to be in this case, said mortgage is a valid mortgage. To allow the rule of decision of Missouri to prevail would be to overturn our policy with respect to mortgages on personal property in this state, and to render nugatory the provision of our statute in relation thereto. The rule of giving operation to the laws of other states as a matter of comity only, is never extended to such cases. It follows, necessarily, that the court erred in overruling the defendants' demurrer to the plaintiffs' petition, and erred in over-

ruling the defendants' demurrer to the plaintiffs' evidence, and erred in rendering judgment upon the special findings of fact for the plaintiffs, and against the defendants, and in refusing a new trial upon the defendants' motion. The judgment is reversed, and the case remanded, with directions to the district court to enter judgment for the defendants upon the findings of fact. All the judges concurring.

(6 Kan. A. 61)

CADE v. JEFFERS et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

FORECLOSURE SALE—REDEMPTION FROM TAX CERTIFICATES.

Where real estate is sold under a foreclosure proceeding, the purchaser is entitled to have the land redeemed from outstanding tax-sale certificates, under paragraph 6902, Gen. St. 1889.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action by Idalia Weed against W. A. Jeffers and others. From a judgment providing for the payment from the proceeds of the sale the tax certificates, W. A. Cade brings error. Affirmed.

L. B. & S. E. Wheat, for plaintiff in error. Baker, Hook & Atwood, for defendants in error.

WELLS, J. This action was originally brought in the district court of Leavenworth county, by Idalia Weed against John L. Pendery, Ruby Pendery, and W. A. Cade, for the foreclosure of a mortgage upon Pendery's real estate. Weed had a first mortgage, and Cade, who is now plaintiff in error, had a second mortgage. Judgments were duly rendered foreclosing said mortgages, and directing that the proceeds be applied to the payment of the costs, the taxes due the county of Leavenworth, and then to the payment of the judgments upon the mortgages in their order, and the remainder brought into court for further distribution and application thereof. The property was duly sold under execution, after appraisalment, to J. O. Lysle. There were no taxes due the county of Leavenworth on said property, but Patrick Bros. then held tax-sale certificates thereon for the taxes for the years 1889, 1890, and 1891. After the sale of the real estate to Mr. Lysle, W. A. Jeffers purchased the tax-sale certificate from Patrick Bros., and filed his motions for an order of the court requiring the payment of the amount necessary to redeem from the purchase money received from said sale, before applying the same to the mortgage indebtedness. Jeffers, the purchaser of said property, also filed his motion for the same purpose. A motion was also made on the same day by the said W. A. Cade, the owner of the second mortgage, to confirm said sale. These motions of Lysle and Jeffers were

heard together, and were by the court sustained, all parties consenting that the first mortgage should be paid before the payment of the amount due for taxes; and the court ordered that thereafter the amount due upon such tax-sale certificates should be next paid, before the payment of the judgment in favor of W. A. Cade, to which the said W. A. Cade and the Pendery defendants duly excepted. Time was taken to make a case for the supreme court, and thereupon a motion to confirm the sale was heard, said sale examined and approved, and a deed ordered made to the purchaser, according to law.

The first question for our consideration is whether that part of paragraph 6902, Gen. St. 1889, that provides, "Where any real estate shall be sold at judicial sale, or by administrator, executor, guardian or trustee, the court shall order all taxes and penalties thereon against such lands to be discharged out of the proceeds of such sale," embraces lands sold for taxes, and held by individuals under tax-sale certificates. We think this question must be answered in the affirmative.

Counsel for plaintiff in error contend that because paragraph 7003 provides that the mortgagee may pay said taxes, or redeem any lands so sold therefor, and recover judgment for the same in his foreclosure proceedings, he is not entitled to the relief furnished by paragraph 6902. We do not think this reasoning is satisfactory. The object of paragraph 7003 is to enable the mortgagee to protect himself either before the institution of the proceeding of foreclosure, or during the pendency thereof, by paying the taxes, and adding the amount to his mortgage indebtedness; but this in no way conflicts with his rights under section 6902. That taxes due upon the tax-sale certificate held by an individual are included in the provisions of paragraph 6902, see following authorities: *Galbreath v. Drought*, 29 Kan. 718; *Kerr v. Hoskinson* (Kan. App.) 47 Pac. 172. In the case last cited, the court expressly refers to the two remedies and the right to elect.

The next contention of the plaintiff in error is that as paragraph 4495 provides that the court, in actions to foreclose mortgages, at the time of rendering the judgment thereon, may make an order for the application of the proceeds, or reserve such application for the further order of the court, and as in this case the court had made such an order, it was not within its power afterwards to change or modify it. We do not think this position is tenable. Under our view of the law, it is substantially in the same condition that it would have been had the court failed to have made an order providing for the payment of the costs; and can it be contended that in such a case it would have been improper, at the time of the confirmation or before, to have amended the order so as to provide first for the payment of costs? In *Galbreath v. Drought*, 29 Kan. 711, the

supreme court says: "The court confirming the sale shall direct the sheriff to satisfy all tax liens," etc.; plainly intimating that after the sale, upon its confirmation, when the sheriff had the money, was the proper time to make the order. See, also, *Harris v. McCrossen*, 31 Kan. 402, 2 Pac. 814.

Our view of the law being that the taxes were a paramount lien to the mortgage indebtedness, the objection made by plaintiff in error to any testimony on behalf of the plaintiff below was properly overruled, and there was no error in sustaining the objections made by the defendants to the questions asked, or in overruling the motions of the plaintiff in error as complained of. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan. App. 64)

KEMPER v. LORD et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

APPEAL—DISMISSAL—JURISDICTIONAL AMOUNT.

1. Where a motion to dismiss is filed for the alleged reason that the record fails to show that \$100 is involved, if the petition is inserted in the case-made, and an examination of such pleading shows that more than \$100 is demanded by plaintiff, and judgment against him for costs, such motion should be overruled.

2. Section 87 of the Code of Civil Procedure defines what a petition should contain. *Held*: that, where a petition contains all the requirements of such section, the same states a cause of action, and a demurrer thereto should be overruled.

(Syllabus by the Court.)

Error from district court, Jefferson county; Louis A. Myers, Judge.

Action by Lottie C. Kemper against C. C. Lord and others. Judgment for defendants. Plaintiff brings error. Reversed.

Gephart & Schaeffer, for plaintiff in error. W. F. Gillesly, for defendants in error.

McELROY, J. This was an action commenced by Lottie C. Kemper against C. C. Lord et al., in the district court of Jefferson county. The plaintiff alleges: "That heretofore, to wit, on the 5th day of June, 1890, said C. C. Lord and Thomas C. Lord, then being partners, under the firm name of Lord Brothers, for value received, made, executed, and delivered, under said firm name, to one R. H. Crosby, their certain promissory note in writing of that date, by which, for value received, they promised to pay to the order of said R. H. Crosby the sum of twenty-seven hundred and twenty-six and sixty one hundredths dollars, six months after date thereof, with interest thereon at the rate of ten per cent. per annum from the date of said promissory note until the sum and interest thereof should be paid. That plaintiff is now the owner and holder of said note, and that a copy of said note, with all the written indorsements thereon, is hereto attached,

marked 'Exhibit A,' and made a part of the plaintiff's petition. That said note, although long past due, remains wholly unpaid, and that said defendants C. C. Lord and Thomas Lord, and each of them, although payment thereof has been demanded of them and each of them, have wholly failed and neglected to pay said promissory note, or any part thereof, or any interest thereon, except the sum of \$62.72, paid thereon July 1, 1891. That there is now due and payable, and wholly unpaid to said plaintiff on said indebtedness and note, the sum of \$3,426.53, with interest thereon at the rate of ten per cent. per annum from the 21st day of March, 1893. * * * Plaintiff further says that said C. C. Lord and Thomas C. Lord, though often requested so to do, have not paid said sum of money, or any part thereof, or any interest thereon mentioned in said notes. * * * Wherefore plaintiff prays judgment against said defendants C. C. Lord and Thomas C. Lord for the sum of \$3,426.53, with interest thereon at the rate of ten per cent. per annum from said 21st day of March, 1893, upon and by virtue of said promissory note of date June 5, 1890. * * * The petition contains another count, and also asks for the foreclosure of an alleged mortgage and sale of real estate. O. C. Lord demurred to the petition, which demurrer was sustained, for the reason that the petition does not state facts sufficient to constitute a cause of action against the defendants, to which ruling plaintiff excepted, and brings the case to this court for review.

The first thing demanding consideration is a motion to dismiss the petition in error, for the reason that it does not affirmatively appear that more than \$100 is involved. This position is not tenable. The petition is a part of the case-made, and shows that more than \$100 is involved.

The only other question presented is: "Does the plaintiff's petition state facts sufficient to constitute a cause of action in favor of the plaintiff, and against the defendants?" This petition states a cause of action. It contains the name of the court, the county in which the action is brought, the name of the parties plaintiff and defendant, followed by the word "Petition," a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition, and contains a demand of the relief to which the plaintiff supposes himself entitled. The recovery of money is demanded, and the amount thereof is stated, together with the interest claimed. The demurrer should have been overruled. There is much in the petition which might be stricken out on proper motion, but the petition states a cause of action. The judgment of the trial court is reversed, and the case will be remanded, with instructions to the trial court to overrule the demurrer, and proceed in accordance herewith. All the judges concurring.

(6 Kan. A. 74)

LYMAN et al. v. FIRST NAT. BANK OF SENECA.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

TAXATION — SHAREHOLDERS IN NATIONAL BANKS.

The statutes of Kansas in relation to taxation impose upon national banks the duty of paying the tax assessed against the shareholders therein, and authorize the treasurer of the county where the bank is situated to issue warrant therefor in case of the failure of the bank to pay. (Syllabus by the Court.)

Error from district court, Nemaha county; J. F. Thompson, Judge.

Action by the First National Bank of Seneca, Kan., against G. A. Lyman and others. From a judgment for plaintiff, defendants bring error. Reversed.

Wells & Wells, for plaintiffs in error. Hayden & Hayden, for defendant in error.

MAHAN, P. J. This action was brought by the bank against the sheriff and his bondsman to recover money that the sheriff had collected from the bank on a tax warrant. The contention of the bank was and is that there is no law of the state of Kansas requiring a bank to pay taxes on the stock of its shareholders, that wherein our statute says "shall" pay the taxes of the shareholders the legislature meant "may," and that there was no warrant in law for the treasurer issuing any warrant to collect the tax. The bank got judgment for the amount of the tax and interest, and the sheriff appeals; so that the only question to be decided is, does the statute require the bank to pay the tax?

The supreme court of the United States has said, in *Bank v. Com.*, 9 Wall. 353, that the legislature might, under the act creating the national banks, require the bank to pay such tax; and the only question is as to the construction of our statute, did the legislature intend that the bank should pay, and it seems to us there can be no doubt about it. Under the act of congress the capital stock of the bank itself or the property in which its capital stock is invested cannot be taxed, but the shares of stock held by the shareholders can be taxed in the county and state where the bank is located. This was done by the statute. The contention is made that, because the assessment was in the name of the shareholders, furnished by the bank under our statute, therefore the bank is not required to pay. The statute says the bank shall pay the tax. The United States supreme court says it is the only means by which nonresident shareholders can be required to contribute their share of the burdens of government, and we are satisfied that the legislature intended to levy the tax upon the stock of the shareholders, and require the bank itself to pay it, as was done in the case of *National Bank v. Com.*, *supra*, although by different language. It is said in brief of counsel for defendant in error that as against the government "shall" always means

"may." But this act of the legislature was not against the state. It was not imposing any duty or obligation upon the state, or any department of the state government. It was imposing a burden upon a citizen, or corporation occupying the relation of a citizen, and the rule contended for does not apply. When the legislature says a citizen or a corporation occupying that relation shall do a thing, it means shall, and not that they may. The holding of the court below was erroneous. The tax was properly levied. It was the duty of the bank to pay it. The treasurer was authorized under the law to issue his warrant against the bank, and the sheriff was authorized to seize the property of the bank in payment of the tax. The judgment will be reversed, and the case remanded, with direction to the lower court to render judgment for the defendants.

McELROY, J., concurs. WELLS, J., having been of counsel, not sitting.

(6 Kan. A. 919)

FREUND v. HIXON et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

EVIDENCE OF AGENCY.

The only issue in this case was as to whether or not B. E. Freund acted for himself, or whether he acted as the agent of plaintiff in error, in the purchase of certain material, and in the construction of a barn. The issue was fairly presented to the jury by the instructions of the court, and the testimony was sufficient to warrant the verdict of the jury. The special findings are not inconsistent with the general verdict. Verdict and judgment affirmed.

(Syllabus by the Court.)

Error from district court, Atchison county; W. D. Webb, Judge.

Action by G. C. Hixon & Co. against Minnie E. Freund. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. P. Adams and C. S. Hull, for plaintiff in error. C. J. Conlon, for defendants in error.

McELROY, J. This was an action brought by G. C. Hixon & Co. against Minnie E. Freund to recover for lumber and material sold to B. E. Freund, the husband of Minnie E., and used in the construction of a barn. The barn was constructed on real estate owned by Minnie E. Freund. It was claimed in the trial court, by the plaintiffs, that B. E. Freund, in the purchase of materials and in the construction of the barn, acted for and on behalf of plaintiff in error, which was denied by Minnie E. Freund. The case was commenced in justice's court, and appealed to the district court, where the trial resulted in a verdict and judgment against plaintiff in error in the purchase of the material and construction of the barn. The jury returned a general verdict in favor of the plaintiffs (defendants in error), and against the defendant (plaintiff in error), and returned certain special findings of fact.

There were seven special findings of fact submitted to the jury. Special findings Nos. 1, 2, 3, 4, and 7 were as to questions which were conceded by both parties during the trial of the case, or which were wholly immaterial. Special finding No. 5 was necessarily involved in the general verdict of the jury. The answer to special finding No. 6 is not very satisfactory; yet neither party took any exceptions to the answer, nor asked to have the same made more full and complete. However, such answer does not seem to be in any way inconsistent with the findings and verdict of the jury.

An examination of the evidence shows conclusively that Mrs. Freund authorized her husband to purchase the material, and construct the barn, with her funds. It seems to have been the intention of the parties that her husband was to use the barn after it was constructed, but, shortly after the construction of the same, her husband left the country. She took possession of the barn, used it, and caused it to be insured in her name. The fact that B. E. Freund did not disclose the authority given him by his wife to construct the barn does not prevent the defendants in error from insisting that she should pay the bill. The verdict of the jury is fully supported by the evidence in the case. The instructions as given fairly presented the issues to the jury. There was no substantial error committed in the giving or in the refusing to give instructions. The judgment of the lower court will be affirmed. All the judges concurring.

(6 Kan. A. 66)

TAFT v. BURRELL.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

APPEAL—NECESSARY PARTIES.

In an action to foreclose a mortgage, in which there is personal judgment against the mortgagor, in favor of several different claimants for liens, and the lien of plaintiff in error in this court is denied, and the liens of other parties awarded to them, and the plaintiff in error in this court seeks to enlarge his judgment against the mortgagor, and to establish his lien against the property in controversy by his petition in error in this court, the mortgagors are necessary parties to the petition in error herein; and, without the presence of such mortgagors, this court has no jurisdiction of the case to determine such contention, and, in their absence, the petition in error will be dismissed.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by Adeline S. Taft, administratrix of E. A. Taft, deceased, against Margaret S. Burrell and others. From the judgment, plaintiff brings error. Dismissed.

E. F. Hilton, for plaintiff in error. A. Bergen, for defendant in error.

MAHAN, P. J. This was an action to foreclose a mortgage, and for a personal judgment against the mortgagors. The plaintiff in error

ror also sought to foreclose a mortgage on the same property. There was a personal judgment in her favor, but a lien was denied. There was a judgment in favor of the defendant in error, decreeing her to have a first lien on the property. The mortgagors were parties defendant below, and they are not brought here. Plaintiff in error seeks to establish a first lien, and enlarge her judgment against the mortgagor, and displace, to the extent of her first lien, the first lien of the defendant in error. Under the well-established rule of the supreme court, as well as this court, we are without jurisdiction in the case, because the mortgagors are not brought before the court. The plaintiff below is the only party brought here. The motion to dismiss will be sustained. All the judges concurring.

(15 Utah 472)

SALT LAKE CITY v. ARMSTRONG et al.,
County Com'rs.

(Supreme Court of Utah. July 29, 1897.)

TAXATION—EQUALIZATION BY COUNTY BOARD.

1. Under section 11, art. 13, of the constitution, and section 21, subd. 15, c. 131, Sess. Laws Utah 1896, the county board of equalization may raise or lower the valuation of the assessment of any class of property in the county for city taxes as well as for county taxes.

2. After full investigation and careful consideration of the assessment, the board may raise or lower the valuation of real estate in a particular locality to equalize with the valuation in the rest of the county.

3. Sections 72 and 73 of chapter 129, Sess. Laws Utah 1896, refer to reductions of the valuation of the property of individuals on their respective applications, not to the valuation of an entire district.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. G. Norrell, Judge.

Action by Salt Lake City against Francis Armstrong and others, county commissioners of Salt Lake county, sitting as a board of equalization. From the judgment, defendants appeal. Reversed.

Waldemar Van Cott, R. W. Young, and Bennett, Harkness, Howat & Bradley, for appellants. William McKay and David B. Hempstead, for respondent.

ZANE, C. J. This is an appeal from a judgment declaring the board of equalization of Salt Lake county had no jurisdiction to adopt the following order, and declaring it annulled: "Resolved, that it is the opinion of the board of equalization of Salt Lake county, Utah, from evidence duly introduced before it, that the real estate of said Salt Lake county and Salt Lake City is unequally assessed, and a large portion of the real estate of said city and county is assessed above its actual cash value, and in excess of the reduction hereby ordered; and that is especially true of that portion of Salt Lake City lying south of the north line of Third South street, and north of the north line of Ninth South street, and of all

that portion of Salt Lake City lying west of First West street and north of Third South street; and this board hereby orders that the assessment of the real estate in these portions of Salt Lake City be, and it is hereby, reduced twenty per cent.; and it is the opinion of said board, from such evidence, that a portion of the real estate in Salt Lake City and Salt Lake county is unequally assessed, and is assessed above its actual cash value; and especially is this true as to that portion of Salt Lake City and Salt Lake county lying between the north line of Ninth South street and the north line of Twelfth South street, being bounded on the east by the most eastern point of Salt Lake City extended southward, and bounded on the west by the most western point of Salt Lake City extended southward; and this board hereby orders that the assessment of the real estate in such portions of Salt Lake City and Salt Lake county be, and the same is hereby, reduced forty per cent." It appears that the county of Salt Lake is one assessment district, and that on the 12th day of June, 1897, the assessment was completed, and that the city authorities determined it would be necessary to raise by taxation revenue, in addition to the revenue received from other sources, \$262,500, and fixed the tax rate at 7 mills on the dollar, that being the rate necessary to raise the revenue required; that on the 12th day of the following July by the order above quoted the valuation of the real estate was reduced in the district described in the order; that the reduction amounted to \$5,000,000 on the valuation. With this reduction, it is claimed by the city authorities, the revenue will be insufficient to pay the ordinary and necessary expenses of the city for the year for which the assessment is made. It appears further that the board, after having made reductions in the taxes of various individuals in the county and city, and after hearing oral objections of the owners of said real estate in the districts named in the order, upon investigation and on its own motion, made the reductions mentioned in the order complained of. In view of these facts the question arises, had the board the power to make the reduction? Counsel for the city claim: First. That the board had no authority to reduce the valuation of the real estate by a general order, but that such should have been made upon the written application of the owners of the real estate; that the board had no right to establish districts as they did by the order, and reduce the valuation upon all the real estate within the limits which they prescribed. Second. That, if they had the authority, they could only act upon the written application of the owners of the real estate within such districts.

Section 3 of article 13 of the state constitution declares that "the legislature shall provide by law, a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations

as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. * * * Section 11 of the same article provides that: " * * The duty of the state board of equalization shall be to adjust and equalize the valuation of the real and personal property among the several counties of the state. The duty of the county board of equalization shall be to adjust and equalize the valuation of the real and personal property within their respective counties. Each board shall also perform such other duties as may be prescribed by law." The last section makes it the duty of the county board to adjust and equalize the valuation of the real and personal property within their respective counties, without prescribing the mode to be adopted. This leaves the board the discretion to adopt any reasonable and just method, and if, upon an examination and investigation of the assessment, the board should be of the opinion that the real estate in a particular locality is too high, and that in other localities the assessment is too low, it would appear to be a reasonable exercise of its authority to prescribe the localities, and raise or lower the valuation so as to equalize the assessment in such districts (describing them). The court may take notice of the fact that a number of deputy assessors are employed by the county assessor, and that these men in assessing the property may differ in their estimates as to the value of the property, and it would seem reasonable that some general authority should exercise the power of equalizing their various assessments so as to make it equal and just throughout the city and county. Section 21, subd. 15, c. 131, Sess. Laws Utah 1896, provides that the board of equalization shall have power "to equalize assessments and to raise or lower the assessed valuation of any class of property in their respective counties (except property assessed and valued by the state board of equalization), for county, county school, or special school taxes. The board of county commissioners may remit or abate the taxes of any insane, idiotic, infirm or indigent person to an amount not exceeding ten dollars for the current year." This section must be construed as meaning that the board of equalization may raise or lower the assessed valuation of any class of property in their respective counties for city taxes, as well as the valuation for county or other taxes. It would be unreasonable to assume that the legislature intended that the county taxes should be based on the valuation of classes of property as fixed by the board of equalization, and the city taxes on the valuation as fixed by the assessor. Hence we assume the board had the authority to raise or lower the assessed valuation of classes of property for city taxes as well as for county taxes.

Section 72, c. 129, Sess. Laws Utah 1896, declares that: "No reduction must be made in the valuation of property unless the party af-

ected thereby, or his agent, makes and files with the board a written application therefor, verified by his oath, or shall appear before the county board of equalization and show facts upon which it is claimed such reduction should be made." And section 73 provides: "Before the board grants the application, or makes any reduction applied for it may examine on oath the person or agent making the application touching the value of the property of such person. No reduction must be made unless such person or the agent making the application, if required, attends and answers all questions pertinent to the inquiry." These two sections refer to reductions upon the application of individuals, and not reductions made upon classes of property within certain localities designated or described by the board. The latter may be made without a written application, upon such reasonable examination and investigation as the board may make according to its best judgment. It would be unreasonable to require several thousand people, property owners in a large district, each to make a written application for such reduction. Where the excessive valuation applies to the entire district, the board may make the reduction as we have indicated, without a written application being made.

We are of the opinion that the court below erred in holding that the county board exceeded its authority in making the order, and in annulling it. The judgment is therefore reversed, and the cause remanded.

BARTCH and MINER, JJ., concur.

(15 Utah 336)

GAMMETT v. STORRS et al.

(Supreme Court of Utah. June 15, 1897.)

HOMESTEAD—WHAT CONSTITUTES.

In an action brought by the plaintiff to enjoin defendant from selling certain land on execution, on the ground that it was exempt, under section 3429, subd. 11, Comp. Laws Utah 1888, relating to homesteads, *held*, that the land, not being the residence of the plaintiff or his family, nor in any manner appurtenant to, or used in connection with, their residence, nor selected by the plaintiff for a homestead, is not within the exemption provided for in the statute, and hence subject to sale by the judgment creditor.

(Syllabus by the Court.)

Appeal from district court, Fourth district; W. N. Dusenberry, Judge.

Bill by James E. Gammett against George A. Storrs and Alexander Wilkins. From a decree for plaintiff, defendants appeal. Reversed.

Bennett, Harkness, Howat & Bradley and George L. Nye, for appellants. Thurman & Wedgwood, for respondent.

BARTCH, J. This is an action to enjoin the defendants, the sheriff of Utah county and his deputy, from selling, under a writ of execution, certain real estate of the plaintiff,

which he claims is exempt from execution by virtue of the homestead exemption laws.

The only material question presented on this appeal is whether, under section 3429, subd. 11, Comp. Laws Utah 1888, the real estate in controversy, not being the residence of the plaintiff or his family, nor in any manner appurtenant to, or used in connection with, their residence, nor selected by the plaintiff for a homestead, is exempt from execution. The court below, in accordance with the contention of the respondent, decided that the property was exempt, and enjoined its sale. Subdivision 11, so far as material to this decision, contains language as follows: "If the debtor be the head of a family, there shall be a further exemption of a homestead, to be selected by the debtor, consisting of lands, together with the appurtenances and improvements thereon, not exceeding in value the sum of one thousand dollars, for the judgment debtor, and the further sum of five hundred dollars for his wife, and two hundred and fifty dollars for each other member of the family. If the homestead selected by the debtor is of a greater value than is exempted under this section, it shall be optional with the judgment debtor to permit the same to be partitioned or to be sold, and to receive in money the value of the homestead as provided in this section. If the debtor so elect, the homestead may be sold as other lands are sold on execution, and, after paying the debtor the value of the homestead, the balance of the money shall be applied upon the judgment." It is insisted for the respondent that this is a statute of exemptions, and not of homestead, and that under its provisions the head of a family is entitled to an exemption out of any real property which he may own equal in value to the monetary limit specified therein, without reference to the family residence of the debtor.

We cannot concur in this position. It is true the statute does not constitute an independent or technical homestead law, and the term "homestead" implies some degree of exemption; but this may be said of every homestead law. The term "homestead," in legal parlance, possesses the quality of inalienability for the debts of the judgment debtor, if he be the head of a family, and, at the same time, conveys the idea of a home place. Waples in his work on Homestead and Exemption, in section 1, defines it as "a family residence, owned, occupied, dedicated, limited, exempted, and restrained in alienability, as the statute prescribes." Possibly, this is a more restricted meaning of the term than that in which it was used in the statute under consideration, but it is the sense in which the word is generally used by courts and law writers. The meaning of the word "homestead," as used in our statute, evidently includes, not only the land whereon the family of the judgment debtor resides, but also any of his land of the limited value which he may have selected, or may select, for a home, although it may never have been actually occupied as the owner's

place of residence. The idea of family residence seems to pervade the entire statute, and the judgment debtor cannot claim land removed from, and in no way connected with, the place where he resides, merely as an exemption, without any intention of using it as a place for a family residence, or in connection therewith. It is clear, from the context, that it was the intention of the legislature to preserve a home for the judgment debtor, and not to exempt from his creditors any quantity of land of the designated value, regardless of the uses to which the property had been, or might be, applied. The real purpose was the conservation of the family home. The law provides for an "exemption of a homestead, to be selected by the debtor." Hence, unless the "homestead" be selected by the debtor, there is no exemption, and such selection must doubtless be made before sale on execution, because upon sale the debtor ceases to be the owner of the property. This is so from the nature of things, although there is no specific provision as to the time when the homestead is to be selected. A failure of selection, therefore, before sale is fatal to the exemption. The homestead is to consist of lands, "together with the appurtenances and improvements thereon." This also indicates family use, because the appurtenances and improvements are necessary to the enjoyment of the home.

Without further specific reference to the provisions above quoted, it will be noticed, from an examination of the whole subdivision, as well as other sections of our laws, that where the word "homestead" occurs, it is suggestive of family home. The policy of the late territory seems to have been to foster families, and secure their permanence as factors of society, rather than to preserve the lands of insolvent debtors only for their own good. It is evident that the statute was not designed for the mere benefit of the impecunious, but to conserve the homes of all classes, as the pillars of the governmental structure. Every head of a family, of high estate or low, either before or when pressed by creditors, is entitled to select out of his land a place for his family home, which shall be exempt under the law. The purpose of such a statute is laudable. The policy under which it is enacted is supported, as tending to promote the best interests of the state, because upon the permanency of the families, which constitute the units of society, depends the progress of civilization, and the welfare of the institutions which the state aims to foster.

Counsel for the respondent cite the cases of *Nance v. Hill*, 26 S. C. 227, 1 S. E. 897, and *Swandale v. Swandale*, 25 S. C. 392, which appear to sustain the contention—that it is not necessary that the homestead should be the place of residence, or intended residence, of the person claiming the exemption. The decisions in those cases, however, were based on a provision of the constitution of South Carolina, which differs materially in language from the provisions of our statute. We must

therefore decline to follow them in deciding the question before us. The views herein entertained are in harmony with those indicated on several occasions in this court, and have the support of authority. Wapl. Homest. § 2; Thomp. Homest. § 100; Knudsen v. Hannberg, 8 Utah, 203, 30 Pac. 749; Cook v. Higley, 10 Utah, 228, 37 Pac. 336. The respondent, never having had his family residence on the land in controversy, and never having selected it as a place for a family home, or with the intention of making it such a home, was not entitled to have his judgment creditor, or the officers acting as his agents, restrained from selling it on execution, and the court erred in making the restraining order.

The cause is reversed and remanded, with directions to the court below to dismiss the action.

ZANE, C. J., and MINER, J., concur.

(15 Utah 325)

NELSON v. SOUTHERN PAC. CO.

(Supreme Court of Utah. June 17, 1897.)

CONSTITUTIONAL LAW—SUPREME COURT—REVIEW OF FACTS—INSTRUCTIONS—CUSTOMS—CERTAINTY—CARRIERS—CONTRIBUTORY NEGLIGENCE—NOTICE TO AGENT.

1. Under section 9, art. 8, Const., the supreme court has been deprived of the power to review the facts in a case at law, except so far as may be necessary to determine questions of law.

2. Where a specific exception has been taken to objectionable matter in a charge, this court will consider not only that to which the exception was specifically taken, but also what is affected thereby.

3. To establish the validity of a custom of trade, on which a party relies in an action for personal injury, the usage must have existed such a length of time as to become generally known, and must be shown to be reasonable, uniform, certain, and not contrary to law; and it is error for a court to charge a jury that the custom or usage must be "so certain as the business to which the rule applies will permit," there being no comparative degrees as to the certainty of a custom.

4. If a person, who is in charge of live stock on a railroad train, while the train is in motion, incautiously, without the exercise of ordinary care and prudence, or such as a man of reasonable care and foresight would under similar circumstances exercise, does an act which causes or contributes to his death, and becomes the proximate cause thereof, it will be such contributory negligence as will bar a recovery by his legal representatives for his death.

5. It is error to permit a witness to answer, over objections, questions intended to show knowledge on the part of "railroad men," without showing that they are agents of the railway company, where the purpose is to show knowledge on the part of the company.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Alfred H. Nelson, administrator of the estate of Charles A. Nelson, deceased, against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

Marshall & Royle, for appellant. Evans & Rogers, for respondent.

BARTCH, J. The plaintiff, as administrator, brought this action to recover damages for the death of Charles A. Nelson, alleged to have been caused by the negligence of the defendant in the operation of its railroad. The jury returned a verdict in favor of the plaintiff in the sum of \$20,000, but the court afterwards, in deciding a motion for a new trial, determined to grant it unless a remittitur were filed which would reduce the amount to \$15,000. The plaintiff then consented to file such remittitur, and thereupon judgment was entered accordingly, and the motion overruled. This appeal is from the judgment, and from the order overruling the motion for a new trial; but as this court has held in *White v. Pease* (decided at the present term) 49 Pac. 416, that no appeal lies in this state from an order overruling a motion for a new trial, the appeal from the judgment alone can be considered.

Counsel for the appellant, in the first instance, insist that certain facts are established by a preponderance of the evidence. However this may be, it is but for us to reply that we have no power to determine whether the preponderance of the evidence is with the appellant or respondent. Section 9, art. 8, of the constitution, provides, "In cases at law the appeal shall be upon questions of law alone." Under this provision of the constitution, this court on appeal has no power to review the facts in a case at law, except so far as may be necessary to determine questions of law. It is therefore useless to incur the record with any evidence in such a case which is not necessary to the determination of the questions of law presented, because, if there is any evidence to sustain the judgment, we are powerless to determine whether such evidence preponderates, or whether, under all the evidence, we would render the same judgment, and, if not, then substitute our judgment for that of the jury. In all such cases it is the province of the trial court and jury to determine as to where the preponderance of the evidence lies. Hence, this being an action at law, all questions of fact raised in the record must be eliminated, and questions of law alone considered.

Counsel also insist that the court erred in its instructions to the jury. At the trial they excepted to a specific portion of the charge, and, as the part so excepted to relates to and affects almost an entire paragraph, we will consider not only that to which the exception was specifically taken, but also what is affected thereby. The portions of the paragraph thus subject to the objection read as follows: "And if in this case the jury believe from the evidence that deceased, by waiting a short time in the sheep cars, until the train stopped at the summit, could have left the sheep cars and walked back to the caboose upon the ground, and that he was exposed to no danger or peril by so remaining in the sheep

cars; that the deceased, disregarding this means of so returning to the caboose, carelessly, or recklessly, in the face of known or apparent danger, attempted to pass from the sheep cars to the caboose over the tops of intermediate cars of unequal height, while passing through the snowsheds, and in a storm of wind and snow so severe as to tax all his energies to maintain his footing upon the tops of the cars (if you find that such climatic conditions existed at that time), and in so doing he was struck and injured,—his own careless and reckless action was the cause of his own injury, and plaintiff cannot recover in this action, even though you believe from the evidence that the defendant was also negligent, unless you further believe from the evidence in this case that it was a usual custom or practice among sheep men at or prior to the time of the injury, and at or near the place of injury, to walk across the tops of the cars, and that such custom or practice was known to the defendants or its agents, and acquiesced in by them. And upon that point the court instruct the jury that, to establish a custom or usage in business dealings and employments, the custom or usage must be so certain, uniform, and reasonable as the business to which the rule applies will permit, and sufficiently old to be generally known, both to the persons occupied in the business in which custom or usage is relied upon, and also to the persons or their agents against whom such custom is sought to be proven." The part specifically excepted to is the last clause above quoted, which defines the word "custom." It will be noticed that this clause refers to the subjunctive clause immediately preceding it, beginning with the word "unless," and that the subjunctive clause qualifies what precedes it. The plaintiff's intestate was accompanying a shipment of sheep to California, and was killed while walking on the top of the cars of a moving train, west of Truckee, at the Sierra Nevada Mountains, as the train entered a snowshed, by being struck in the back of the head by one of the timbers of the overhead structure; and one of the most important issues in the case was whether, in shipping stock over the appellant's railroad across those mountains, it was a custom known to the railroad company for those in charge of stock, after attending to the same, to get on top of the cars and walk back to the caboose over the running boards. Therefore the defining of the word "custom" became a material element in the charge of the court, because it was important that the jury should clearly understand its legal significance. In its ordinary acceptance, Webster defines "custom" as "frequent repetition of the same act; way of acting common to many; ordinary manner; habitual practice; usage; method of doing or living"; and in its legal acceptance as "long-established practice, considered as unwritten law, and resting for authority on long consent; usage." Bouvier defines it as "such a usage as by common consent and uniform practice has become the law of the place,

or of the subject-matter, to which it relates." And Anderson defines it as "that length of usage which has become law; a usage which has acquired the force of law." To establish the validity of a custom of trade, the usage must have existed such a length of time as to become generally known, and must be shown to be reasonable, uniform, certain, and not contrary to law. If, however, it is not directly known to the parties to the transaction, but is so general and well established as to raise a presumption of knowledge, it will nevertheless be binding upon them. *Bouv. Law Dict.*; *And. Law Dict.*; 1 *Bl. Comm.* 78; 2 *Greenl. Ev.* § 251; *Smith v. Wright*, 1 *Calnes*, 43; *U. S. v. Macdaniel*, 7 *Pet.* 1; *Wootters v. Kauffman*, 67 *Tex.* 493, 3 *S. W.* 465. Testing the objectionable matter in the charge by these definitions and principles, it is apparent that the court's definition is erroneous, because, as will be observed, it violates one of the essential elements necessary to the existence of a custom or usage of trade, which is that it is certain. This element is made to depend upon how much certainty the business will allow, for the jury were told that the custom or usage must be so certain as the business to which the rule applies will permit. A custom does not depend upon whether the business in which it is claimed to exist will permit its existence. The question is, does it actually exist? Is it established as a fact? In addition to being certain, the custom or usage must be uniform, reasonable, and not contrary to law. There are no comparative degrees as to the certainty of a custom. It is either certain, or it is not, and the charge of the court qualifying this element is erroneous; and in this case the error is material, because the portion of the paragraph in which it occurs relates to the preceding portions of the same paragraph, wherein the court, in substance, told the jury that if they believed from the evidence that the deceased, without exposing himself to any danger, could have remained in the sheep cars until the train stopped, and then could have walked to the caboose, but, instead of so doing, carelessly and recklessly, in the face of known danger, attempted to return to the caboose over the top of the cars, while passing through the snowsheds, in a storm so severe as to tax all his energies to maintain his footing, if such climatic conditions existed, then the plaintiff could not recover, unless they further believed from the evidence that it was a custom among sheep men, known to the defendant and acquiesced in by it, at or prior to the time, and at or near the place, of the injury, to walk across the top of the cars while in motion. In other words, the jury were instructed that the plaintiff was not barred from a recovery unless the deceased carelessly or recklessly, in the face of known danger, under the conditions described, returned to the caboose over the top of the cars. Under such a rule the defendant, in order to avoid liability in this case, would have the burden of showing little less than a wan-

ton disregard on the part of the deceased of his own life and safety. Such is not the law. It is apprehended that if the deceased, even incautiously, without the exercise of ordinary care and prudence, or such as a man of reasonable care and foresight would under similar circumstances exercise, did an act which was the proximate cause of his death, his legal representatives will not be entitled to a recovery. The question is not as to the degree of negligence on the part of the deceased, but whether he was guilty of any negligence which caused or contributed to the injury. Nor is it necessary, to bar a recovery, that the act of negligence should have been committed in the face of known or apparent danger. It is sufficient if the deceased was guilty of any negligence which was the proximate cause of the injury, although at the time the real danger of the act was not apparent or known to him. That the charge of the court respecting custom and contributory negligence was erroneous and misleading to the jury is obvious. There are also several other portions of the charge, respecting contributory negligence, which are not invulnerable to careful scrutiny; but, as they were not excepted to, we cannot consider them.

It is further contended that the court erred in permitting the witness Pascal, over the objection of counsel, to answer the following question, "Now, at the time he made that remark to the boys, were there any railroad men in the caboose?" This referred to a remark which the witness testified the deceased made when the train was about to leave Truckee, and as he was about to leave the caboose to attend to the sheep, and was evidently introduced as tending to show that the agent of the defendant was aware that the deceased was somewhere on the train, outside of the caboose, before the train entered the snowshed where the fatal accident occurred. We are of the opinion, therefore, that the question was subject to the objection that it was too general. It should have been limited to the conductor or agent of the defendant, because all railroad men are not such agents.

We do not deem it necessary to discuss any other questions presented in the record. The case is reversed and the cause remanded, with directions to grant a new trial.

ZANE, C. J., and HILES, District Judge, concur.

(15 Utah 334)

SAUNDERS v. SOUTHERN PAC. CO.

(Supreme Court of Utah. June 19, 1897.)

CARRIERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—CONCLUSIONS—PREJUDICIAL ERROR.

1. For a decision of the questions raised herein respecting contributory negligence, and the instructions of the court, reference is made to the case of Nelson v. Southern Pac. Co. (decided at the present term) 49 Pac. 644, where the same questions were considered. The plaintiff herein was injured at the same time and place that the

plaintiff's intestate therein was killed. The Nelson Case followed.

2. Where a court permits a witness, not an expert, over objections, to give his conclusion as to a matter which the jury ought to determine, it is prejudicial error.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Philander V. Saunders against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

Marshall & Royle, for appellant. Evans & Rogers, for respondent.

BARTCH, J. This case was before us on a former occasion, and is reported in 44 Pac. 932. It is an action for damages for personal injuries alleged to have been sustained because of the negligence of the defendant. The jury returned a verdict in favor of the plaintiff in the sum of \$7,500, and the court entered judgment for that sum. Afterwards, when the motion for a new trial was being decided, the plaintiff, at the instance of the court, in order to avoid the granting of the motion, remitted a part of the judgment, so as to reduce it to \$5,000, and judgment was then rendered accordingly. The plaintiff in this case was injured at the same time that the plaintiff's intestate in the case of Nelson v. Southern Pac. Co. (decided at the present term) 49 Pac. 644, was killed. They were both walking together on top of the cars, and were struck by the timbers of the overhead structure of the snowshed at the same time. This is an appeal from the judgment, and from the order overruling a motion for a new trial; but since no appeal lies, under the constitution, from an order overruling a motion for a new trial, as was decided in White v. Pease (at the present term) 49 Pac. 416, the only effectual appeal is that from the judgment.

Counsel for the appellant insist that the court erred in its instruction to the jury, wherein it stated that: "Unless you further believe from the evidence in this case it was a usual custom or practice among sheep men, at or prior to the time of the injury, and at or near the place of the injury, to walk across the tops of the cars, and that such custom or practice was known to the defendant or its agents, and acquiesced in by them." This clause, and the part of the charge which it qualifies, also appear in the charge of the court in the Nelson Case, above mentioned. The principal and qualifying clauses taken together were there held to be erroneous. We refer to that case for our views on this point herein.

At the trial the witness Thomas Nelson was asked by counsel for plaintiff the following question: "Did you consider it dangerous, if a man was walking with his face towards the east, and the train running west, and the train should go under a snowshed, if the timbers were high enough to permit him to pass?"

The witness was permitted to answer this question, over the objection of the defendant. Whether or not it was dangerous for a man to walk on top of the cars, under the circumstances of the case, was for the jury to decide, in determining the question of contributory negligence. The calling for a conclusion of the witness was therefore improper, and the answer was prejudicial error.

All the principal points herein referred to were also presented and decided in the Nelson Case, hereinbefore mentioned; and on the authority of that case this cause is reversed and remanded, with directions to grant a new trial.

ZANE, C. J., and HILES, District Judge, concur.

(15 Utah, 341)

WOOLLEY v. MAYNES-WELLS CO. et al.

(Supreme Court of Utah. June 18, 1897.)

LESSOR'S LIEN—ATTACHMENT—DISCHARGE OF WRIT.

The plaintiff, lessor of a certain storeroom, brought suit against the defendant, his lessee, to recover rent due, and instituted attachment proceedings, under which he seized the goods of the lessee; but the court, against the objections of the plaintiff, upon the lessee filing a bond to secure the lessor, released the goods. *Held*, that Act March 8, 1894 (Sess. Laws, p. 123), relating to lessor's liens, does not of itself afford a complete remedy, and that the court had power, under sections 3324, 3325, Comp. Laws Utah 1888, upon the execution of the bond, to discharge the writ of attachment, and release the property, the law of 1894 making no provision for the discharge of a writ or release of property seized.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by George E. Woolley against the Maynes-Wells Company, a corporation, and John Kirkman, assignee thereof. Judgment for defendants, and plaintiff appeals. Affirmed.

O. A. Woolley, C. W. Boyd, and N. V. Jones, for appellant. D. Harrington and E. E. Dudley, for respondents.

BARTCH, J. The plaintiff brought this action to recover of the defendant company \$1,080.60, rent for a certain storeroom which had been leased to the company. He claimed a lessor's lien, under the act approved March 8, 1894 (Sess. Laws, p. 123), on all the goods contained in the storeroom, and instituted attachment proceedings as provided in the act. Thereupon a writ of attachment was issued, and the proper officer levied upon and seized the goods by virtue thereof. Thereafter, on motion of counsel for the defendants, and upon the defendant company filing a bond to secure the lessor, the court discharged the writ of attachment, and ordered the goods to be released, and this action of the court is assigned as error.

The only question presented is whether the

court erred in discharging the writ of attachment upon the filing of the bond by the company, the sufficiency of which does not appear to be assailed. It is contended for the appellant that the act of 1894 provides in itself a complete remedy for this class of cases, and that there is nothing in the act which authorizes the release of property seized pending the final determination of the suit brought for the recovery of the rent. This position cannot be successfully sustained. While the act is silent as to the release of attached property pendente lite, it is apparent from a perusal thereof that it was not intended to provide a complete method of procedure in the cases to which it applies, nor to interfere with the general law of attachments respecting the discharge of the writ and release of property upon the filing of a sufficient bond by the defendant in the attachment proceedings. That the legislature did not intend to provide a complete method of procedure therein is evidenced by the fact that the act nowhere provides for the discharge of the attachment in any case where the writ was irregularly or improperly issued. Would counsel undertake to maintain the position that, because of the failure of the legislature to so provide therein, the courts have no power to discharge the writ in such cases? Or in case the property levied upon and seized under the writ afterwards turned out to be property exempt from execution, or, if not so exempt, it became apparent that the affidavit on which the attachment proceeding was based was absolutely without foundation in fact. In either of such cases, could it be seriously insisted that the court would be powerless to discharge the writ, because there is no provision therefor in the act? Likewise, in case perishable property were attached, could it be said that the court had no authority to order a sale thereof, because there is no provision for such sale in the law which authorized the seizure of such property? The mere statement of these propositions is sufficient to show the fallacy of the contention that the law of 1894 contains within itself a complete remedy. The act provides for a lessor's lien for an affidavit in attachment proceedings as a foundation for the writ, for service of the writ, for the seizure of property, and for the retention thereof until the determination of the action pending between the lessor and lessee; but it contains no provision respecting the discharge of the writ, nor does it specify any cause as a basis for its discharge. The statute being silent as to the procedure to vacate the attachment or to release the property, the court has the right to dispose of motions made for such purposes under and in accordance with the provisions of the Code of Civil Procedure. Therefore, in the case at bar, the court had power, under sections 3324, 3325, Comp. Laws Utah 1888, upon the execution of the bond, to discharge the writ of attachment, and release the property, the bond conforming to the requirements of the law. We perceive no error in the action

of the court in the premises. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

(15 Utah §14)

RACHE v. STANLEY et al.

(Supreme Court of Utah. June 12, 1897.)

APPEAL—NOTICE—ADVERSE PARTY.

Plaintiff obtained a judgment by default on foreclosure of a mortgage on realty against S. as receiver of a partnership and T. as administratrix. The money for which the mortgage had been given was received and used by the partnership, and the land mortgaged was partnership land. The administratrix was the wife of one of the partners, and a deficiency judgment was entered against her. Upon appeal the administratrix failed to serve notice on S., the receiver. *Held*, that S. was an adverse party under section 3636, Comp. Laws 1888, and that the failure to serve him with notice was fatal to the appeal.

(Syllabus by the Court.)

Appeal from district court, Fifth district; E. V. Higgins, Judge.

Action by Nelle T. Rache against W. B. Stanley, as receiver of the partnership of Thompson Bros., and Sarah S. Thompson, as administratrix of the estate of E. W. Thompson. Judgment for plaintiff. Defendant Thompson appeals. Dismissed.

Jones & Schroeder and Booth, Lee & Gray, for appellant. Williams, Van Cott & Sutherland, for respondent.

BARTCH, J. This action was brought against W. B. Stanley, as receiver of the partnership of Thompson Bros., and against the appellants, Sarah S. Thompson, as administratrix of the estate of E. W. Thompson, Jr., and Sarah S. Thompson, as a private person, to foreclose a mortgage executed by E. W. Thompson, Jr., since deceased, to E. W. Thompson, Sr., to secure a promissory note. It is alleged in the complaint that on February 15, 1890, E. W. Thompson, Jr., made and delivered to E. W. Thompson, Sr., a promissory note for \$2,000, due in six months after date, and secured the same by mortgage on certain real property; that afterwards, by agreement between the mortgagor and mortgagee, the note was taken up and canceled, and in lieu thereof another note, in the sum of \$2,820, was executed and delivered on July 15, 1893, to be secured by the same mortgage which had been executed to secure the first note; that in the year 1881 a partnership was formed between E. W. Thompson, Jr., and E. A. Thompson, for the purpose of carrying on a live-stock business in Utah and Colorado, which partnership was known by the firm name and style of Thompson Bros.; that the land so mortgaged was the property of the partnership, although the title thereto, at the time of its purchase with partnership funds, was taken in the individual name of E. W. Thompson; that the money borrowed from the mortgagee was for the use of the partnership, and the debt there-

by created was a partnership debt; that the mortgage was given to secure it; that on November 20, 1893, E. W. Thompson, Jr., died, and thereafter his widow, Sarah S. Thompson, was duly appointed administratrix of his estate, and qualified as such, and since has been discharging the duties of the office; that after the death of E. W. Thompson, Jr., the defendant W. B. Stanley was appointed receiver of all the effects of the partnership, and since has been acting as such receiver; that on December 28, 1895, the mortgagee assigned and transferred the note of \$2,820, and the mortgage to the plaintiff, who is now the owner thereof; that the plaintiff sued the receiver by permission of the court; that the principal of the note and interest has been demanded, but no part thereof paid; and that the defendants claim some right, title, and interest in and to the premises, but the same are subordinate to the mortgage lien. It appears there was no answer filed, but the defendant Sarah S. Thompson filed a general demurrer to the complaint. Afterwards the demurrer was withdrawn, and thereupon a decree was made, and judgment entered by default, in favor of the plaintiff for the principal of the note, interest, and costs. The decree ordered the sale of the mortgaged property, and that, in case there was a deficiency, then judgment should be entered for the amount thereof against the defendant Sarah S. Thompson, as administratrix of the estate of E. W. Thompson, Jr. This appeal from the judgment was prosecuted by defendant Sarah S. Thompson, both in her individual right and in her official capacity.

Under these facts, appearing in the record, the respondent challenges the standing of the appellant in this court by a motion to dismiss the appeal on the ground that the receiver, W. B. Stanley, the co-defendant, was not served with notice of appeal. It is contended by the respondent that the interests of the partnership were affected by the suit, and that, therefore, the receiver was a necessary party thereto, and, after judgment rendered, was entitled to notice of appeal as an adverse party, under section 3636, Comp. Laws Utah 1888. We think this position is sound. It is apparent from the facts above stated that the receiver was a necessary and proper party to the suit. By allowing a default to be entered, it was admitted, as alleged in the complaint, that the money was borrowed for the use of the partnership, and that the debt secured by the mortgage, and for which the mortgage was foreclosed, was in reality a partnership obligation. The mortgaged property belonged to the partnership. Under these circumstances, it may well be that the receiver was satisfied with the judgment which directed the sale of the property, and relieved the partnership from any deficiency; but this does not indicate that the interests of the partnership would not be affected by a reversal of the judgment, for it would be impossible to know what the result of another trial would be. To reverse the final judgment would be

to overturn all the proceedings, and leave the parties in the same position in which they were before the case was tried. The receiver of the partnership of Thompson Bros. was clearly an adverse party, and the failure to serve him with notice is fatal to the appeal. The same question was presented and discussed with some care in the case of *Commercial Nat. Bank v. United States Savings, Loan & Building Co.* (Utah) 44 Pac. 1043, and on the authority of that case the appeal herein is dismissed.

ZANE, C. J., and MINER, J., concur.

(15 Utah, 371)

HAUERBACH v. CALDER.

(Supreme Court of Utah. July 23, 1897.)

DISCHARGE OF EMPLOYEE—WAIVER OF RIGHT.

In determining whether an employer had violated the terms of his contract, an instruction by the court to the jury as follows: "If you find a waiver or condonation of any particular act, that act cannot subsequently be relied upon by the employer as a reason to discharge the servant. Such discharge must then arise from another act or acts occurring subsequently to those waived or condoned,"—is not error, since the court did not say that an act subsequent to one waived as a justification for a discharge might not be considered in the light of such former acts and conduct.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by J. A. Hauerbach against George Calder. Judgment for plaintiff. Defendant appeals. Affirmed.

Williams, Van Cott & Sutherland, for appellant. J. M. Hamilton and Hoppaugh & Krebs, for respondent.

ZANE, C. J. The plaintiff, a professional musician, made a contract with the defendant to furnish an orchestra, consisting of a certain number of musicians, to play at the latter's park each day except Sundays during the season of 1894, for which the defendant bound himself to pay \$60 per month, and to furnish the members of the band free transportation to and from the park, and a lunch each day. It also appears that defendant discharged the plaintiff and his orchestra before the season closed. The defendant admitted the contract, but denied that he discharged the plaintiff or his orchestra without reasonable cause, and alleged that different members of the orchestra became intoxicated, and conducted themselves in an offensive manner in the presence of ladies and others attending his resort, and that he discharged the plaintiff and his orchestra for that reason. The plaintiff introduced evidence on the trial tending to prove the allegations of his complaint, and the defendant introduced evidence tending to prove that some of the members of plaintiff's orchestra were drunk at different times during the performance in defendant's

park, and were guilty of offensive conduct before and on the occasion for which plaintiff was discharged. In rebuttal the plaintiff offered evidence tending to prove that the defendant's answer and evidence with respect to drunkenness were untrue. The evidence was submitted to the jury under the charge of the court, and a verdict was found against the defendant in the sum of \$330, to compensate for the loss from defendant's breach of contract, and a judgment was rendered thereon for that sum and for costs. From that judgment the defendant has appealed, and assigns the following paragraph in the charge of the court as error: "Upon the question of performance of the contract, you are further instructed that any breach of contract may be waived by the employer, and whether or not there has been a waiver of any particular act is to be determined by the jury; and, if you find a waiver or condonation of any particular act, that act cannot subsequently be relied upon by the employer as a reason to discharge the servant. Such discharge must then arise from another act or other acts occurring subsequently to those waived or condoned." There was evidence tending to prove that the previous drunkenness or conduct of which defendant complained occurred before that on the day named, for which plaintiff and his orchestra were discharged, and that such previous drunkenness and conduct were known to the defendant a considerable time before the discharge. The evidence was conflicting as to whether the members of the orchestra were intoxicated, and were guilty of the conduct complained of. The court told the jury in the charge that a breach of the contract might be waived by the employer, and when any particular act is waived it cannot afterwards be relied upon by the employer as a reason for discharging the employee. In this the court did not say that an act subsequent to one waived as a justification for a discharge might not be considered in the light of such former acts and conduct. We are disposed to hold that the exceptions relied upon are not well taken. The judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

(15 Utah, 261)

MCKAY v. FARR et al.

(Supreme Court of Utah. June 7, 1897.)

EQUITY—FINDINGS OF FACT—NEW TRIAL—PRESUMPTION.

1. While the supreme court has power, under section 9, art. 8, of the constitution, to review questions of fact in an equity case, still, when such cases have been regularly tried before a court of chancery, and facts found on all material issues, the appellate court will not disturb such findings unless they are so manifestly erroneous as to demonstrate some oversight or mistake which materially affects the substantial rights of the appellant.

2. Where it is urged that a trial court erred in refusing a new trial on the ground of newly-

discovered evidence, and it does not appear from the affidavits why the newly-discovered evidence could not have been produced at the trial, and the transcript shows no assignment of error upon the action of the trial court thereon, and where it does not appear on the hearing of the appellant's motion for a new trial that the court's attention was directed to the affidavits, or that they were considered by the court, or identified as papers used on the hearing, the appellate court will not consider the affidavits. The appellate court must presume that the court below committed no error in overruling a motion for a new trial, and the burden of overthrowing this presumption, and of showing that the action of the court was erroneous, is on the appellant.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Isaac McKay against Newton Farr and others. Judgment for plaintiff. Defendant Lorin Farr appeals. Affirmed.

Elijah Farr and E. T. Hulaniski, for appellant. Evans & Rogers, for respondent.

BARTCH, J. It appears from the complaint in this case that on the 14th of January, 1893, the defendants Newton and Ezra Farr executed and delivered to the plaintiff a promissory note in the sum of \$900, and at the same time Newton Farr and his wife, Martha D. Farr, executed and acknowledged a mortgage on certain real property as security for the note. When this action was brought by the plaintiff to foreclose the mortgage, the defendant Lorin Farr set up in his answer, as matter of defense, that on the 16th day of February, 1893, Newton Farr executed and delivered to him a note for \$3,000, and secured it by mortgage on the same property as that described in the complaint, and that the mortgage was recorded on the following day. He also averred that the plaintiff's mortgage was not recorded, and that he had neither actual nor constructive notice of a prior mortgage. At the trial a decree of foreclosure was made, and judgment entered in favor of the plaintiff, and this action of the court is now challenged on appeal.

The decisive question in this case, it being conceded that respondent's mortgage was not recorded, is whether the appellant, at or before the time of taking his mortgage, had actual notice of the existence of the prior unrecorded mortgage. Counsel for the appellant contend that the fifth finding of fact, wherein the court found that the appellant had such notice of the prior mortgage, and of the fact of its being a lien on the property therein described, is not supported by the evidence. This being an action in equity, the supreme court is empowered (under section 9, art. 8, of the constitution, which provides, "In equity cases the appeal may be on questions of both law and fact") to examine the evidence, and determine whether it is sufficient to sustain the finding. From the record it appears that only two witnesses, the defendants Lorin and Newton Farr,—father and son,—testified as to this question. The father testified that when he took the note and mortgage he had no no-

tice of the respondent's mortgage, or of any lien on the premises in question. He also testified in substance that he was about 74 years of age, and that his memory was "not so very good as to conversations"; that his recollection and memory of everything except facts were not as good as prior to the time when he received an injury on his head, which was about nine years ago, and was so severe that he knew nothing and was unconscious for over a month; that in discussing this matter his son at first insisted that he had told him about the prior mortgage, but afterwards he thought perhaps he had not told him; that he generally was very dutiful and respectful; and that his son would oppose his judgment as much as any of his children, but he would naturally expect him to give in if they were disputing about facts. Newton Farr testified in substance that, to the best of his recollection, he told his father about the prior mortgage, and that he was giving him a second mortgage. Further reference to the evidence in detail would answer no useful purpose, because a substantial conflict therein is apparent. The father testifies positively, it is true, while the son testifies to the best of his recollection, but under all the circumstances of the case the son's testimony appears quite convincing to the mind. The father himself says that, owing to the severe injury which he received about his head, his memory is impaired as to conversations, and it is quite likely that at this distance of time he has no recollection of what his son said to him about the second mortgage. There is nothing to show that the son would have any interest in opposing, or inclination to oppose, his father's interests; and it is much more charitable to entertain the view that the conflict in the evidence is the result of an admitted defective memory than to hold that either the father or son committed perjury. This is especially so as to us who have had no opportunity to observe the conduct of the witnesses while on the stand, or to test their powers of recollection. The trial court having had such opportunity, we will not, in view of the conflicting testimony, and under the peculiar circumstances of this case, hold that its findings are not supported by the evidence, or that the findings do not support the judgment. While we have power, under the constitution, to review questions of fact in an equity case, still, when such cases have been regularly tried before a court of chancery, and facts found on all material issues, we will not disturb such findings unless they are so manifestly erroneous as to demonstrate some oversight or mistake which materially affects the substantial rights of the appellant. This is the settled rule in this state. *Stahn v. Hall*, 10 Utah, 400, 37 Pac. 585; *Mining Co. v. Haws*, 7 Utah, 515, 27 Pac. 695; *Dooly Block v. Transit Co.*, 9 Utah, 31, 33 Pac. 229; *Whitesides v. Green* (Utah) 44 Pac. 1032; *Wells v. Wells*, 7 Utah, 68, 24 Pac. 752.

It is also insisted that the court erred in re-

fusing a new trial on the ground of newly-discovered evidence. Three affidavits of Lorin, Ezra, and Enoch Farr appear in the record, and are relied upon to support this contention. The alleged new evidence is contained in the affidavits of Ezra and Enoch Farr. It is merely cumulative, and it does not very satisfactorily appear from Lorin Farr's affidavit why this evidence could not, by the use of reasonable diligence, have been discovered and produced at the trial,—especially that of Ezra Farr, who was one of the defendants. Nor does the transcript show any assignment of error upon the action of the trial court thereon. Nor does it anywhere appear that on the hearing of the appellant's motion for a new trial the court's attention was directed to the affidavits, or that they were considered by the court, or identified as papers used on the hearing. Under these circumstances, we cannot consider the affidavits, because they are not properly a part of the record. This court must presume that the court below committed no error in overruling the motion for a new trial, and the burden to overthrow this presumption and show that the action of the court was erroneous is on the appellant. He having failed in this, its action must be upheld. *Nash v. Harris*, 57 Cal. 242; *Baker v. Snyder*, 58 Cal. 617; *Walsh v. Hutchings*, 60 Cal. 228. We perceive no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

MACNAUGHTON CO. v. MCGIRL.

(Supreme Court of Montana. July 10, 1897.)

INTERSTATE COMMERCE—WHAT CONSTITUTES—
STATUTE AFFECTING—VALIDITY.

1. Const. U. S. art. 1, § 8, relating to the regulation of interstate commerce, applies as well where the commerce is carried on by corporations as when carried on by natural persons.

2. Where a foreign corporation sent its agent into Montana to buy or solicit the consignment of wool to its warehouses in other states, the business thus conducted was interstate commerce, within Const. U. S. art. 1, § 8, giving congress the exclusive power to regulate interstate commerce.

3. Act March 8, 1893, requiring every foreign corporation, before commencing business in the state, to designate an agent and its principal place of business, and declaring its contracts void on failure to comply, in so far as it applies to foreign corporations engaged in interstate commerce, is void.

Appeal from district court, Yellowstone county; George R. Milburn, Judge.

Action by the MacNaughton Company, a corporation, against Thomas McGirl, to recover money advanced defendant by plaintiff on his wool clip. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

The plaintiff and appellant herein, a corporation organized and existing under the laws of the state of New Jersey, at the time of this suit and of the transaction which brought

it about, was doing a commission business, as a wool commission merchant, in the states of New York and Massachusetts, and the state of Montana. The complaint alleged that in July, 1892, the defendant, at Billings, Mont., consigned a wool clip to plaintiff, in New York, to be sold by plaintiff for defendant on 60 days' credit, the proceeds thereof to be paid to defendant by plaintiff, less the commission on sales, interest on moneys advanced, freight and interest thereon, discount on sales not due, cartage, and advances. It is alleged that plaintiff, to accommodate defendant, deposited in the hands of defendant, on account of the transaction between the parties, the sum of \$7,019.20, as an advanced payment in case of the sale of said wool, on the net proceeds thereof, to be kept by defendant on account of the net sales of the wool if the said wool sold for enough, less commission and charges, to amount to \$7,019.20, but that any amount over and above the net proceeds of the sale of the wool, or the difference between the net proceeds of the sale and the \$7,019.20, if any, should be subject to a drawback by the plaintiff, and be to and for the use of plaintiff, and to be returned to plaintiff by defendant if the net proceeds of the wool did not amount to the sum advanced; that pursuant to this agreement the defendant's wool was consigned to plaintiff; and that some time thereafter it turned out that on the accounting pertaining to the transaction between plaintiff and defendant a balance was found due and owing by defendant to plaintiff, inasmuch as the wool did not sell for a sufficient sum to fully pay plaintiff for its advances to defendant, and the charges agreed to be paid. Judgment was asked for the amount claimed to be due as a drawback. The defendant admitted that he had consigned the wool to plaintiff to be sold for him, and that he had been paid by plaintiff, as an advance on said consignment of wool, the sum of \$7,019.20, but denied all of the alleged agreement concerning the shipment of the wool subject to the drawback claimed by plaintiff. For an affirmative defense the answer also averred that there was to be no drawback, and that, if the wool did not sell for an amount sufficient to cover the advance made by the plaintiff, it would bear the loss. Among other defenses pleaded, it was averred that plaintiff could not maintain his action for the reason that plaintiff was a corporation organized under the laws of the state of New Jersey, and had not complied with chapter 24, div. 5, Gen. Laws, Comp. St. Mont., in that it had not filed in the office of the secretary of state, or with the county clerk of Yellowstone county, a duly-authenticated copy of its charter or certificate of incorporation, and the statement required by section 442 of the law referred to, and in other respects had not complied with said law, or with the provisions of an act of the Third legislative assembly of the state of Montana entitled "An act to provide the conditions upon which foreign corporations may do business in this state,"

approved March 8, 1893. The cause was tried to a jury, and evidence heard. The court then, of its own motion, instructed the jury that inasmuch as the plaintiff was a foreign corporation, and had not complied with the act of the Third legislative assembly providing the conditions upon which foreign corporations might do business in Montana, the act and contract of the plaintiff with the defendant was void as to the corporation, and could not be enforced in the district court, and that it was the duty of the jury to find for the defendant. In accordance with this instruction of the court, a verdict was rendered for the defendant for costs. A motion for a new trial was made and overruled. The plaintiff appeals.

Gib. A. Lane, for appellant. O. F. Goddard, for respondent.

HUNT, J. (after stating the facts). The plaintiff, a corporation of New Jersey, doing business in that state, and in the states of New York and Massachusetts, as wool commission merchant, sent an agent into Montana to solicit consignments of wool to its Eastern houses, there to be sold on commission by plaintiff for the benefit of certain consignors, woolgrowers of the state of Montana. It had various transactions of this nature with woolgrowers in Montana. In the particular case before us the exact terms of the agreement between the plaintiff and the defendant gave rise to this litigation, but the facts were undisputed that plaintiff advanced a large sum of money to defendant upon his wool, and that the defendant's wool was consigned to plaintiff at New York, to be sold there by plaintiff, who was to credit defendant with the amount of the sale. The real contention between the parties was whether the shipment so made was subject to a drawback by plaintiff against defendant if the wool did not net a sufficient sum in New York to cover plaintiff's advances to defendant, including interest, costs, etc., or whether the burden of any loss that there might be was to fall entirely on plaintiff. The defendant availed himself of several defenses, including the one upon which the court directed a finding in his favor, namely, that the contract sued on was void as to the corporation, and could not be enforced in favor of the corporation. By an act of the legislative assembly of the state of Montana approved March 8, 1893, every foreign corporation, before it commenced to do business in Montana, was required to file a certificate with the secretary of the state, designating an agent, who must be a citizen of Montana, upon whom service of process might be had, and also stating the principal place of business of such corporation in this state. It was also provided by section 2 of said act that, if any foreign corporation failed to comply with the provisions of the law, all its contracts made and entered into with citizens of this state should be void as to the corporation,

and that no court of this state should enforce the same in favor of the corporation. Inasmuch as plaintiff did not comply with the statute just cited, the important question raised is whether or not, if the plaintiff's facts alleged in its complaint are true, and the defendant does in reality owe to plaintiff the amount sued for as a drawback, plaintiff can recover on its contract. It has been repeatedly laid down by the supreme court of the United States that interstate commerce carried on by corporations is entitled to the same protection against the exactions of a state which is given to such commerce when carried on by individuals. We are aware that the construction put upon section 2, art. 4, of the constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states, has been generally uniform, to the effect that the language of that clause relates only to natural persons, and not to artificial bodies, as corporations, and that the privileges and immunities guaranteed by the language referred to mean those of the general nature granted to a state's own citizens, and not those special privileges conferred upon corporate bodies. *Insurance Co. v. French*, 18 How. 404; *Bank v. Earle*, 13 Pet. 519; *Ducat v. Chicago*, 10 Wall. 410; *Paul v. Virginia*, 8 Wall. 168; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118. But, in the carrying on of interstate commerce, corporations are guaranteed the same rights and are entitled to the same protection as individuals. The supreme court in *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 204, 5 Sup. Ct. 826, expressly held that it did not make any difference whether such commerce is carried on by individuals or by corporations. Justice Bradley, sitting on the circuit bench in the case of *Stockton v. Railroad Co.*, 32 Fed. 9, used the following language: "And, in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of congress, and cannot be molested in another state by state burdens or impediments. This was held and decided in the case of *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 204, 5 Sup. Ct. 826, and affirmed in the recent case of *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118; and although the decision in *Paul v. Virginia*, 8 Wall. 168, conformed to the doctrine of *Bank v. Earle*, the following striking language was used by the court, to wit: 'At the time of the formation of the constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the

supposition that it was intended, in the grant of power to congress, to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentality by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations.' We may fairly supplement this language by adding that, when the constitution was adopted, it could not have been supposed that the regulations of commerce to be made by congress might be of no avail to commercial corporations, or at least might be rendered nugatory, with regard to them, in consequence of state restrictions upon their power to act as corporations in any other state than that of their origin." We may therefore proceed with the investigation of the case, relying upon the truth of the proposition that, if the transactions between the plaintiff and the defendant in this case were commerce among the several states, congress alone could regulate such commerce, under the constitution of the United States, and the state had no power to regulate that commerce, or impose any obligation or exaction upon the plaintiff which it could not impose or exact upon an individual transacting the same business.

Now we inquire, what was the nature of the business done, and was it interstate commerce? If we find that it was interstate commerce, did the statute obtain requiring the corporation to file the certificate referred to as a condition precedent to its right to purchase the wool of the defendant in the manner that it did, and was it an attempt on the part of the state to regulate commerce among the several states, and therefore null and void? In the case of *Gibbons v. Ogden*, 9 Wheat. 1, Chief Justice Marshall, in one of his greatest opinions, discussed section 8, art. 1, of the constitution of the United States, in which congress has been granted the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." He said: "The subject to be regulated is commerce, and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic,—to buying and selling, or the interchange of commodities,—and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." In *Welton v. State of Missouri*, 91 U. S. 275, Justice Field used the following language: "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transporta-

tion, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation." Again we find Justice Field defining for the court what commerce among the states consists of, as comprehended by the constitution of the United States, in the case of *County of Mobile v. Kimball*, 102 U. S. 691. He there said: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce." In the still later case of *Gloucester Ferry Co.*, supra, the same justice, speaking for the court, said: "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in congress, is the power to prescribe the rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties and other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted, are of infinite variety. While with reference to some of them which are local, and limited in their nature or sphere of operation,

the states may prescribe regulations until congress intervenes and assumes control of them, yet when they are national in their character, and require uniformity of regulation, affecting alike all the states, the power of congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation. Its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in congress." In *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, Justice Lamar quotes approvingly the following definition of "commerce" as given by Pomeroy on page 376 of his work on Constitutional Law: "It includes," says Pomeroy, "the fact of intercourse and of traffic, and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places, and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated." In *Cook v. Brick Co. (Ala.)* 12 South. 918, the supreme court of Alabama decided that the sale of bricks in another state, to be delivered in Alabama, or the filling of an order sent from Alabama for bricks in another state, is an act of interstate commerce, not affected by the statutes of Alabama, which required a foreign corporation to have a place of business and an agent in Alabama as a condition precedent to its capacity to do business in Alabama. A like decision was made very recently by the supreme court of Tennessee. *State v. Scott*, 39 S. W. 1. A law of Tennessee required every person, other than photographers of the state, who solicited pictures to be enlarged outside of Tennessee, to pay a certain sum per annum as a privilege tax. But the court held the statute unconstitutional, and used the following language: "Enlargement of pictures by citizens of other states for citizens of this state is the primary matter, though the tax is in terms laid upon other persons engaged, as agents, in the promotion thereof. The process of enlarging involves the making of a larger picture after the image or likeness of a smaller one. When this is

done by one person, upon the order of another, and the larger picture is delivered for a consideration, the parties have certainly had a commercial transaction; and if they be citizens of different states, and the picture be made in one state and sent into the other state, as indicated in the statute and averred in the presentment, the transaction, as between the principals, is, as obviously, interstate commerce. The latter is a commercial transaction between citizens of different states, and that is what 'interstate commerce' means. Whether the transaction be conducted directly or entirely by the principals themselves, or in part by the agency of another, is of no consequence. It is interstate commerce in both instances. So there is no room for doubt that the enlargement of pictures referred to in the statute is, to all intents and purposes, interstate commerce."

Now, when we apply to the facts of this case the principles of the foregoing definitions, what do we have? The plaintiff corporation sent its agent into Montana to solicit or buy wool to be consigned to its wool houses in other states, wherein it does its principal business. The agent did no other kind of business for the corporation in Montana. Such being the case, it seems clear to us his business directly pertained to interstate commerce. It related to intercourse and traffic between Montana and New York, and the subject-matter of the intercourse and traffic was the wool itself. If the Northern Pacific Railroad in transporting the wool over its road between Montana and Minnesota was engaged in interstate commerce,—as clearly it was,—we cannot perceive how the transaction by which the wool itself was exchanged through consignment or sale by defendant to plaintiff can be excluded from any reasonable definition of "commerce among the states." The sale and exchange of wool is among the great operations of the commercial world. It is, like traffic in cotton or wheat or corn, a subject of frequent intercourse between citizens of the different states and different nations. The railroad transportation is a part of the commerce,—the instrument or vehicle of intercourse; the wool, the essential subject-matter of the intercourse and traffic. It being our opinion from what we have said that the plaintiff corporation was engaged in a business which was strictly interstate commerce, no law of the state could control or restrict such commerce by exacting conditions for permitting the plaintiff to do such business. The argument that a foreign corporation has its domicile in the state from which it derives its existence, and that its right to transact business elsewhere, and to enforce its contracts made in other states, depends purely upon the comity of those states, is not pertinent. The power of a state to make discriminations in privileges granted to foreign corporations may be exercised where a foreign corporation desires to do business within the limits of the state, not strictly interstate or foreign com-

merce. This may be illustrated by familiar instances of cattle and sheep companies, or mining and smelting corporations, in Montana. No foreign corporation, we take it, organized for any of the purposes for which such associations are usually formed, and desirous of carrying on its business and of acquiring a domicile in Montana, can escape the consequences of omission to comply with the terms and conditions upon which it has a right to do business within the state. Indeed, such corporations, in the exercise of legislative discretion, may be excluded from the state altogether, as was laid down in *Paul v. Virginia*, 3 Wall. 168, and *Horn-Silver Min. Co. v. State of New York*, 143 U. S. 305, 12 Sup. Ct. 403. Such conditions or restrictions, however, are permissible upon the ground that a state may not be willing, upon grounds of a policy of its own, to have a corporation, even if legally created under the laws of the state of its creation, establish a business in Montana, or the state may demand of it a license tax, or the performance of any other reasonable condition, before it can claim the same protection in the conduct of its business that is accorded to like corporations within the jurisdiction of the state. *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737. But a most vital limitation in this respect upon the power of the state springs up where the business of the foreign corporation is commerce between the corporation, the creature of the legislature of one state, and a citizen of another state. *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, supra. As against all such foreign corporations engaged in interstate commerce, the state can pass no prohibitory law, constitutional or statutory, without impinging upon the commercial clause of the constitution of the United States. The decisions of the United States supreme court justify these views. In *Cooper Manuf'g Co. v. Ferguson*, 113 U. S. 734, 5 Sup. Ct. 739, the court had before it statutes quite similar to those upon which respondent in this case relies; and, while the decision was based upon the ground that the statute could not affect a corporation under the laws of one state which did a single act of business in another, still there is language in the opinion recognizing the doctrine that the statute could not be construed "to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of congress to regulate commerce among the several states." The implication from this language is that if a foreign corporation has sent an agent into Montana, and made a contract within the latter state for the consignment of wool between Montana and New York, no construction can be put upon the statute of Montana which would render such a contract void without invading the exclusive right of congress. If, therefore, this contract sued upon was lawfully made, notwithstanding a statute which

declares or attempts to declare it void, it follows that any legislation of the state which seeks to prevent the enforcement of the contract is equally an invasion of the exclusive right of congress. It must be true that, if the state cannot declare the contract void, it cannot prevent the enforcement of the contract. In the case of *Cooper Manuf'g Co. v. Ferguson*, supra, there is a brief concurring opinion by Justices Matthews and Blatchford, in which they planted themselves firmly upon the broader ground that the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado, was commerce, and that for the state of Colorado to prohibit it, except upon conditions, was to regulate commerce between Colorado and Ohio, which lay exclusively within the province of congress. "It is quite competent, no doubt," said Justice Matthews, "for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery made elsewhere, for that would be to regulate commerce among the states." The facts in that case, as also in the case of *State v. Scott* (Tenn. Sup.) 39 S. W. 1, heretofore cited, and that of *Bateman v. Milling Co.* (Tex. Civ. App.) 20 S. W. 931, present the converse of the case at bar. The foreign corporations in all those instances were domiciled in other states, and through their commercial agents solicited business and sold and shipped goods to points in the other states, in which laws existed imposing upon foreign corporations compliance with certain conditions precedent to their right to do business within such states. But the opinions were all based upon the reasoning that the goods sold were commodities subject to barter and sale, and that the sale, transportation, and delivery of goods and the transaction of business between a foreign corporation of one state and a citizen of another state constituted interstate commercial transactions, which corporations, as well as individuals, could carry on free from any restraints by any state. But, as we have heretofore seen, the transaction pertaining to the wool shipped by the defendant to the plaintiff in this case is obviously brought within the same rule. It is just as much an interstate commerce transaction to export wool from Montana to New York as it is to import clothes made of the wool from New York to Montana. Either transaction is interstate commerce, and neither can be interfered with by local law.

Of course, this exclusive power of the regulation of interstate commerce by congress does not interfere with the police power of the state. Police regulations often incidentally affect commerce, but they still remain police regulations. The line of distinction between an attempt to put a burden or restriction upon interstate commerce, and the police power of

the state, has been very recently discussed by Judge Grosscup in *Re Lebolt*, 77 Fed. 587, who thus expressed himself: "The supreme court of the United States, in an unbroken line of decisions, has held that any attempt to put any burden or restriction upon interstate commerce, either by the way of taxing it, or requiring a license from its agents or drummers, or a discriminating license or tax upon any of its goods or products, is outside the power of a state, and an infringement upon the powers of the national government. The government of the United States has control and exclusive power to regulate interstate commerce. The government of the state has the power to look after police regulations, such as affect the life, health, or morals of the citizens." The decision of Judge Grosscup in the case quoted from was to the effect that an ordinance of the city of Chicago which prohibited the sale or the offering for sale of vinous liquors in Illinois by the representative of a California association, without a license, was not an exercise of the police power of the state, but was an attempt to regulate interstate commerce, and consequently invalid. It has also been held in the case of *McCall v. California*, supra, that where a statute affects commercial transactions among states only in such an indirect, incidental, and remote manner as not to burden or impede interstate commerce, it is not in conflict with the constitution of the United States. But there again a different rule applies from that which must be applied in this case.

We do not think it necessary to proceed any further in this discussion. It has been so repeatedly held by the supreme court of the United States that every tax on interstate commerce is a burden on that commerce, and, if imposed by the legislature of a state, is illegal, that it is scarcely necessary to cite more decisions to that effect. They are referred to in *Leloupe v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, and are reviewed by the supreme court of Tennessee in *State v. Scott*, supra. The trend of the later decisions of the supreme court has been, we think, to extend the protection afforded to the carrying on of interstate commerce by including within the definition of the words any form of interstate commerce, "whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on." *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725; *Crutcher v. Kentucky*, 141 U. S. 58, 11 Sup. Ct. 851; *Brennan v. City of Titusville*, 153 U. S. 302, 14 Sup. Ct. 829. As the country has developed, and commercial intercourse between the citizens of the several states has expanded, and facilities for the conduct of such commerce have so vastly multiplied, the wisdom and perspicuity of the framers of the constitution in preserving in congress the exclusive right to regulate and control such commerce, and to preserve it wholly free from any local

interference or impediment on the part of the state, is too apparent to need comment. It may be safely said that one of the causes for the development of the states is the business relations between citizens of different states,—relations which, in turn, exist because of the guaranty by the federal constitution that interstate commerce shall remain free from any impositions or discriminations of state legislation.

The sequel of these views is that the contract alleged to have been made between the plaintiff corporation and the defendant was, if made as a fact, valid and enforceable; and, the transaction being one of lawful interstate commerce, it could in no manner be affected by any statute of the state imposing conditions (not in the exercise of the police power) upon plaintiff precedent to its capacity to enter into the contract. Perhaps the legislature did not mean to extend the statute under consideration to foreign corporations engaged in interstate commerce. The presumption would be that they did not, but whatever the purpose may have been in this respect is immaterial to this discussion; for, if it was intended to include such foreign corporations, we hold the statute unconstitutional in that respect. The judgment is therefore reversed, and the cause is remanded for a new trial. Reversed and remanded.

PEMBERTON, C. J., and BUCK, J., concur.

RISTE et al. v. MORTON et al.

(Supreme Court of Montana. July 10, 1897.)

MINING CLAIMS—PATENTS—NOTICE OF DISCOVERY—DESCRIPTION.

1. In order to entitle a locator of a mining claim to a patent, it is not necessary that there be a record that one to whom he had sold an interest has lost title by his failure to contribute his share of work and expense to represent the claim for certain years, and that the locator advertised the vendee out, by publication, as provided by Rev. St. U. S. § 2324.

2. A notice of discovery describing a mining claim as bounded by three other claims on three sides thereof locates the claim with reference to permanent monuments, unless it affirmatively appears that such other claims are not permanent monuments.

Appeal from district court, Park county; Frank Henry, Judge.

Action by Thomas Riste and another against Robert L. Morton and others. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiffs appeal. Affirmed.

This is an action to recover a part payment of the purchase price of certain mining claims mentioned in the complaint, on the ground of misrepresentations made as to the character and value of the property, and also on the ground that the title to said mining claims was defective. From the record it appears that on the 28th day of May, 1891, the defendants sold to the plaintiffs the mining

claims described in the complaint for the sum of \$8,000. Of this sum, \$2,000 was paid at the time of the purchase. At the same time the defendants executed to the plaintiffs their bond by which they bound themselves to convey the mining claims in question to the plaintiffs upon the condition that they should pay to them the further sum of \$2,000 on the 2d day of July, 1891, and \$4,000 on the 1st day of December, 1891, with 6 per cent. interest. On the 8th day of August, 1891, it seems, the plaintiffs came to the conclusion that they would not take the property, and notified the defendants thereof in writing; alleging as their reasons for their action that the said property was misrepresented to them by the defendants, and also that the title thereto had failed, in that the defendants at the time only owned an undivided one-half interest in the Nevada King quartz lode, one of the mining claims mentioned in the complaint. Thereafter, on October 5, 1891, the plaintiffs brought this suit to recover back the \$2,000 paid by them as part of the purchase price of said mining claims. On the trial the plaintiffs waived their first ground of recovery (that is, that the mining claims had been misrepresented to them), and sought to recover the purchase money paid by them solely upon the ground that the defendants had no sufficient title to the claims in question. The case was tried to a jury. At the close of plaintiffs' testimony the defendants moved for a nonsuit on the ground, among others, that plaintiffs had failed to show that the title to the property in question was incumbered or imperfect in the defendants at the time of the alleged agreement of sale, or at the time the deed was deposited, and further that the plaintiffs had failed to point out any particular defects, if any, in the title of defendants to the property in controversy, or any part thereof. The court sustained the motion, and a verdict was rendered in favor of the defendants. From the judgment rendered in the case, and from an order overruling a motion for a new trial, the plaintiffs appeal.

Campbell & Stark, for appellants. W. H. Poorman, for respondents.

PEMBERTON, C. J. (after stating the facts). This being an appeal from a judgment of nonsuit, the question for determination is as to whether there is any substantial evidence in the record which establishes, or tends to establish, the allegation in the complaint that the defendants did not have and could not convey a good title to the mining property in controversy in accordance with the terms of their bond. It must be observed that the bond was to convey a good title to unpatented mining ground, or such title as would enable plaintiffs to procure a patent thereto. The plaintiffs knew they were contracting for title to unpatented mining ground. This is not disputed. It seems that, prior to the execution of the bond in question by defendants to plaintiffs, one undivided half of the Nevada King min-

ing claim, mentioned in the complaint, had been sold by defendant Hall, the locator, to E. F. Ferris. Ferris failed to contribute his share of the necessary work and expense to represent said claim for the years 1886 and 1887. Hall advertised Ferris out, in accordance with section 2324, Rev. St. U. S. It is contended by appellants that Hall's notice of publication to Ferris was not published for the length of time required by the statute. It is true that one affidavit of the publisher of the newspaper in which the notice was published would support this contention. But this affidavit was afterwards corrected by the publisher by the filing of another affidavit, showing the notice was published for the full time required by law. So there is nothing in this contention. Appellants contend that the record should show that Ferris had lost his title to the ground by the publication of such notice, and that the record should show Ferris had not contributed his part in labor or money to represent the claim for the year in question. But counsel does not tell us what record the law requires to be kept to show these things. All the law requires is that the party applying for a patent be prepared to prove these things in the land office. In this case the record shows that the defendants, as the grantees, would have been amply prepared to make such proof on application for a patent to the ground.

Appellants contend that Hall's notice of discovery of the Nevada King mining claim is defective, in that it does not locate the claim with reference to any permanent monument. The notice describes the claim as adjoining and being bounded by three other claims on three sides thereof. In *Mining Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153, this court held that a description in a location notice referring to a mining claim was a sufficient reference to a permanent monument, saying that such mining claim "will be presumed to be a well-known natural object or permanent monument until the contrary appears." There is no evidence or presumption in this case that the three mining claims referred to in the Nevada King notice of location are not patented, and, if not patented, that they are not well-known and permanent monuments. Neither Ferris nor any one else, as far as the record shows, is claiming any title or interest in the mining property in controversy, or any part of it, adverse to the title of the defendants. There is nothing in the record that shows, or tends substantially to show, that defendants were not capable of conveying a good title to the ground in controversy,—just such title as they contracted to convey; that is, such title as would enable plaintiffs to obtain a patent thereto. This is all defendants contracted to do. The evidence shows they were able and willing to comply with the terms of their bond. There is no merit in this appeal. The judgment and order appealed from are affirmed. Affirmed.

HUNT and BUCK, JJ., concur.

**FIRST NAT. BANK OF MILES CITY v.
BULLARD.**

(Supreme Court of Montana. July 10, 1897.)

LIMITATIONS—PAYMENT ON JOINT DEBT—SUFFICIENCY OF EVIDENCE.

1. A partial payment by one joint maker of a note does not remove the bar of limitations as to the others, in view of Comp. St. 1887, div. 1, § 53, providing that no acknowledgment shall evidence a new contract, and thereby remove the bar of the statute, unless signed by the party, but that the act shall not alter the effect of a payment, and section 54, providing that the limitation shall begin after the last payment after due, and section 1296, div. 5, providing that joint obligations shall be taken as joint and several.

2. The opinion of a witness that there was a certain understanding between the parties respecting a material matter is not alone sufficient evidence to support a verdict.

Appeal from district court, Custer county: George R. Milburn, Judge.

Action by the First National Bank of Miles City against William H. Bullard. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

On September 28, 1895, at Miles City, Mont., six persons executed a promissory note for \$1,000, payable, on demand, to the First National Bank of Miles City. It appears that the principal who signed the note was one Alfred Ward. The other persons, although joint makers of the note, signed the same, as to Ward, only as sureties. One of these makers was Joseph Leighton, at the time, and subsequent thereto, president of the payee bank. Another was W. H. Bullard, the defendant and appellant in this action. Three payments were indorsed on this note as follows: April 30, 1886, \$181.10; October 25, 1886, \$81.19; May 4, 1888, \$42.40. On the 29th day of December, 1885, said Ward, for the purpose of indemnifying his co-signers of the note, executed to them a chattel mortgage on certain personal property—the fixtures and furniture of a saloon—of which he was the owner. On April 30th, the mortgagees, having taken possession of said chattels, caused the sheriff of Custer county to sell said property. At this sale defendant, Bullard, purchased a piano, paying therefor the sum of \$184. The remainder of the property was sold in bulk to Leighton. On the same or the next day the sheriff had a settlement with Leighton, and turned over to him, as the net proceeds of the sale, the sum of \$422.60. Leighton, as president of the bank, caused the payments to be indorsed on the note in the sums and at the times specified thereon. On August 10, 1893, the bank brought suit against Bullard for the balance due on said note. The plaintiff on the trial introduced evidence for the purpose of showing that Leighton was the agent for his co-mortgagees in the chattel mortgage, and had purchased the property at the sheriff's sale upon the understanding and agreement that he should hold the property purchased by him,

and, as he disposed of portions of it from time to time, should make indorsements on the note. The testimony introduced to establish the fact of this agreement was as follows: E. B. Weirick, cashier of the bank, stated: "At the time this stuff was sold under the mortgage, Mr. Leighton bid it in, in the interest of the signers of the note. He was one of the makers with Mr. Ward, Mr. Bullard, and others, and, under the foreclosure of the mortgage, he bid the property in. The indorsement here of Mr. Savage [referring to the first indorsement on the note] was for the sale, as I recollect, of the piano. Mr. Leighton was a little late in getting to the sale. His idea was to purchase the whole property there, so as to keep it intact to continue the business. This property was all bid in by Mr. Leighton, in the interest of the signers of the note under this mortgage, and he was to hold the property, and dispose of it as he could, and the proceeds of those sales were to be indorsed on the note. This indorsement of May 4, 1886, for \$42.40 was the proceeds of a sale of the bar,—that is, the mirror and glass back of the bar,—and, under the instructions of Mr. Leighton, I suppose that was the case. I know that this property was held by him as agent for those people, to make any indorsement of proceeds of sale of this property, and at that time this glass and bar was sold, and the proceeds indorsed on this note. * * * My opinion was that Mr. Leighton intended to buy all the property there for the benefit of the makers of the note, with the understanding of continuing the business with the parties, and working out the amount of the note. I understood that it was the understanding among the makers of the note that Mr. Leighton should buy all the property in at the sheriff's sale, for the benefit of the makers. Mr. Bullard was one of the makers of that note. I don't know how there could have been an understanding between all of the makers of the note that Mr. Leighton was to buy in all the property, if it is a fact that Mr. Bullard arrived at that sale prior to Mr. Leighton getting there, and purchased the piano." Bullard in his testimony positively denies any such agreement between Leighton and himself in reference to the former buying in the property for the benefit of all the mortgagees, and applying the proceeds as aforesaid.

The court, in its instructions to the jury, virtually told them that a payment by Leighton on May 4, 1886, would remove the bar of the statute of limitations (which is six years) as to all the joint signers of the note. The jury returned special findings to questions submitted to them. The first finding was as follows:

"We, the jury, in the above entitled action, find for the plaintiff in the sum of eight hundred sixty-one ⁵³/₁₀₀ dollars (\$861.53), as per statement attached. [Signed] A. Bittle, Foreman. Dated Aug. 22d, 1894."

Statement.

Face of the note dated Sept. 28th, 1885	\$1,000 00
Interest on same from date to Aug. 21, 1894, eight yrs., ten months, twenty-three days, at 12%	1,067 67
Total	\$2,067 67
Payments on above note:	
Nov. 24th, 1885	\$100 00
Int. on same to Aug. 21, 1894, 8 yrs., 8 mos., 27 days	104 90
April 30th, 1886	422 60
Int. on same to Aug. 21, 1894, 8 yrs., 3 mos., 21 days	421 33
October 25th, 1886	81 19
Int. on same to Aug. 21, 1894, 7 yrs., 9 mos., 26 days	76 12
Total	\$1,206 14
	\$ 861 53

"Note: The above item 'April 30th, 1886, \$422.60,' includes the \$42.40 paid to bank May 4th, 1886, and also item of \$181.10, paid bank April 30th, 1886."

The appeal is from an order denying a motion for a new trial and a judgment in favor of plaintiff. Section 53, div. 1, Comp. St. Mont. 1887, is as follows: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this act, unless the same is continued in some writing signed by the party to be charged thereby; but this act shall not alter the effect of any payment of principal or interest." Section 54, Id., reads thus: "Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment shall be made after the same shall have become due, the limitation shall commence from the time the last payment was made." Section 1296, div. 5, Id., is as follows: "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants."

C. R. Middleton and John B. Clayberg, for appellant. Strevell & Porter, for respondent.

BUCK, J. (after stating the facts). The question in this case, most elaborately discussed by respective counsel in their oral argument and briefs on file, is whether or not a part payment by one of the several joint makers of a note after it is due, without the consent or ratification of the others, extends the time prescribed by the statute for an action thereon as to all. A leading authority relied upon by respondent is a decision rendered by Chief Justice Shaw in the case of *Sigourney v. Drury*, 14 Pick. 387. Among the authorities for the view contended for by appellant, we have deemed especially worthy of our consideration the cases of *Willoughby v. Irish* (Minn.) 27 N. W. 379, and *Cowhick v. Shingle* (Wyo.) 37

Pac. 689. The Minnesota decision construes a statute almost identical in its terms with section 53, div. 1, Comp. St. Mont. 1887. In the Wyoming case the authorities on both sides of the proposition are cited and discussed in detail. The courts of this country are in conflict, but in our opinion the more modern and better-reasoned decisions answer the question in the negative. We hold, therefore, that, under the statutes of Montana, one joint maker of a note, by a partial payment thereon after its maturity, without the assent or ratification of his co-makers, binds only himself, so far as an extension of the statutory period of limitations is concerned. The lower court erred in the view of the law it announced on this question to the jury.

We come next to the evidence on which the judgment for plaintiff is based. A careful analysis of the statements made by the witness Weirick forces us to the conclusion that his evidence as to the understanding between Leighton and the other mortgagees was the result of a mere opinion entertained by himself, without any actual knowledge as a basis for it. It is true, he declares positively that Leighton was authorized to sell the property he had bought in, and apply the proceeds of sales from time to time on the note. But, however positive his assertion may be, he destroys its force by finally admitting that "it was his opinion that there was such an understanding;" "that he understood there was such an understanding." It was incumbent upon the plaintiff to prove that the note was not barred as to the defendant, Bullard, and the only evidence offered by it on this issue was that of Weirick. The lower court should have granted a new trial for insufficiency of the evidence. Moreover, it is apparent, from an inspection of their first finding, that the jury believed that Leighton, as president of the bank, should have applied and indorsed the entire proceeds of the mortgage sale,—namely, \$422.60,—on April 30, 1886, when he receipted to the sheriff for that sum of money. It is inconsistent with some of the other findings returned. These findings, however, were mere conclusions of law, and it is unnecessary to recite them.

For these reasons, the judgment is reversed, and the cause is remanded, with directions to the lower court to grant a new trial. Reversed and remanded.

PEMBERTON, C. J., and HUNT, J., concur.

CONRAD et al. v. PACIFIC PACKING CO.
et al.

(Supreme Court of Oregon. July 26, 1897.)

DECREE—AMENDMENT ON APPEAL.

The supreme court cannot amend a decree on motion of a party who failed to appeal.

Appeal from circuit court, Multnomah county; Henry E. McGinn, Judge.

Suit by Peter Conrad and others against the Pacific Packing Company, a corporation, and others, for the appointment of a receiver, and to wind up the affairs of defendant corporation. From the decree said corporation and other defendants appealed. Motion by P. Selling, a defendant who failed to appeal, to amend the decree. Denied.

Joseph N. Teal, for the motion. Allan R. Joy, opposed.

PER CURIAM. This is a motion by a judgment creditor of the defendant to correct a decree against it. The material facts are that plaintiffs, as stockholders, brought a suit against the Pacific Packing Company, an alleged insolvent corporation, for the appointment of a receiver and to wind up its affairs, whereupon P. Selling and other creditors were made parties defendant. Issues having been joined, the evidence was taken, from which the court found that on December 17, 1892, the corporation, being the owner in fee of certain real property, executed a mortgage thereon to secure the sum of \$1,700, which was duly assigned to the defendant Charles W. La Barre; that on December 28, 1896, P. Selling, having commenced an action against the said corporation to recover the sum of \$700 and interest, caused its property to be attached, and thereafter obtained a judgment for the amount demanded; that on February 13, 1896, the corporation executed its mortgage to one Mary Young upon certain property; that she duly assigned the same to the Commercial National Bank; and that the amount due thereon is the sum of \$3,000. And the court thereupon decreed that the property of the corporation be sold, and out of the proceeds there be paid (1) to Charles W. La Barre, the sum of \$1,700; (2) to the Commercial National Bank, the sum of \$3,000; and (3) that the balance be distributed pro rata among all bona fide creditors of the Pacific Packing Company. From this decree the corporation and other defendants appeal, but, after the time had elapsed for taking an appeal, Selling discovered that the lien of his judgment was made by the decree subordinate to the lien of the Commercial National Bank. He therefore moves to amend the decree, contending that the failure of the trial court to provide therein for the application of the proceeds of the sale of the property of the corporation according to its findings of fact was an inadvertent omission, and that, the cause having been brought here, this court possesses plenary power to correct the error complained of, notwithstanding his failure to take an appeal. The jurisdiction of this court is restricted to the revision of the final decisions of the circuit courts brought here by appeal, and, this being so, it is evident that the decree in this cause cannot be modified until the final hearing on the merits, and then only as to the parties to the appeal; and, inasmuch as the motion contemplates a modification of the decree

in the interest of a defendant not a party to the appeal, it follows that the motion must be denied, and it is so ordered.

(31 Or. 62)

MORRIS & WHITEHEAD v. TAYLOR,
Mayor, et al.

(Supreme Court of Oregon. July 26, 1897.)

MUNICIPAL BONDS—POWER TO ISSUE—EXTENDING DEBT LIMIT.

1. An ordinance authorizing a city to issue negotiable bonds in exchange for outstanding warrants does not increase the municipal indebtedness, in violation of charter.

2. A city expressly authorized to borrow money for municipal purposes, and to issue negotiable bonds, may issue bonds for the purpose of funding its floating debt.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Application by Morris & Whitehead, a corporation, for a writ of mandamus compelling Frank J. Taylor, mayor of the city of Astoria, and others, to execute and deliver to the applicant municipal bonds. From a judgment denying the application, said applicant appeals. Reversed.

R. E. Moody, for appellant. Frank J. Taylor, for respondents.

BEAN, J. In April, 1897, the city of Astoria, having a bonded indebtedness of \$100,050, and a floating indebtedness, represented by warrants owned by the plaintiff, of \$90,000, passed an ordinance providing for the exchange of negotiable 20-year bonds of the city, bearing semiannual interest at the rate of 6 per cent. per annum, for said warrants. By this ordinance it was provided that the bonds should be deposited with the city treasurer, and by him kept in a safe place until such time as the plaintiff or its duly-authorized agent should deliver to him any of the warrants in lieu of which the bonds were to be issued, when he should deliver to it or its agent bonds equal in amount to the sum then due on the warrants so surrendered, and continue to deliver bonds, as fast as warrants were surrendered to him, until the contemplated exchange should be completed, and that the warrants so surrendered should be immediately canceled. A question having subsequently arisen as to whether the city, under its charter, had such authority to issue such bonds, and the officers thereof having refused to execute or deliver them, this action was instituted to test that question; and, a pro forma judgment having been entered in favor of the city officers, the plaintiff brings this appeal.

Two questions are presented by the record: First, whether the issue of such bonds is violative of the charter, which provides that the indebtedness of the city shall never exceed in the aggregate the sum of \$200,000 and that any debt or liability incurred in excess thereof, except certain specified indebt-

edness, not necessary to be here mentioned, shall be null and void and of no effect; and, second, whether the provision of the charter authorizing the city "to borrow money on the faith of the city, or loan the credit thereof, or both, for purely municipal purposes, and to issue or dispose of negotiable or other municipal bonds with interest coupons attached," empowers it to issue negotiable bonds for the purpose of funding its outstanding indebtedness. The first question seems easy of solution. By the express provisions of the ordinance, the bonds shall only be issued to a holder of the outstanding warrants in exchange and as a substitute therefor, so that the aggregate indebtedness could not be thereby increased in any way, but the transaction would simply operate as an exchange of one evidence of indebtedness for another, without increasing the amount thereof.

The other objection to the validity of the proposed bonds is based upon the proposition that a municipal corporation, without explicit authority, cannot lawfully issue negotiable bonds for the purpose of funding its floating indebtedness; and, while this question is not by any means free from doubt, we are inclined to the opinion, from a careful review of the authorities, that when a municipality has the express power to borrow money for municipal purposes, and to issue or dispose of negotiable or other municipal bonds, it may under such power issue bonds in lieu of, and for the purpose of funding, its floating indebtedness. Such seems to be the rule deducible from the following authorities: *Simonton, Mun. Bonds*, § 125; *City of Quincy v. Warfield*, 25 Ill. 279; *City of Galena v. Corwith*, 48 Ill. 423; *Village of Hyde Park v. Ingalls*, 87 Ill. 13; *Rogan v. City of Watertown*, 30 Wis. 259; *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 21 N. E. 168; *Portland Sav. Bank v. City of Evansville*, 25 Fed. 389; *Com. v. Councils of Pittsburgh*, 41 Pa. St. 278. An analysis or review of these cases, or any further discussion of the question, must be dispensed with, in view of the limited time at our disposal. The judgment of the court below is reversed and the cause remanded, with directions to issue the peremptory writ of mandamus as prayed for.

(58 Kan. 315)

ATCHISON, T. & S. F. R. CO. v. TUNNELL.
(Supreme Court of Kansas. July 10, 1897.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

An engineer was not chargeable with contributory negligence in running his switch engine into cars left on the main track at night, unguarded, and without signals displayed, because the switchman, whose proper place was on the footboard of the tender, and a part of whose duty it was to give signals to the engineer, and look for signals from others, climbed into the cab just before the accident, and was allowed to remain there; it appearing that the engineer had no authority to order him out, and that the switchman had a view of the track from the cab.

Error from district court, Ford county; A. J. Abbott, Judge.

Action by Southey B. Tunnell against the Atchison, Topeka & Santa Fé Railroad Company for personal injuries. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. B. F. Milton and Fenlon & Fenlon, for defendant in error.

PER CURIAM. The defendant in error was an engineer in the employ of the plaintiff in error, and was operating a switch engine in the company's yards. Between 10 and 11 o'clock at night he started to go upon the main track from the west to the east end of such yards. At that hour a passenger train from the East was very nearly due, and a freight train from the same direction was overdue about eight hours. While making a run from one part of the yards to another, this belated train arrived, and, as usual, stopped at the east side of the yards, and, as usual, the engine pulling it was detached, and run upon a side track, the train being left standing upon the main track, but unguarded, and without the putting out of any danger signals. The defendant in error ran his engine into the cars thus left unguarded, and was severely injured, to recover for which he sued. Verdict and judgment went for him in the district court, to reverse which the company prosecutes this proceeding in error.

Many findings covering the minor details and minutiae of the accident were made, but the important matters of negligence upon the part of the company and contributory negligence upon the part of the defendant in error were very little inquired about. For information concerning these we have been compelled to examine the evidence. The negligence of the company in failing to guard the train left standing on the track was clearly established. There is, however, a conflict of evidence as to whether the defendant in error was guilty of negligence contributing to the accident. A switchman named McGeorge rode on the engine; part of the time on footboards on each side and at the end of the engine tender. It was the duty of this switchman to give signals to the engineer, and to look out for signals from others, and to throw switches, and make couplings of cars. The proper and most convenient place for him was on the footboards mentioned. A very short time before the collision, he got into the engine cab, and stood with his back to the boiler head, and facing the direction in which the engine was going, and likewise the train of cars with which they presently collided. The weight of the testimony is to the effect that he was not in his proper place; that he should have been on the footboards, where he could have better overseen the track upon which they were running. The charge of contributory negligence is the failure of the defendant in error to or-

der him out of the cab to his post of duty. The weight of the testimony, however, is that the engineer was invested with no authority to give such order; that he could only have requested him to go to his proper place, and, upon failure by him to do so, would have been justified in stopping his engine, and refusing to run it until the switchman consented to take the post belonging to him. There are no findings by the jury concerning this matter. The general verdict, however, is a finding in favor of the defendant in error of all matters necessary to his recovery which were not specially found. We can readily comprehend how the very presence of the switchman in the engine cab might have been taken by the engineer as an evidence that the track was clear. He might readily suppose that the switchman, whose safety would be as much imperiled by negligence as would his own, would not desert his post except after first assuring himself that the track was clear. Besides, the switchman, from his place in the cab, could have a view of the track; perhaps not as good a view as from the footboards, but nevertheless a view of it. There was no error in the instructions of the court, and there is, in our judgment, ample evidence upon which to sustain the verdict. The judgment of the court below is therefore affirmed.

(58 Kan. 815)

ATCHISON, T. & S. F. R. CO. v. CAREY.

(Supreme Court of Kansas. July 10, 1897.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES.

Where a railroad fireman is injured by the breaking of a locomotive on account of a defect in its construction, and the broken parts had been constructed in defendant's own shops, and the defects must have been obvious to those engaged in the work, the defendant is liable.

Error from district court, Neosho county; L. Stillwell, Judge.

Action by William Carey against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

A. A. Hurd, O. J. Wood, and J. L. Denison, for plaintiff in error. C. A. Cox and S. C. Brown, for defendant in error.

PER CURIAM. The defendant in error was a fireman in the service of the plaintiff in error. The machinery of the engine upon which he was running broke on account of a defect in its original construction, causing him severe injuries, for which he sues. The broken parts had been constructed in the company's own shops, by its own employes, and the defects in question must have been obvious to those engaged in the work. In such cases the master is, without doubt, liable for resulting injuries. There is nothing in the claim of contributory negligence set up by the plaintiff in error, either as matter of fact or in the rulings of the court below; nor is there in the claim that a more specific answer should have been

returned by the jury to a certain special question. The judgment of the court below is therefore affirmed.

(58 Kan. 816)

HELM v. VOILS.

(Supreme Court of Kansas. July 10, 1897.)

CONTINUANCE—ABSENCE OF PARTY.

A motion by plaintiff for continuance when the case was called for trial in her absence should have been granted on a showing that plaintiff intended to be present, and that a failure to attend was due to the miscarriage of a letter written by her attorney.

Error from district court, Sumner county; James A. Ray, Judge.

Action by M. Lou Helm against W. H. Voils. Judgment for defendant. Plaintiff brings error. Reversed.

Snoddy & Snoddy, for plaintiff in error. W. W. Schwinn, for defendant in error.

PER CURIAM. The record shows that the plaintiff in error has had no opportunity to have her rights to the property in controversy determined by the court. When the case was called for trial her counsel was refused time in which to make a showing for a continuance. There is nothing indicating that the application was made in bad faith. The proof on the motion for a new trial shows that the plaintiff intended to be present at the trial, and that her failure to attend was due to the miscarriage of a letter written by her attorney. Parties to lawsuits have a right to use the mails, and to rely on them to some extent. No good reason is apparent why the plaintiff should not have been afforded an opportunity to try her case, which she seemed to be prosecuting in good faith; for, when notified of its dismissal, she went from Manhattan to Wellington, and promptly moved to set aside the order of dismissal, and for a new trial. The judgment of the district court dismissing the plaintiff's cause of action and quieting the defendant's title will be reversed, and the cause remanded, with directions to grant the plaintiff a new trial.

(58 Kan. 816)

CASE et al. v. RICHARDS.

(Supreme Court of Kansas. July 10, 1897.)

PETITION IN ERROR—NOTICE OF SETTLEMENT.

Where notice of the time and place of settlement of the case made was not given to defendant in error, the petition in error will be dismissed.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Henry F. Richards against Aderial H. Case and others. Judgment for plaintiff. Defendants bring error. Dismissed.

A. H. Case and John Guthrie, for plaintiffs in error. J. C. Douglass, for defendant in error.

PER CURIAM. The case made fails to show that notice of the time and place of settlement was given to the defendant in error. On the other hand, it is shown by the evidence filed in behalf of the defendant in error that no notice was in fact given, and that counsel for the defendant in error had no knowledge of the presentment of the case for settlement, and was not present, and only a part of the amendments suggested were allowed. Under the authority of *Safford v. Turner*, 53 Kan. 728, 37 Pac. 121, and cases therein cited, the petition in error must be dismissed.

(58 Kan. 491)

STATE v. BOARD OF COM'RS OF SCOTT COUNTY.

(Supreme Court of Kansas. July 10, 1897.)

STATE SCHOOL FUND—INVESTMENT—MUNICIPAL BONDS—COUNTIES—MEETINGS OF BOARD—REFUNDING BONDS—VALIDITY—ESTOPPEL.

1. The statutory provision that the commissioners for the management and investment of the state school funds "shall not invest in any bonds which, together with the other outstanding indebtedness, shall exceed ten per cent. of the assessed valuation of said municipal corporation," is a binding requirement on those officers which cannot be safely ignored; but if the commissioners should consciously or unconsciously violate this provision, and purchase municipal bonds in excess of the limitation, the municipality will not be relieved from the payment of the bonds so purchased.

2. County commissioners have no authority to convene as a board away from the county seat, and beyond the limits of the county, to compromise and refund the county indebtedness; but where they do so, and refunding bonds are issued in good faith to pay off a valid indebtedness, which is canceled and surrendered, and subsequently an entry is made in the journal of the proceedings of the board, which indicates that the meeting was held at the county seat, and that all the proceedings were regular, and where the bonds are subsequently purchased by the state, an innocent purchaser, and the board of county commissioners thereafter and for a number of years levies and collects taxes for the payment of interest upon the refunding bonds, and actually pays the same to the state, thereby recognizing and ratifying its invalid action in issuing the bonds beyond the limits of the county, *held*, that the irregularity and invalidity are thereby cured, and the county is estopped from denying its liability upon such bonds.

3. *Riley v. Garfield Tp.*, 53 Kan. 299, 49 Pac. 85, followed.

(Syllabus by the Court.)

Error from district court, Scott county; J. E. Andrews, Judge.

Action by the state against the board of commissioners of Scott county. From a judgment for defendant, plaintiff appeals. Reversed.

L. C. Boyle, Atty. Gen., for the State. J. C. Starr, J. F. Pancake, S. S. Ashbaugh, and Travis Morse, for defendant in error.

JOHNSTON, J. This was an action to recover interest claimed to be due upon refunding bonds alleged to have been issued by the board of county commissioners of Scott county, and which were purchased as

an investment of the permanent school fund by the state. In August, 1887, the board of county commissioners of Scott county issued \$120,000 of bonds in aid of the construction of two railroads,—\$80,000 for the C., K. & N. Railroad, and \$40,000 for the D. M. & A. The bonds had previously been authorized by a vote of the electors of the county, the railroads had been built, and the bonds were issued and exchanged for equal amounts of the capital stock of the companies, in pursuance of law, and in compliance with the conditions of the contract between the companies and the county. After a number of years, the county failed to pay the interest accruing upon the bonds, and two different actions were brought in the circuit court of the United States for the district of Kansas by the holders of the bonds to recover the defaulted interest. In one of these judgments was rendered against the county on January 11, 1892, for \$11,745.41, and upon the same day judgment was taken against the county in the other case for \$21,479.20. Soon afterwards negotiations looking towards the refunding of the entire debt were begun, and in March, 1892, after a number of public meetings of the electors of the county, participated in by the members of the board of county commissioners, an agreement was reached, and a compromise effected. The amount of the debt was somewhat reduced, and refunding bonds were issued to the holders of the original indebtedness signed by the chairman of the board of county commissioners and the county clerk. It appears that the bonds were actually executed and delivered in the city of Topeka, in the county of Shawnee, Kan., instead of in Scott City, the county seat of Scott county. For the convenience of all the parties, the members of the board of county commissioners went to Topeka at the expense of those to whom the refunding bonds were delivered, and the execution and delivery of the bonds were there completed, and the old indebtedness surrendered for cancellation. Upon his return to the county, the county clerk entered an order of the board upon the journal authorizing the compromise, and refunding of the debt, and also an order confirming and approving the reported issue of the bonds by the chairman of the board and the county clerk. These orders show that the meetings were regularly held at the county seat in Scott county, and that all the steps were legally taken. Subsequently the school fund commissioners purchased the refunding bonds in several installments. One purchase was made on June 13, 1892, another on July 19, 1892, another on August 4, 1892, and the final purchase was made on June 5, 1893. Taxes were assessed by the board of county commissioners, levied, and collected for the purpose of paying the interest upon these bonds, for several years, but default was made in the interest accruing in 1893, and no payment was thereafter made.

On December 28, 1895, the present action was brought. The county resists payment, and defends upon the grounds that the bonds were issued without authority, and that they are not valid obligations of the county. The district court took that view of the case, and gave judgment in favor of the county. The indebtedness was refunded in pursuance of the provisions of chapter 50, Laws 1879, as amended by chapter 163, Laws 1891. The question of issuing refunding bonds was never submitted to a vote of the electors, and it is earnestly contended that a vote is indispensable, and that the refunding bonds in suit are therefore invalid. This question, and some others closely related to it, which have been argued by counsel for the county, have been decided adversely to his contention in the recent case of *Riley v. Garfield Tp.*, 49 Pac. 85. One objection urged against the right of the state to recover upon the refunding bonds is that the school fund commissioners transgressed the statutory restriction in purchasing them. In paragraph 6654, Gen. St. 1889, where authority is given to the commissioners to invest the school funds in municipal securities, there is a provision that they "shall not invest in any bonds which together with the other outstanding indebtedness shall exceed ten per cent. of the assessed valuation of said municipal corporation." It appears that the bonds issued exceeded that limitation. This restriction, however, relates to the duties of the commissioners in investing the school funds, and not the power of the municipalities to issue bonds. It is a safeguard against investing in doubtful securities, and a prohibition which the commissioners cannot safely ignore. The legislature intended that no bonds should be purchased except from municipalities which were in good financial condition, and which were abundantly able to meet the obligations when they became due. It was clearly not intended that, if the commissioners purchased a bond of less value than that directed by statute, the state school fund should for that reason lose the entire amount invested in such bond. The failure of the commissioners to exercise that degree of care which the statute requires did not destroy the validity of the bonds, nor will it prevent the state from enforcing the payment of the bonds purchased.

A more serious question arises upon the admitted fact that the bonds were executed and delivered away from the county seat, and outside the county. The constitution provides for establishing county seats, and the statute requires that the meetings of county commissioners for the transaction of county business shall be held at the county seat. In fact, every county officer is required to keep his office at the seat of justice of his county. Const. art. 9, § 1; Gen. St. 1889, pars. 1623, 1672, 1877. County commissioners are officers of the county, and they cannot convene as a board, or exercise the powers conferred upon the board, outside the territorial limits of the county. Indeed, the order authorizing the com-

promise of the debt and the issue of refunding bonds could only be made when the commissioners were convened as a board in the court house at Scott City. *Commissioners v. Barker*, 25 Kan. 238; *Commissioners v. Webb*, 47 Kan. 104, 27 Pac. 825. It follows that the board had no jurisdiction to transact county business at Topeka, and the action there taken was clearly irregular and invalid. While the orders made and steps taken at Topeka were without authority of law, we think that the board has since that time recognized their action as legal, and has ratified and confirmed the steps taken by them in refunding the debt. Their action in this respect was open and above board, and that the debt had been compromised and refunded by them, and the old indebtedness surrendered and canceled, was well understood by the taxpayers and people of the county. In going to Topeka to execute the bonds and exchange them for the old indebtedness, the commissioners were actuated by considerations of convenience only. When they returned to the county seat the clerk entered at length upon the journal the order previously made authorizing the compromise, and the refunding of the debt, and the order approving the execution and delivery of the bonds in exchange for the old indebtedness. The orders have remained in the journal, which was kept under their supervision, and must now be deemed to have been entered and recorded with their sanction and approval. No effort was made to prove that fraud was contemplated or committed, nor that the commissioners had acted clandestinely or secretly in issuing the bonds. On the other hand, the proof shows that they were issued in accordance with the desire of most of the people of Scott county. The refunding of the debt, a portion of which was then in judgments, had been under serious consideration by the commissioners and the people of the county for months prior to the time when the bonds were issued. Public meetings of the electors and taxpayers were called at which this question was openly considered. Propositions from the creditors were received and discussed at these meetings, and the action there taken was reported to and published in the local newspapers. Finally, a proposition was made which was favorably received, and at a largely attended public meeting a resolution was adopted with practical unanimity instructing the county commissioners, who were present, to accept the proposition, and proceed to compromise and refund the debt upon the basis which was subsequently carried out. There was no concealment of the fact that the bonds had been issued at Topeka, and, as we have seen, a full record of the compromise and refunding was made immediately after they returned. Everything was open and fair, and the only irregularity is that the action was taken away from the county seat. Upon its face the record which they made and kept in their journal indicated absolute regularity and validity. The bonds which they executed were

in the form of ordinary commercial securities, contained the usual recitals, and appeared to be regularly issued. The state purchased them without knowledge of any irregularity, and is in the position of an innocent purchaser, whatever that may be worth. The judgments funded had been satisfied, and the old indebtedness surrendered and canceled. More than this, the board of county commissioners has, since the irregular issue of the bonds given them, its official sanction. For a series of years the commissioners met as a board, and levied taxes for the payment of the interest accruing upon the refunding bonds. The taxes were assessed, levied, and collected in the usual way, and the amount thus obtained was paid to the state in discharge of this indebtedness. This was a complete recognition of the validity of the bonds, and an official ratification which cured the irregularity. There was ample authority in the board in the first instance to issue the bonds, and it is a general rule, applicable to municipalities as well as individuals, that where there is power originally to do a particular thing they have power to ratify and make valid an attempted effort to do such thing, however defectively it may have been done in the first instance. *State v. Commissioners of Pawnee Co.*, 12 Kan. 439; *Sullivan v. School Dist.*, 39 Kan. 347, 18 Pac. 287; *Columbus Waterworks Co. v. City of Columbus*, 46 Kan. 677, 26 Pac. 1046; and cases cited. See, also, *Supervisors v. Schenck*, 5 Wall. 772; *Freeport v. Marks*, 59 Pa. St. 253; *Burr v. Chariton Co.*, 2 McCrary, 603, 12 Fed. 848; 15 Am. & Eng. Enc. Law, 1254. The board could not have chosen a more effective way of confirming and ratifying its irregular action, nor can a case be conceived where the doctrine of ratification is more justly applicable than in this. The board made and maintained a record of its proceedings which invited confidence, and would leave no doubt in the mind of a purchaser of the validity of the bonds. For a number of years after the issue was made, the board acted as if its authority was regularly exercised, and the bonds valid. Instead of rescinding or attempting to rescind its action it has repeatedly acknowledged the validity of the debt, and has availed itself of the benefits derived from the issuance and sale of the refunding bonds. The county has been relieved from the burdens of the old indebtedness, which was confessedly legal, and, notwithstanding this, it seeks to have the new bonds declared invalid, and thus escape liability entirely. Having recognized the validity of the bonds, retained and availed itself of the benefits of the compromise and refunding of the old indebtedness, levied and collected taxes, and paid the interest upon the refunding bonds for a number of years, the county is not in a position to raise the question of irregularity in the issue, nor to contest the validity of the bonds as against the state, which is an innocent purchaser and bona fide holder of the same. *Commissioners v. Hinchman*, 31 Kan. 737, 3 Pac. 504; *Brown v. City of Atchison*,

39 Kan. 37, 17 Pac. 465; *Brown v. Milliken*, 42 Kan. 769, 23 Pac. 167; *Johnson v. Stark Co.*, 24 Ill. 90; *Keithsburg v. Frick*, 34 Ill. 421.

There is no force in the point that judgments cannot be refunded, as the statute expressly authorizes counties to "compromise and refund its matured and maturing indebtedness of every kind and description whatsoever." Laws 1879, c. 50. *Riley v. Garfield Tp.*, supra. None of the objections urged against the validity of the bonds can be sustained, and therefore the judgment of the district court will be reversed, and the cause remanded for further proceedings.

ALLEN, J., concurring. DOSTER, C. J., not sitting.

(58 Kan. 464)

DAVIS v. CLARK et al.

(Supreme Court of Kansas. July 10, 1897.)

LIMITATIONS—ACTION ON ADMINISTRATOR'S BOND
—ABSENCE OF PRINCIPAL.

1. The liability of an administrator for failure to pay over money of the estate to his successor when ordered to do so by the probate court, is one created by statute, and an action thereon by the administrator de bonis non against the sureties upon the bond of the former administrator can only be brought within three years after the cause of action has accrued.

2. The absence from the state of the principal does not suspend the running of the statute of limitations in favor of the sureties; they are severally liable, and are severally entitled to the protection of the statute.

Allen, J., dissenting.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by Thomas H. Davis against W. M. Clark and others. Judgment for defendants, and plaintiff brings error. Affirmed.

This was an action against Lalla C. Collins, as administratrix of the estate of A. F. Harsh, deceased, and also against W. M. Clark, E. W. Ober, and J. B. Shellabarger, who were sureties upon the administration bond which had been given by Lalla C. Collins. Lalla C. Collins was removed as administratrix on March 14, 1890, when Thomas H. Davis was appointed in her stead. He brought this action, alleging unfaithful administration, and that the sum of \$7,000 of the assets of the estate came into her hands as administratrix, of which she made no account to the probate court, and had failed to pay the same over to her successor. On a trial by the court the issues were found in favor of the plaintiff, and the following findings of fact and conclusions of law were made:

Findings of Fact. "(1) On the 24th day of December, 1888, A. F. Harsh, then and therefore a resident of Saline county, Kansas, died, leaving surviving him as his only heir at law, Lalla C. Collins, one of the above-named defendants, and leaving an estate consisting of real and personal property. (2) Said A. F. Harsh died intestate, and no letters of administration were taken out on his estate

until the 19th day of June, 1889, when the widow, Lalla C. Harsh, was appointed by the probate court of Saline county, Kansas, administratrix of the estate of said deceased, and duly qualified by taking the required oath of office, and by executing a bond, with said defendants W. M. Clark, E. W. Ober, and J. B. Shellabarger as sureties, which bond was duly approved by the probate court on the 21st day of June, 1889. A copy of said bond is attached to plaintiff's petition. Said Lalla C. Harsh acted as administratrix of said estate until the 14th day of March, 1890, when she was discharged, and plaintiff, Thos. H. Davis, was appointed, and duly qualified as administrator in her stead, and thereafter continued to act as such. (3) On the — day of January, 1889, said Lalla C. Harsh (now Lalla C. Collins) received from one W. P. Book the sum of \$7,000 in money, of the value of \$7,000, being the proceeds of a loan on real estate, negotiated by the said A. F. Harsh, before his death, and assets of said estate. No account of said money or assets was made by said administratrix in the inventory which was filed by her in the probate court of said county on June 21, 1889, nor was any reference whatever made to the fact that such assets had been received by her; and in the final report made by said administratrix on the 12th day of March, 1890, no account was made of said money and assets, nor any reference made whatever to the receipt of the same. The final report of said administratrix was filed in said probate court on the 12th day of March, 1890, in pursuance of a citation issued upon her by said court to show cause why she should not be removed as administratrix because of her having become a nonresident of the state of Kansas. No notice was given or published to persons interested in said estate that such report would be made by the administratrix, and only an ex parte hearing was had thereon on the 14th day of March, 1890, when said report was approved, and said administratrix discharged, and plaintiff, Davis, appointed in her stead. In the order discharging said Lalla C. Collins and appointing Thos. H. Davis the court ordered and directed said administratrix to turn over and deliver to said Thos. H. Davis all assets of said estate that had come into her hands. Said administratrix did not account to said Thos. H. Davis for said sum of \$7,000, or any part thereof, nor has said Davis at any time received anything from any source on behalf of said estate for and on account of said \$7,000. (4) In the month of January, 1890, the widow, Lalla C. Harsh, was married to one Dr. Collins, of Pueblo, Colorado, and at that time she removed to Colorado, and has been a resident of that state, and absent from the state of Kansas, continuously from the — day of January, 1890, to this time, with the exception of one or two days, when she was on a visit in Kansas. (5) The estate of A. F. Harsh is insolvent, and there is not sufficient property and assets to pay the claims proved

and allowed against said estate. (6) By reason of the failure of said Lalla C. Collins to account for and turn over said money and assets, there has been a loss sustained by said estate to the amount of \$7,000, with interest from March 14, 1890, at the rate of 6 per cent. per annum. (7) No evidence was introduced to show what use or disposition was made of the \$7,000 by Mrs. Harsh. (8) This action was commenced by said Thos. H. Davis, as administrator of said estate, against said Lalla C. Collins and the sureties upon her bond, on the 17th day of July, 1893, to recover the damages sustained by said estate by reason of the failure of said Lalla C. Collins, as administratrix, to properly account for and turn over the said assets of said estate which had come into her possession."

Conclusions of Law. "(1) Said Lalla C. Collins, as administratrix of the estate of A. F. Harsh, deceased, was guilty of the breaches of the conditions of her bond as administratrix in failing to inventory the said money and assets in her hands, and in failing to account for and turn over the same to her successor, the plaintiff in this case. (2) By reason of the breaches of the conditions of said bond, a cause of action accrued to the plaintiff on said bond on the 14th day of March, 1890, for the recovery of the damages sustained by said estate. (3) The plaintiff is entitled to judgment against said Lalla C. Collins, the principal in said bond, for the sum of eight thousand nine hundred dollars. (4) This action, not having been commenced within three years after the cause of action accrued to the plaintiff, is barred as to the defendants W. M. Clark, E. W. Ober, and J. B. Shellabarger, and they are entitled to judgment for costs."

Of these rulings plaintiff in error complains.

Garver & Larimer, Bond & Osborn, and J. G. Mohler, for plaintiff in error. Burch & Burch, W. H. Bishop, and Hutchinson & Reaser, for defendants in error.

JOHNSTON, J. (after stating the facts). The action was not barred against Lalla C. Collins, the principal on the bond, and the main question for our determination is whether it was barred against the sureties. It was not brought until more than three years after she was ordered by the probate court to turn over the assets of the estate to her successor, and the court held that the three-years statute of limitations was applicable. It is contended by the plaintiff in error that the basis of the action is a contract in writing, and that, therefore, it may be brought at any time within five years after the right to sue accrued. The cause of action, however, does not arise out of the bond, but rather from the default of the administratrix, or her failure to account for and pay over the money of the estate when ordered by the court. The bond, as has been held, is only collateral security for the enforcement of causes of action that may arise, and, while there is a statute bar-

ring an action upon the bond which accrues more than five years before the action is begun, it does not suspend the operation of other statutes of limitation. And when a cause of action is barred by any statute of limitations, the right to maintain an action therefor upon a bond necessarily ceases to exist. *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518. We think the action was upon a liability created by statute, which, under the Code, can only be brought within three years after the cause of action shall have accrued, and not afterwards. The office of administrator is created and the trust defined by statute. Every step to be taken, and every duty to be performed, is prescribed. He takes only such powers as the statute confers, and all of his duties, functions, and liabilities are fixed by statute. The substance, if not the form, of the bond of the administrator is prescribed by statute, but it does not give the cause of action. The liability of the administrator exists independently of the bond, and is just such a liability as the statute defines. The foundation of the plaintiff's right of recovery was the liability of the administrator to pay over the money in accordance with the order of the probate court, and the action thereon accrued under and was limited by the statute. Without the statute, the plaintiff, who is an administrator *de bonis non*, could not maintain an action on his predecessor's bond. Under the common law he simply took up the estate where his predecessor left it, and had to do only with the goods of the estate which remained unadministered. The former administrator was responsible for defaults and delinquencies to creditors and next of kin, but never liable to his successor for property of the deceased which had been converted into money. *Beal v. New Mexico*, 16 Wall. 535; *Carrick v. Carrick*, 23 N. J. Eq. 364; *Court of Probate v. Smith* (R. I.) 17 Atl. 56. Our statute, however, gives the substituted administrator the right to maintain an action against his predecessor as well as the sureties upon his bond. Gen. St. 1889, par. 2810. It therefore appears that the right of the plaintiff to bring an action against the former administratrix and her bondsmen is derived solely from the statute, and for these reasons we think it may fairly be said that the liability of the principal and sureties is created by statute, and an action thereon must be brought within three years after it accrues. Authority is found for this view in *Commissioners v. Van Slyck*, 52 Kan. 622, 35 Pac. 299. That was an action in favor of the county to recover from the county clerk fees for his services, which, under the statute, were to be accounted for, and deducted from each quarterly allowance of his salary. The action was upon the official bond of the county clerk, and it was held that it was based upon a liability created by statute, and must, therefore, be brought within three years after it accrued. The absence from the state of the principal did not suspend the running

of the statute of limitations in favor of the sureties. The liability upon which the action was brought was several, and the general rule is that, where there is a several liability, each is entitled to the protection of the statute of limitations, and can be deprived of it only by some personal act of his own. *Steele v. Souder*, 20 Kan. 39. When the administratrix made default, the sureties at once became liable, and an action could have been brought against them, although she had absconded, and was beyond the jurisdiction of the courts. The statute of limitations would be of little benefit to the sureties if the concealment or absence of the principal would extend their liability indefinitely. The statute is one of repose, designed for peace and quiet; and, as the sureties are severally liable, we think they are severally entitled to the protection of the statute. The judgment of the district court will be affirmed.

DOSTER, C. J., concurs.

ALLEN, J. (dissenting). This action is on the official bond of an administratrix, and clearly falls within the fifth clause of section 18, Code Civ. Proc. As to the sureties, there is and can be no liability created by statute. Their liability arises solely from having signed the administratrix's bond, and her default. This liability is fixed by the terms of the obligation they signed and the law as it stood at the time of its execution. The legislature is powerless to impose by statute a liability on them which they did not incur by the execution of the bond. As to them, there was not, and cannot be, a liability created by statute. Whether the liability of the administratrix be one created by statute, or upon a contract express or implied, is unimportant, for the case falls within section 21, Code Civ. Proc., she having been absent from the state a sufficient length of time to take away the bar of the statute. Her liability is conceded, and the court rendered a judgment against her. Sureties on the bond of an administrator may plead, as a defense to an action against them, either that the cause of action on the bond accrued more than five years before the commencement of the suit, in which event they would be discharged from liability, whether their principal was so or not, or that the cause of action against the principal was barred by some shorter limitation, and, being barred against the principal, it would, of course, be barred against the surety. Under the bond, they could never be liable when the principal was discharged. But neither of these pleas could avail the sureties in this action, for it was brought in less than five years after it accrued, and the principal has not been discharged from liability by any other statute of limitations. There is, therefore, no defense of which they may avail themselves.

(58 Kan. 507)

STATE v. SCHOLL.

(Supreme Court of Kansas. July 10, 1897.)

CONSTITUTIONAL LAW—TITLE OF ACT—REPEAL OF STATUTE.

1. Chapter 137 of the Laws of 1897, entitled "An act to repeal or strike out certain redundant, obsolete and inoperative provisions of the General Statutes of 1889," violates section 16 of article 2 of the constitution of this state, and is void. It contains a multiplicity of subjects, which are not expressed in the title of the act, and, by repealing many sections, attempts to change the law on numerous diverse and disconnected subjects, not indicated by the title.

2. Section 16 of article 2 of the constitution applies as well to bills which change the law by repealing acts already in force as to the enactment of new laws; and, where it is sought to change the law by repealing statutes then in force, the bill for that purpose must contain only one subject, which must be expressed in its title.

(Syllabus by the Court.)

Appeal from district court, Montgomery county; A. H. Skidmore, Judge.

Will Scholl was convicted of forgery, and appeals. Affirmed.

J. D. McCue, Jos. Chandler, T. H. Sanford, and O. P. Ergenbright, for appellant. L. C. Boyle, Atty. Gen., John Callahan, A. B. Clark, W. E. & J. B. Ziegler, and S. H. Piper, for the State.

ALLEN, J. The defendant was convicted in the district court of Montgomery county of the crime of forgery, and sentenced to confinement in the penitentiary. From this conviction he appeals, and raises in this court the single question whether chapter 137 of the Laws of 1897, which in terms repeals the law creating the Eleventh judicial district, is valid. The act, if valid, repeals paragraphs 1998 and 1999 of the General Statutes of 1889,—the first, creating the Eleventh judicial district of the counties of Cherokee, Labette, and Montgomery; the second, prescribing the time for holding terms of court in the several counties. The same section of the act under consideration in terms repeals the law establishing the Sixth, Twelfth, Seventeenth, Twentieth, Twenty-First, Thirty-Fourth, and Thirty-Fifth judicial districts. Acts passed subsequent to 1889, however, fixed the time for holding terms of court in the Sixth, Twelfth, Seventeenth, and Twenty-First districts, and these acts are not repealed. The laws fixing the time for holding court in the First and some other districts which are not abolished are also repealed. In this case the existence of the Eleventh judicial district only is directly challenged, but in determining the question it becomes necessary to consider the validity of the whole act. The title to the act is as follows: "An act to repeal or strike out certain redundant, obsolete and inoperative provisions of the General Statutes of 1889." It is claimed on behalf of the state that the act violates section 16 of article 2 of the constitution, in two essential particulars: First, that it contains

more than one subject; second, that the title does not express the subject of the act.

On examination of the various portions of the General Statutes which are in terms repealed, we find that it includes laws relating to the subjects of cities, railroads, counties, courts, civil procedure, raid claims, school lands, and others, parts of which, at least, were in full force and operation at the time of the passage of this act. It would be difficult to select subjects more distinct and diverse than those named, yet under one title it is sought to abolish operative provisions of law relating to each of them, and thereby to change the law as effectually as it could be changed by the enactment of new provisions, or by express amendment of the statutes covering each of those topics. The title of the act is more restrictive than if it read "An act to repeal certain provisions of the General Statutes of 1889," for it limits it to such provisions as are redundant, obsolete, and inoperative. If the title had omitted these restrictive words, could it be claimed that it would be competent for the legislature to include provisions absolutely repealing whatever portions of the General Statutes it saw fit? If the legislature may by a repealing act change the law on a great variety of subjects, may it not pass an equally great variety of laws in one bill by simply adopting an equally comprehensive title which will fail to call the attention of any one to any particular subject? Would any one claim that a title, "An act to establish certain laws," would be sufficient to cover legislation on all the subjects touched by this repealing statute? If so, the constitutional requirement that a bill shall contain only one subject is utterly without force. The title not only fails to indicate the subjects on which it was attempted to legislate, but it is positively and grossly misleading. It purports only to repeal matter appearing in the printed volume which was without force. Yet many of the sections attempted to be repealed were as valid, as operative, as free from being redundant or obsolete, as any provisions in the books. Members of the legislature undoubtedly voted for this bill with the understanding that the law would not be thereby changed in any essential particular, but that the statute books would merely be disincumbered of rubbish. Certainly it would be a serious charge to bring against any member who voted for this bill that he purposely voted to abolish the district courts in the districts named. An examination of the journals shows that this bill was introduced in the senate and read the first and second times on the 8th of March, and that it was read a third time and passed by a unanimous vote on the 9th of March; that it was sent to the house, and there read the first time on March 10th; that it was read the third time and passed on the same day by a vote of 81 to 1. So far as the journals show, it was never referred to or considered by a committee of either house, and we fail to find that it was

ever read the second time in the house. It was to prevent the evil effects of just such ill-advised and disastrous legislation that the section of the constitution requiring a bill to contain one subject only, and that subject to be expressed in the title, was wisely inserted in the fundamental law by the framers of the constitution. The necessity for the courts to declare void legislation attempted in violation of its provisions has been demonstrated time and again, but never more clearly than in this instance. The history of the bill, in its passage, and the unanimity with which all members concurred in it, clearly shows that they were deceived and misled by the title. Their purpose was commendable, namely, the elimination of useless matter from the statute books. There is nothing in the body of the act challenging the attention of any one to any real modification of the law. Reference is made in all instances to nothing more than titles of bills, numbers of paragraphs, chapters, and sections. Yet, if the act should be held valid, it would materially change the law, not only by abolishing various judicial districts, and the times for holding courts in others, but also, by repealing parts of the Code of Civil Procedure, the law relating to cities, counties, railroads, and other subjects. This cannot be done in one bill, or under a grossly-misleading title. That the provisions of section 16 of article 2 of the constitution are mandatory, and that the courts will declare void an act passed in violation of them, is firmly fixed in the jurisprudence of this state. *Commissioners v. Bailey*, 13 Kan. 600; *Swayze v. Britton*, 17 Kan. 625; *Evans v. Adams*, 21 Kan. 119; *State v. Bankers' & Merchants' Mut. Ben. Ass'n*, 23 Kan. 499; *Shepherd v. Helmers*, Id. 504; *State v. Barrett*, 27 Kan. 213; *State v. Lewin*, 53 Kan. 679, 37 Pac. 168; *State v. Deets*, 54 Kan. 504, 38 Pac. 798; *State v. Guiney*, 55 Kan. 532, 40 Pac. 926. So far as the title is expressive of anything, it indicates the least important provisions. To repeal a redundant, obsolete, and inoperative provision is not to make a substantial change in the law. The substance of the act is therefore entirely omitted from the title, which is altogether deceptive and misleading. For these reasons the act must be held wholly without force or effect. This being the only question raised by appellant, the judgment of conviction is affirmed.

JOHNSTON, J., concurring.

DOSTER, C. J. I concur in the opinion of Mr. Justice ALLEN in this case, but believe that additional reasons for the decision, more fundamental in character than those adduced by him, may be given. The effect of the act in question, were it not open to the objections already stated, would be to oust the courts of jurisdiction over a large portion of the state, and to suspend therein the operation of the laws, so far as the courts have to do with their enforcement. It would be impossible, up-

on any theory of legislative power, to sustain such an act. To undertake to do so would be to repudiate the entire theory of our political system, which apportions the powers of government among three co-ordinate branches, and which gives to each, acting within its sphere, jurisdiction throughout the entire territory of the state. The legislature may, within constitutional limits, remodel the judicial system of the state. Within such limits, it may enlarge or restrict the jurisdiction of the courts, so far as subject-matter is concerned. But it cannot deprive the people of the state, or the people of any portion of the state, of courts for the adjudication of questions of disputed right. Were there no constitutional provisions restrictive of the power of the legislature in this respect, its lack of power would nevertheless be derivable by necessary implication from the very plan and theory of constitutional government under which we live. To my mind, however, the act in question violates, not merely the spirit, but the letter, of both state and federal constitutions. Section 18 of the bill of rights declares that "all persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." This declaration of our state constitution is not a mere political generalization. It is a guaranty of legal right. But it can have no operation except through the instrumentality of the courts, and, if courts are to be denied to any portion of the people, the protection of the guaranty would be withdrawn as to them. The fourteenth amendment to the federal constitution in explicit terms negatives the right of a state to discriminate between its citizens as the act in question attempts to do. It declares: "• • • Nor shall any state deprive any person of life, liberty or property, without due course of law, nor deny to any person within its jurisdiction the equal protection of the laws." I am not a believer in the exaggerated extent to which the supremacy of the federal constitution and laws in the affairs of the states has been carried, and think that many refinements of construction have been placed upon the fourteenth amendment to adapt it to purposes not within its original intent, but the language quoted would seem to interdict the enactment of statutes which deny to some of the citizens of a state that resort to the courts which is allowed to others. Such a statute is a denial by a state to persons within its jurisdiction of the equal protection of its laws. We have no warrant for saying, as was suggested upon argument, that the act in question was designed to be temporary, and that we should presume that the legislature would presently, by some new plan of judicial apportionment, restore to the people within the territory in question their ancient judicial tribunals. There is nothing in the act, or in any other act, or in the circumstances of its passage, to indicate that the legislature presently intended or would repair the wrong that had been done.

(6 Kan. A. 76)

LOCKE v. REDMOND.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

CONVEYANCE OF HOMESTEAD—CONSTITUTIONAL LAW—SUBROGATION.

1. A mortgage given upon the homestead without the joint consent of husband and wife is void. The alienation of a homestead after it has once been established is such a personal privilege as cannot be delegated by either the husband or wife to the other. There has been a guard thrown not only around the wife, but also around the husband. The doctrine of unity between husband and wife has been solemnly declared in the constitution, and the homestead cannot be alienated without their joint consent.

2. The provisions of chapter 60, Laws 1889, apply to the estate other than the homestead of insane persons. If such provisions were intended to apply to the homestead, they are in conflict with the constitution, and to that extent void.

3. The right of subrogation denied where it is not asked in the petition, and where the record fails to show that the trial court was requested to make such order.

(Syllabus by the Court.)

Error from district court, Nemaha county; J. F. Thompson, Judge.

Action by Mary M. Locke against Margaret Redmond and James Redmond. Judgment for Margaret Redmond, and plaintiff brings error. Affirmed.

S. K. Woodworth, for plaintiff in error. R. N. Emery and F. W. Jacobs, for defendant in error.

McELROY, J. Mary M. Locke, plaintiff in error, began an action against Margaret Redmond and James Redmond on a note for the recovery of \$800, and for the foreclosure of a mortgage on the homestead of the defendants, who were husband and wife at the time of the execution of the note and mortgage. The note and mortgage were executed by James Redmond, and James Redmond as guardian for his insane wife, under an order of the probate court. The defendant Margaret Redmond answered, and the plaintiff replied. James Redmond was in default. An examination of the record and pleadings shows that on the 15th day of July, 1890, Margaret Redmond, the wife of James Redmond, was adjudged insane by the probate court of Nemaha county, and the husband was appointed guardian of her person and estate; that he acted as guardian until the 15th day of September, 1891, when she was adjudged sane by the court, and her guardian discharged; that about August, 1890, her guardian procured an order from the probate court authorizing him to mortgage the homestead of the Redmonds to plaintiff in error for the sum of \$800, with interest at 8 per cent., due and payable three years after date; that James Redmond, as an individual and as guardian, made, executed, and delivered to Mary M. Locke a certain negotiable promissory note in writing of August 6, 1890, for the sum of \$800, and a mortgage upon the homestead of the Redmonds to secure the payment of the note.

There was a prior mortgage in the sum of \$400 paid off with a portion of this money. Afterwards, on the 15th day of September, 1891, Margaret Redmond, with full knowledge of the facts, paid to plaintiff in error an installment of interest on the note. On the 15th day of March, 1893, Margaret Redmond recovered a judgment and decree for a divorce against James Redmond. This decree became final. In the divorce proceedings the court awarded Margaret Redmond the following described real estate, to wit, the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 20, in township 5, in range 12, Nemaha county, in fee simple, subject to any legal incumbrance thereon; this being the homestead and premises mortgaged. This case came on for hearing on motion for judgment on the pleadings. The court rendered judgment that the note and mortgage were void, and of no effect, and that Mary M. Locke was forever barred and foreclosed from having or setting up any title or lien under and by virtue of said mortgage in and to the lands above described. The court awarded judgment against James Redmond on the note, and he is not a party to this proceeding. The plaintiff in error excepted, and presents the case to this court for review, and alleges that the trial court erred—First, in sustaining said motion for judgment on the pleadings; second, in rendering judgment against said plaintiff in error and in favor of said defendant in error, canceling said mortgage.

The plaintiff in error presents and discusses: "The joining of the guardian of an insane spouse, under order of the probate court regularly obtained therefor, under chapter 60, Gen. St. 1889, with the sane spouse, in a mortgage on the homestead (title to which is in the sane spouse), is such a joint consent as contemplated by our constitutional provision (Const. art. 15, § 9) relating to incumbering the homestead." Any attempt to alienate the homestead without the joint consent of husband and wife is void. This proposition needs the citation of no authorities. It has been recognized in almost every volume of our supreme court reports. The alienation of a homestead after it has once been established is such a personal privilege as cannot be delegated by either the husband or the wife to the other. There has been a guard thrown not only around her, but also around the husband, and the doctrine of unity between husband and wife has been solemnly declared in the constitution, and the homestead cannot be alienated without their joint consent. In regard to the right of husband and wife in the homestead, our constitution provides (article 15, § 9): "A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be

alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." Kingman, C. J., in *Helm v. Helm*, 11 Kan. 21, says: "Our homestead provision is peculiar. The homestead cannot be alienated without the joint consent of the husband and wife. The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against any act of her husband or of creditors without her consent. If her husband abandons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home. It may be difficult to define the estate, but it is one nevertheless. It is not like dower. Dower is only a possible estate, an inchoate interest, that, depending on uncertain events, the wife may never enjoy. That the wife's right under our homestead laws is an existing interest, probably none will deny." Simpson, C., in *Howell v. McCrie*, 36 Kan. 644, 14 Pac. 261, says: "To divest the homestead estate, the mode of conveyance prescribed by the law governing the alienation of such estates must be strictly pursued, is the rule generally adopted in all the states in which such laws have been enacted, held more strictly in some than in others, and yet in all there must be a literal compliance with the provisions of the statutes in this behalf. From all the adjudications upon this subject, the three following rules are deducted, and may fairly be considered as settled: (1) The object of the homestead law is to protect the family of the owner in the possession and enjoyment of the property. (2) That construction must be given such laws which will best advance and secure their object. (3) To divest the homestead estate, there must be a literal compliance with the mode of alienation prescribed by the statute. The usual and legal signification of the word 'consent,' implies assent to some proposition submitted. In cases of contract it means the 'concurrence of wills.' Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. In the very nature of things, consent to the alienation must precede the act of conveyance. The husband must have made a proposition to the wife, or the wife to the husband, or a purchaser to both, to alienate the homestead, and the minds of the husband and the wife must have concurred, and they must have jointly consented to the execution of the conveyance, or the creation of the lien, both assenting, and both signing the instrument before delivery." Horton, C. J., in *Coughlin v. Coughlin*, 26 Kan. 117,

says: "These provisions of our constitution and statute have already been decided to be entitled to a liberal interpretation, so as to accomplish their object, and carry out their spirit. Thus, no incumbrance or lien or interest can ever attach to or affect the homestead, except the one specifically mentioned in the constitution. No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity. Nothing that he alone can do, or suffer to be done, can cast the slightest cloud upon the title of homestead. It remains absolutely free from all liens and incumbrances, except those mentioned in the constitution." Brewer, J., in *Chambers v. Cox*, 23 Kan. 279, says: "While the legislature may regulate the matter of inheritance, it cannot avoid or limit the constitutional provision for the protection of homesteads. The constitution forbids the alienation without the joint consent of husband and wife. It does not add, 'providing they are living together, and occupying the homestead,' nor 'providing that both are residents of the state'; but the prohibition against separate alienation is absolute when the relation of husband and wife exists. Whether any exception to this absolute prohibition were wise, it is not for us to inquire. The legislature has not attempted to make any, even if it had the power, but has repeated in the statute the very terms of the constitutional prohibition. Neither is the presence of both husband and wife essential to the existence of a homestead. Though one may have abandoned the other, yet either may have the children to care for, and be the head of a family, and occupy a homestead." Some of the provisions of chapter 60, Laws 1889, seem to be in conflict with section 9, art. 15, of the constitution. We do not believe that it was the intention of the legislature that these provisions should take the place of the "joint consent" provided for by the constitution. We think that the provisions of this chapter apply to the estate other than the homestead. Any other construction would be in conflict with the constitution. The constitution forbids the alienation of the homestead without the joint consent of husband and wife. Consent is defined to be the agreement of mind; concurrence of wills; approval; an agreement of the mind to what is proposed or stated by another; supposes physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. The theory of the law in regard to acts done and contracts made by parties, affecting their rights, is that in all cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation. The fact of insanity does not destroy the relation of husband and wife, however much it may impair that relation. The provisions of this chapter do not authorize the husband, by himself and as guardian, to mortgage the

homestead without the consent of the wife. Such an attempt is in direct conflict with the provisions of the constitution. When the reason of the wife has been overthrown; when she has become so unfortunate as to be unable to protect herself; when by her efforts to keep the homestead and family together she has been overcome, and her mind gives way,—it is not an unwise provision of our constitution that she should be protected to the extent of the homestead. That this homestead should be placed beyond the power of a guardian, and beyond the power of her husband, except with her consent, is wise and just. The construction contended for by plaintiff in error would preserve the homestead to the wife and children during health and prosperity only. This cannot be the spirit of our constitution. We hold that it requires the joint consent of husband and wife to alienate the homestead, and such consent cannot be supplied by a guardian. If, for the reason of insanity, or any other reason, the wife's consent cannot be procured, there can be no conveyance. This consent is prerequisite.

The plaintiff in error argues the right of subrogation. This right is not asked for in the petition, nor does the record show that the trial court was requested to make such an order. In this case the plaintiff in error, with full knowledge of the insanity of the wife and the homestead character of the premises, accepted this mortgage. The note and mortgage are void as to the defendant in error. The judgment is affirmed. All the judges concurring.

(6 Kan. A. 83)

FREEMAN v. TRICKETT et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

ACTION SOUNDING IN TORT.

A petition that alleges that the plaintiff was induced by the fraudulent and untruthful misrepresentations of the defendant to buy from him and pay for the capital stock of a corporation, the same being utterly valueless, and that the defendants knew at the time they made the representations of the untruthfulness thereof, and that the plaintiff, relying upon such statements, parted with his money, and bought stock, states but one cause of action sounding in tort; and it was error for the court, upon demurrer being presented by the defendants to the evidence of the plaintiff in support thereof, to require the plaintiff to state or say by what common-law name he denominated his cause of action.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; Thomas P. Anderson, Judge. Action by W. H. H. Freeman against C. W. Trickett and others. Judgment for defendants. Plaintiff brings error. Reversed.

W. H. H. Freeman, in pro. per. Hutchings & Kepplinger and C. W. Trickett, for defendants in error.

MAHAN, P. J. This was an action begun by the plaintiff against the defendants to recover from them the purchase price of certain shares of stock in the Wyandotte Loan & Trust Company, which the plaintiff alleges he was induced to purchase through the false and fraudulent representations of the defendant Trickett, whom the plaintiff alleges was acting for the other defendants. The petition alleges, and the evidence sustains the allegation, that the defendant Trickett did not disclose for whom he was acting in respect to the sale of the stock, but declined so to do. Whether the plaintiff might have, under the evidence, had the allegations been sufficient, recovered damages, in addition to the money paid, is immaterial. He only sought to recover back the money and interest that he had lost by reason of the tortious acts of the defendant Trickett. The case was tried to a jury, and, the plaintiff having rested upon the introduction of his evidence, the defendants demurred thereto, for the reason that the same was not sufficient to sustain a cause of action against them.

It was disclosed that the defendant Jennings had no connection with the transaction, and no judgment was asked against him. The court sustained the demurrer to the evidence, but, before rendering its decision thereon, it required the plaintiff to say what was his cause of action, or to give it a name, such as it would have had at common law. The plaintiff objected to so naming his cause of action, and the court insisted thereon, and, the defendants likewise insisting, the plaintiff said, through his counsel, that they called it "an action for money had and received." The facts proven might have, under the common law, sustained a declaration for money had and received, but our Code has abolished all forms of action, and has declared there shall be but one form of action, which shall be called "a civil action," and that the plaintiff shall state the facts constituting his cause of action concisely, without repetition. It then becomes the duty of the court to say whether or not it states a cause of action, and to what relief the plaintiff is entitled; but it need not say whether it would have been called at common law this, that, or the other name. The court simply has to determine whether the rights of the plaintiff have been violated by the acts of the defendant, and, if so, what is the plaintiff's measure of recovery. The petition stated a cause of action for damages upon the ground of the fraud of the defendants. There was sufficient evidence introduced by the plaintiff to go to the jury for them to determine whether or not the allegations of the plaintiff's petition were true, and, if true, the amount of money he had been induced to part with by reason of such fraud of the defendants. It was therefore error for the court to sustain a demurrer, and it was error for the court to require

the plaintiff to state or say what, in his judgment, his cause of action would have been called at common law.

The court and the defendants proceeded with the trial upon the theory that two distinct causes of action were set forth in the petition. This is not correct. Had the plaintiff alleged the facts in one aspect for the purpose of procuring damages as for a tort in one count, and in another count in the same petition have presented the cause upon the aspect of a rescission, and asked judgment for both kinds of relief, there would have been something for the court to have acted upon in requiring an election. There was, however, but one cause of action stated, and but one cause of action attempted to be proven, and the evidence was sufficient, *prima facie*, to justify a verdict for the plaintiff against the defendants, and the case should have been submitted to a jury.

The judgment is reversed, and the case remanded, with directions to the district court to grant a new trial. All the judges concurring.

(6 Kan. A. 86)

FREEMAN v. WYANDOTTE LOAN & TRUST CO.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

JUSTICES OF THE PEACE—DISMISSAL—VACATION OF JUDGMENT—APPEARANCE—JURISDICTION.

1. Where an action pending in justice's court is continued to 9 o'clock a. m. of a certain day, and the justice makes an entry of such continuance in his docket, and afterwards, at about 10 o'clock, at the request of the defendant, in the absence of the plaintiff, dismisses the action for want of prosecution, and renders judgment for costs, such judgment, on motion of the plaintiff, may be vacated because of its rendition before 10 o'clock, and a new trial granted, on reasonable notice of such motion being given to plaintiff.

2. In an action before a justice of the peace, a judgment of dismissal was, in the opinion of the justice, improvidently entered. The defendant appeared, contested the motion to set aside the default, took a part in the trial, appealed to the district court, and afterwards testified at the trial, and is by reason of such acts estopped from claiming that the district court had no jurisdiction of his person.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by the Wyandotte Loan & Trust Company against W. H. H. Freeman. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. H. Freeman, in pro. per. Saml. Maher, for defendant in error.

McELROY, J. This was an action brought by the Wyandotte Loan & Trust Company, as plaintiff, against W. H. H. Freeman, defendant. The action was commenced in the justice court. The case was continued until September 15, 1892, at 9 o'clock a. m. The record shows that the defendant appeared in

person; that the case was dismissed for want of prosecution. The plaintiff filed a motion to reinstate the case for the reason that the same was dismissed before the hour of 10 o'clock a. m. On September 20th, at 9 o'clock a. m., this motion was heard on affidavits, and the court found for the plaintiff, set aside the default, and set the case for trial. During the trial the defendant was sworn, and examined in his own behalf. Afterwards, on the 26th day of September, the court rendered judgment against the defendant. The defendant filed his appeal bond, and then appeared specially, and asked the dismissal of the case, because the court had no jurisdiction of the defendant or the subject-matter in the action. The motion to dismiss was submitted to the court, overruled, and the ruling excepted to. The defendant objected to the introduction of any testimony because the court had no jurisdiction of the person of the defendant. Objection overruled, and exceptions taken. The plaintiff, on the trial, offered evidence, and the defendant was a witness in his own behalf. The jury found a verdict in favor of the plaintiff and against the defendant. The defendant filed a motion for a new trial, which was overruled, and presents the case to this court for review. The record does not contain any of the evidence. The only question presented to this court is as to whether or not the district court had jurisdiction of the person of the defendant (plaintiff in error) and the subject-matter of the action. Freeman appeared in justice court, and took issue with the plaintiff upon the merits of the motion to reinstate the case. This issue was tried on affidavits, and the court found for the plaintiff. This proceeding of the justice has been held by the supreme court to be within his authority. *Barons v. Anderson*, 37 Kan. 399, 15 Pac. 226. In the case of *Haas v. Lees*, 18 Kan. 449, *Horton, C. J.*, delivering the opinion of the court, held that an appeal taken by the defendant waived all questions of jurisdiction as to his person. "The plaintiffs in error are in no condition to take any advantage of any defective service in the proceedings before the justice of the peace (if there was, which we do not decide), for by their appeal they are estopped from denying service of summons. Any defect existing in the service of process is thereby waived. The action of the plaintiffs in error in presenting and having a bond of appeal filed and approved is a submission in itself to the jurisdiction of the court, and they cannot be permitted on error to allege a want of jurisdiction." The plaintiff in error, by his appearance, and contesting the motion to set aside the default, by his appearance at the trial in justice's court, by presenting and having a bond of appeal filed and approved, by his appearing afterwards, and taking part in the trial, waived any question as to the jurisdiction of his person. It appears, however, from the record in the case, that the court had at all times jurisdiction of

the plaintiff in error and of the subject-matter. The judgment of the trial court will be affirmed. All the judges concurring.

(6 Kan.App. 89)

KANSAS ELEVATOR CO. v. HARRIS et al.
(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

WAREHOUSEMAN—BREACH OF CONTRACT—EVIDENCE—DAMAGES.

1. Where one of the items of damage sought to be recovered upon was that the plaintiff had, during the autumn of 1892, furnished the defendant, who was running an elevator for the storage of grain for hire, a certain amount of white No. 2 corn of the crop of 1891, and under the contract of storage was to have the same returned upon demand, or at least an equal amount of corn of the same kind and quality, but that the defendant, upon proper demand, only returned a part of the quantity, and that of an inferior quality, and from the crop of 1892, the admission of evidence as to the value of old corn and the difference in value of old corn and new was not error.

2. A bailee for hire, who receives a consignment of grain upon a promise, express or implied, to redeliver the same, or other grain of the same kind and quality, to the consignor upon demand, and fails to do so within a reasonable time after demand, is liable to the party injured for the value of the grain so withheld at the time it should have been delivered, although such bailee continuously avowed his intention to comply with said demand, but failed to do so.

3. Where a consignment is made to a bailee for hire, accompanied with specific directions as to how the property is to be disposed of, the bailee must either refuse to accept the consignment, or comply, in substance, with the instructions given.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; Thomas P. Anderson, Judge.

Action by W. H. Harris and others against the Kansas Elevator Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

Junius W. Jenkins, for plaintiff in error.
N. B. Carskadon, for defendants in error.

WELLS, J. This action was brought in the court below to recover from the defendant there, the plaintiff in error here, which is engaged in the business of operating a public elevator in said county, first, damages sustained by plaintiffs below from the defendant below on account of said defendant delivering to said plaintiffs corn of a different kind and inferior quality to that received by it; and, second, by failing to return to plaintiffs all the corn received from them. A trial was had to a jury, and a verdict found for the plaintiffs against the defendant for \$623. This verdict was approved by the trial court, and judgment rendered accordingly, and the case brought here for review.

There are five specifications of error, which we will consider in their order, combining the first two, and considering them together. Under these specifications, the plaintiff in error alleges that the court erred in admitting testimony as to the value of old corn,

and the difference in value of old corn and new. One of the claims for damages was that the plaintiffs had, during the fall of 1892, furnished defendant a certain amount of No. 2 white corn of the crop of 1891, and under the contract was to have the same corn returned, or at least an equal amount of corn of the same kind and quality; but that the defendant returned a part only, and that of an inferior quality, and from the crop of 1892. Now, it seems to us clear that, if old corn was of a greater value than new corn, the plaintiff was entitled to have at least the same kind returned that he had deposited, and the plaintiff had a right to prove the difference in value of the corn deposited and the corn returned; and, if there was no difference in value, that question would be immaterial.

The third allegation of error is in giving instruction No. 11, which is as follows: "With reference to the corn that has not been redelivered to the plaintiffs, if you believe from the evidence that this corn was to be taken and redelivered to the plaintiffs as they desired and ordered it, and that orders had been made—requisitions made—from the plaintiffs to the defendant to redeliver this corn to them by loading it in cars for shipment, and the defendant has failed to do that within a reasonable time after the request and order was made, and that it still refused to do that up to the commencement of this action, I say to you that would amount to a conversion of the corn, and the plaintiffs would be entitled to a verdict at your hands for the market value of the corn at the time and place that the corn should have been delivered to the plaintiffs by the defendant. But if you believe from the evidence that the defendant was not under any obligations to deliver this corn to the plaintiffs, except as cars were furnished at its elevator, and that it was the duty of the plaintiffs, under their contract, to furnish the cars, and that the plaintiffs, notwithstanding they made orders for this grain, did not furnish the cars, and that the cars in fact were not furnished at the elevator, and it was the contract that the plaintiffs were to furnish the cars, then I say to you that the plaintiffs cannot recover for this claim, and it would not amount to a conversion on the part of the defendant until cars were furnished after orders were made for the delivery of this corn."

The first objection urged to this instruction is that the defendant did not refuse to deliver the corn, but, on the other hand, he always promised to do so, and failed to keep his repeated promises. We do not think a person can avoid liability by promising to perform his legal duty, but failing to do it. He is in no better position than if he had at once notified the other party that he did not intend to comply with the demand. Probably it would have been more accurate if the court had used the word "fail" instead

of "refuse," but we cannot see that the defendant was injured by its not doing so. They say the instruction is bad because it makes no exceptions for delay caused by matters beyond the defendant's control. We think all these matters were proper subjects to be presented to the jury, to show what was a reasonable time in which to make the delivery. Finally, the plaintiff in error seems to argue that because the defendant did not refuse in words, but in acts only, to make the delivery, it could not be held for conversion. We think the instruction gave the law correctly on that subject.

The next complaint is of the giving of instruction No. 15, as follows: "I will say to you, also, if you find that the contract between these parties was that this corn was to be separately binmed, and kept separately, and the identical corn redelivered to the plaintiffs when called upon for it, then if the defendant commingled that corn with other corn, that would amount to a conversion; but if that was not the contract to keep it separate, then the commingling of that corn with other corn would not be a conversion. All that the defendant would be required to do would be to keep on hand sufficient corn of that grade to fill plaintiffs' order, and deliver it to them when it was called upon so to do." Counsel for plaintiff in error seems to make the mistake of supposing that the preliminary conversation had between the parties at the time they first made arrangements to do business with each other constituted all of the contract upon which evidence could be introduced, and says in his reply: "Counsel for defendants in error admits in his brief, at page 2, that the corn was put into the elevator 'under no special contract or agreement,' which eliminates one question from the case." We do not think this is correct, either as to the fact, or the contention of counsel for defendant in error. We think that if a consignment is made of property to a party engaged in business as a bailee, with specific directions as to how the property is to be disposed of, under ordinary circumstances, the bailee must either refuse to accept the consignment, or comply, in substance, with the instructions of the consignor. In this case there was competent evidence offered showing that the consignment was accompanied by instructions to bin certain of the corn together, and also that these instructions were received by the defendants prior to the unloading of the corn. This evidence, although contradicted, justified the instruction, as against the objection of the defendant. As to the admission of the defendant in error on page 2 of his brief, while the punctuation and division of the sentence is somewhat faulty, it is apparent, both by the language of the so-called admission and the argument in relation thereto, that what was meant was that at the first conversation there was nothing

said either as to the price or method of storing; but, as to the latter, instructions were given by letter, which it was the duty of the defendant to follow.

As to the fifth specification of error, the plaintiff in error argues but one additional point, and that is that the verdict is contrary to the undisputed evidence in the case. We do not think this is true. On the contrary, we think the weight of evidence supports the verdict. We see no material error in the case. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan.App. 919)

BURGE v. KELCHNER et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

APPEAL—MOTION TO DISMISS.

Where a motion to dismiss is filed, and an examination of the alleged defects in the record would involve an examination of the merits of the case, and the record contains something over 400 pages, held, that it would be more fair and reasonable that the case should be examined with the aid of such briefs and arguments as the parties desire to present on the final hearing of the case.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by W. J. Kelchner and R. J. Mackey against D. N. Burge. Judgment for plaintiffs, and defendant brings error. Motion to dismiss overruled.

E. G. Wilson, for plaintiff in error. Wm. R. Hazen, for defendants in error.

McELROY, J. This was an action by W. J. Kelchner and R. J. Mackey, as plaintiffs, against D. N. Burge, sheriff, as defendant, in the district court of Shawnee county. A trial was had, which resulted in a verdict and judgment for the plaintiffs. Motion for new trial filed and overruled, exceptions taken, and the case is presented to this court. This case is before the court on a motion to dismiss the petition in error.

1. That it does not affirmatively appear in the record that the motion for a new trial was filed at the same term of court in which the verdict of the jury was returned and judgment rendered. The record shows that the proceedings had in this case were begun on Tuesday, the 25th day of April, 1895, at the April term of court; and, further, that the motion for a new trial was overruled during such term of court.

2. That there is no merit in the appeal in this case, and the same has been taken for delay. To pass upon this question intelligently the court would be required to examine the whole record. It would seem more fair and reasonable that this proposition should be examined with the aid of such briefs and arguments as the parties desire to present on the final hearing of this case.

3. The petition in error does not specifically set forth the errors complained of, and does not state facts sufficient to show that any error was committed by the court that plaintiff in error is entitled to have reviewed by this court. An examination of the petition in error shows that it is in the usual form adopted and used by the best attorneys practicing in the state, and we think it sufficient, at least, to present some questions for consideration. The motion to dismiss the petition in error will be denied, and the costs of the motion taxed to defendants in error. All the judges concurring.

(6 Kan.App. 96)

DOUGLASS v. CITY OF LEAVENWORTH
et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

ABATEMENT OF PUBLIC NUISANCE—DEPOT IN PUBLIC HIGHWAY.

1. A private party, whose property is specially, peculiarly, and injuriously affected by the erection and maintenance of a public nuisance, may maintain an action to abate the same, and restrain the maintenance thereof.

2. The erection and maintenance of a depot building upon a public street in a city of the first class constitutes a public nuisance, and a city council of such city cannot, by ordinance, lawfully authorize the construction and maintenance of such a nuisance.

Wells, J., dissenting.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Bill by John C. Douglass against the city of Leavenworth and others. From an order sustaining a demurrer to the petition, plaintiff brings error. Reversed.

John C. Douglass, in pro. per. J. W. Hauserman and J. H. Wendorff, for defendants in error.

MAHAN, P. J. This is an action in the nature of a bill in equity to restrain and abate a public nuisance. The plaintiff declares he is the owner of certain lots on Main and Delaware streets, in the city of Leavenworth; that the defendants the city of Leavenworth and the Leavenworth Depot & Railroad Company are maintaining a public nuisance by the erection of a passenger depot and stone wall surrounding the same upon the street adjacent to his property, by which he might have access to and from his property and the wharf upon the Missouri river, used for steamboat landings, and prays for the abatement of the nuisance, and an injunction restraining the defendants from maintaining the same. A demurrer was interposed to the petition in the court below, which was sustained by the court upon the ground that the petition does not state a cause of action. The plaintiff sets out in his petition, and makes a part thereof, an ordinance of the city of Leavenworth authorizing the depot and railroad company to

construct the passenger depot upon that part of Delaware street lying within the east line of Main street and the west line of Missouri river, parallel therewith. The ordinance also provides that the company may lay and maintain railroad tracks for connection with the depot upon and across Water street, within certain limits. The allegations of the petition are: That the construction and maintenance on the street of the city of Leavenworth adjacent to the property of the plaintiff of the depot and the tracks in connection therewith occupy the entire street immediately in front of the plaintiff's property, and all of the street lying between his property and the river, so as to cut off all access to the front of the building. Water street, according to the allegations of the petition and the map accompanying the same, lies parallel with Main street, and the plaintiff's property is situated between Main and Water, extending from one to the other, with two fronts, one on Main and the other on Water street; the front on Water street being three stories high, and the one on Main street being two stories high. That the property is a business property, used for storeroom and warehouse. That before the construction of this depot the plaintiff had access from the east front—the Water street front—of his building directly to the river and to the landing of steamboats by means of drays for the purpose of carrying drayage to and from steamboats and his warehouse. The petition alleges the construction and maintenance of a public nuisance. It further alleges a special and individual injury occasioned by the nuisance to the plaintiff's property; that the right to the use of the street, which was dedicated in the ordinary mode by the making and the filing of the plats in fee, had inured to the plaintiff more than 30 years ago, and long prior to the making of the ordinance and the construction of the nuisance. So that the plaintiff contends by his petition that the ordinance is void because it is an attempted invasion of vested rights of the plaintiff in the use of the street which is held in trust by the board of county commissioners for the use of the public as well as himself.

It seems to be pretty well settled that a public nuisance may be abated by a bill in equity, or a petition in the nature thereof, by a private party who has suffered special damages by reason of the nuisance; but it is necessary that the plaintiff in such petition should show that he has sustained, and is still sustaining, individual injury thereby. The supreme court of the United States, in *Railroad Co. v. Ward*, 2 Black, 485, so holds, and says: "The private party, though nominally suing on his own account, acts rather as a public prosecutor on behalf of all who are or may be injured." And it seems also to be well-settled law that a municipal corporation, like a city of the first or second class, under the Kansas statute, cannot authorize the establishment and maintenance of a public nuisance under such circumstances; that

it cannot, even where vested rights have injured,—as in this case,—vacate the street to the injury of the abutting property holders. In addition to the above case, the following are important cases bearing upon these questions: Upon the question of the invalidity of such an ordinance, see *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719; *Commissioners v. Lathrop*, 9 Kan. 453; *Board of Education of Incorporated Village of Van Wert v. Inhabitants of Town of Van Wert*, 18 Ohio St. 221; *Pumpelly v. Green Bay Co.*, 13 Wall. 179; *Frith v. Railroad Co.*, 45 Iowa, 406; *Cadle v. Railroad Co.*, 44 Iowa, 12; *Babcock v. Stockyard Co.*, 20 N. J. Eq. 296; *Heller v. Railroad Co.*, 28 Kan. 625. Upon the first question above presented, see *Woodruff v. Mining Co.*, 18 Fed. 753; *Association v. Meninger*, 14 Kan. 312; *Barclay v. Howell*, 6 Pet. 500; *Leffeler v. City of Burlington*, 18 Iowa, 361; *Brown v. Manning*, 6 Ohio, 298; *Railroad Co. v. Larson*, 40 Kan. 307, 19 Pac. 661; *Clercq v. Town of Gallipolis*, 7 Ohio, 218; *Osborne v. Railway Co.*, 147 U. S. 258, 13 Sup. Ct. 299. This case also holds that where the injury is continuing in its nature and injurious character, or inflicts an irreparable injury, an action at law for damages is not an adequate remedy. See, also, *Park v. Railroad Co.*, 43 Iowa, 636; *Heller v. Railroad Co.*, 28 Kan. 625.

There is but one other question that can present itself in this case, and that is as to the laches of the plaintiff. This, however, seems to be more in the nature of a defense than otherwise, and does not arise upon the demurrer to the plaintiff's petition. The petition sufficiently states a cause of action, and the judgment of the district court sustaining the demurrer is reversed.

McELROY, J., concurs. WELLS, J., dissents.

(6 Kan.App. 100)

BOARD OF COM'RS OF ATCHISON COUNTY v. SULLIVAN.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

PROCEEDINGS IN ERROR—COMMENCEMENT—FILING PAPERS IN WRONG COURT.

The judgment of the trial court was rendered on the 26th day of October, 1895, at which time the defendant in the court below prepared his case for review, and filed his petition in error, together with a case-made, in the supreme court, on the 16th day of January, 1896. The case was afterwards transferred to this court by order of the supreme court, and filed in this court February 23, 1897. *Held*: (1) That under section 10 of the act of 1895 the filing of the record in the supreme court was equivalent to filing the same in this court. (2) That where a party complies with the statute in the commencement of proceedings to vacate a judgment by petition in error and case-made, and by some mishap or mistake such case is filed in the supreme court, when it should have been filed in the court of appeals, such act is deemed and held a commencement of proceedings in error.

(Syllabus by the Court.)

Error from district court, Atchison county; W. D. Webb, Judge.

Action by Timothy D. Sullivan against the board of commissioners of Atchison county. From a judgment for plaintiff, defendant brought error to the supreme court. The case was afterwards transferred to the court of appeals. On motion to dismiss. Denied.

C. D. Walker and J. L. Berry, for plaintiff in error. J. T. Allensworth and Bailey & Bailey, for defendant in error.

McELROY, J. This was an action brought by Timothy D. Sullivan against the board of county commissioners of Atchison county. The case was tried in the district court, and resulted in a judgment for the plaintiff. The judgment in the trial court was rendered on the 26th day of October, 1895, at which time the defendant in the court below prepared his case for review, and filed his petition in error, together with a case-made, in the supreme court, on the 16th day of January, 1896. The issuance and service of summons were waived. The defendant in error filed his motion to dismiss the case for the reasons: First, because the amount in controversy is less than \$2,000; second, because, more than one year having elapsed since the rendition of the judgment in the district court, said action cannot now be transferred to the appellate court. This motion was submitted to the supreme court, and after due consideration was overruled, and the record and proceedings transferred by order of the supreme court to this court February 23, 1897, and the case is now before this court upon the motion to dismiss. The judgment sought to be reversed was rendered on the 26th of October, 1895, and the case was filed in this court the 23d of February, 1897. If the filing of the record in the supreme court was equivalent to filing the same in this court, then the motion should be denied. The same grounds urged in this motion for dismissal were presented to the supreme court. The supreme court has authority, under section 13 of the act of 1895, to prescribe rules and regulations for the transfer of cases to this court, and, having ordered and directed such transfer, its judgment and order are binding, and an adjudication, so far as any question of jurisdiction is concerned. Section 556, Code Civ. Proc., reads: "No proceeding for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of." This proceeding to reverse the judgment of the trial court was commenced within the time prescribed by law. Section 10 of the act of 1895 reads: "In the event of any case being sent from a lower court on appeal or writ of error to the wrong court of appeals or to the supreme court, it shall be the duty of the court to which the case

has thus been sent, immediately upon such fact coming to its attention, to direct its clerk to forward the transcript or record therein, with the order of transfer, to the clerk of the proper court of appeals. * * * On receipt of such record by the proper clerk, he shall at once file the same in his office, and the case shall be proceeded with in the court to which it is transferred as if the same had gone there directly from the trial court." This makes ample provision for the protection of litigants in just such cases as presented, and confers upon this court authority to proceed in this case as fully as if it had come to this court direct from the trial court. It is not the policy or spirit of the Code to restrict the right of one to have his case reviewed by a superior court. If, in good faith, he complies with the statutes in the commencement of proceedings to vacate a judgment by a petition in error and case-made, and by some mishap or mistake such case is filed in the supreme court, when it should have been filed in the court of appeals, such act is deemed and held equivalent to a commencement of such proceedings in error in this court. The legislature has power and authority to provide for the transfer of cases from one court to another of competent appellate jurisdiction. *Hentig v. Redden*, 1 Kan. App. 164, 41 Pac. 1054. The motion of the defendant in error is denied, and the costs of the motion are taxed to the defendant in error. All the judges concurring.

(6 Kan.App. 42)

BAILL v. BIGGAM et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

LIMITATION OF ACTIONS—DISMISSAL—NEW ACTION
—PROVINCE OF JURY.

1. In an action upon a contract brought before a justice of the peace, in which the plaintiff recovers a judgment, an appeal is taken to the district court, where the plaintiff again recovers judgment, and a proceeding in error is prosecuted to the supreme court, and the judgment is reversed, upon the ground that neither the justice of the peace nor the district court had jurisdiction of the case, by reason of the fact that the amount of the claim exceeded the jurisdiction of the justice, the plaintiff's claim is saved from the bar of the statute of limitation, under the provision of section 23 of the Civil Code, if a new action is brought thereon within one year from the dismissal of the first action.

2. An issue in such case that the cause of action sued upon in the second suit is not the same cause of action sued upon in the first suit is an issue of fact to be submitted to the jury; and an issue of fact made by the pleadings in such second suit, whether the first suit had been dismissed prior to the institution of the second suit, is also an issue of fact to be submitted to the jury, under proper instructions, by the court. (Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by David Biggam and John S. Doolittle, partners as Biggam & Doolittle, against

H. E. Ball. From a judgment for plaintiffs, defendant brings error. Affirmed.

Douthitt & Wolfe and Wheeler & Switzer, for plaintiff in error. Keeler, Welch & Hite, for defendants in error.

MAHAN, P. J. There are but two questions in this case. The justness of the cause of action does not seem to be seriously disputed, but the statute of limitation is relied upon as a defense. The plaintiff relied upon section 23 of the Civil Code to save him from the bar of the statute. He had brought an action before a justice of the peace for the same claim, and obtained judgment. The defendant had appealed to the district court, where he again obtained judgment, and error was prosecuted in the supreme court, and judgment reversed, for the reason that the justice, in the first instance, had no jurisdiction of the case, by reason of the amount being in excess of his jurisdiction, and hence the appeal conferred none upon the district court. 23 Pac. 565. For this reason the judgment was reversed, with direction to the district court to dismiss the case. The present action was begun within a year after this reversal; but the plaintiff in error contends that, because the judgment was reversed for want of jurisdiction of the court, therefore there was no action to toll the statute. We are of the opinion that this contention cannot be sustained. The statute says that if the action be commenced within due time, and the plaintiff obtains judgment, and the judgment be reversed, without regard to the grounds of reversal, he shall have a year thereafter in which to bring a new action. The statute further provides that if the action fail otherwise than upon the merits, the plaintiff may commence a new action within one year after such failure, and the supreme court, in construing this part of the statute in *McWhirt v. McKee*, 6 Kan. 419, hold that the court will not inquire why the action was dismissed; that, if it was dismissed, it fails, and the failure is otherwise than upon the merits indicating that that court at least intends that the statute shall be liberally construed, or at least that its language shall be given effect to its full import. In this case there was an action commenced. There was a judgment, and that judgment was reversed at the instance of the plaintiff in error in this case, and that brings the case strictly within the very terms of the statute. And, in the language of Chief Justice Kingman in the case last cited, it is immaterial to this court why the judgment was reversed, and this court will not inquire why it was reversed.

The case is also within the second provision of section 23. The action failed otherwise than upon its merits. It was dismissed. *Hall v. Hurd*, 40 Kan. 374, 19 Pac. 802; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22. It was contended in this latter case that, because there was no cause of action at the time

the first action was begun, therefore there was no action,—no case. It will not do to say there was no case in the court, no action begun, no judgment in this case, simply because the court of last resort held that the action of the court was without jurisdiction. Giving to the statute that construction to which it is entitled, it seems to be clear that the case comes within the provision of section 23, and that the pendency of that suit, even though the court had no jurisdiction of the cause of action, tolled the statute of limitations, and brings it within the saving clause.

The second contention is that the court erred in submitting to the jury questions of law, to wit, whether the cause of action sued on in this case was the same cause of action upon which the former suit was brought; and, second, whether the suit brought before had been disposed of prior to the bringing of this suit. These were questions of fact, the same as any other questions of fact in the case upon which the jury might pass; and the court did not err in submitting these questions to the jury, together with the other facts in the case. The judgment is affirmed. All the judges concurring.

(6 Kan. A. 103)

CITY OF HOLTON v. STANLEY.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

CRIMINAL LAW—APPEAL FROM POLICE JUDGE—JURISDICTION.

After an appeal has been perfected by the defendant from a judgment of conviction of a police judge in a city of the second class for a misdemeanor, under an ordinance of the city, the police court has no longer any jurisdiction of the case, and an order made by him thereafter dismissing such appeal is without jurisdiction, and is void.

(Syllabus by the Court.)

Appeal from district court, Jackson county; Louis A. Myers, Judge.

James Stanley was convicted of a misdemeanor, and appeals from an order of the district court dismissing an appeal. Reversed.

Crane & Woodburn, for appellant. Sidney Hayden, for appellee.

MAHAN, P. J. This is an appeal from an order of the district court of Jackson county dismissing an appeal of the defendant from a judgment of conviction before a police judge of the city of Holton, for a misdemeanor, under an ordinance of that city. The appeal from the police court was properly taken and perfected, as required by the statute in such cases. Subsequently, the parties appeared before the police judge, and consented to an order dismissing the appeal; whereupon a commitment was issued by the police judge, and the defendant committed to the city jail. The defendant filed another appeal bond, and the case was thereupon duly certified to the district court. The trial

in the police court was had on the 23d of January, and a judgment pronounced. At the same time there was a motion filed in arrest of judgment, which was continued from time to time until the 25th of January, when the motion in arrest of judgment was denied, and the prior judgment of the police judge reaffirmed. The first appeal bond was filed within the time prescribed by the statute, assuming that the judgment was entered on the 23d of January. The last appeal bond, however, was not filed until more than 10 days had expired from the 23d of January, but within 10 days after the 25th. The district court dismissed the appeal on the motion of the city. After the filing of the first appeal bond, the police judge had no longer any jurisdiction of the case, nor could the parties confer jurisdiction upon the police judge by consent. The order dismissing the appeal could only be made by the district court to which the case had gone by the appeal. The attempted order of the police judge dismissing the defendant's appeal was without jurisdiction, and void. The second bond was useless and nugatory. The district court erred in dismissing the appeal. The judgment is reversed, and the case remanded to the district court, to proceed with a trial of the cause. All the judges concurring.

(6 Kan. A. 105)

CITY OF HOLTON v. MANNIX.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

CRIMINAL LAW—APPEAL—ESCAPE OF ACCUSED.

In a criminal case, where the appellant has escaped, and is not within the jurisdiction or control of the court, either actually or constructively, it is clearly within the discretion of the court of appeals to refuse to hear such case on appeal. Under such circumstances it is not necessary or advisable to hear and decide what may prove to be only a feigned issue.

(Syllabus by the Court.)

Appeal from district court, Jackson county; Louis A. Myers, Judge.

William Mannix was convicted of violation of a city ordinance, and appeals. Dismissed.

Crane & Woodburn, for appellant. Sidney Hayden, for appellee.

McELROY, J. This is an appeal by William Mannix from a judgment of conviction in the district court of Jackson county for the violation of a city ordinance. The case was brought to that court on an appeal from the police court of the city of Holton. It appears that on the 11th day of April, 1897, the appellant became a fugitive from justice. It is admitted that the appellant has escaped, and is not within the jurisdiction and control of the court below, either actually or constructively. If this court should affirm the judgment, he is not likely to ap-

pear, and submit to his sentence; and if this court should reverse the judgment, and order a new trial, he will appear or not, as he may consider most to his interest. Under such circumstances, we do not deem it necessary or advisable to hear and decide what may prove to be only a feigned issue. It is clearly within our discretion to refuse to hear a criminal case on appeal unless the appellant is where he can be made to respond to such judgment as might be rendered. It is therefore ordered that, unless the appellant submits himself to the jurisdiction of the court within 60 days from this date, the appeal be dismissed. All the judges concurring.

(6 Kan. App. 920)

LATTO v. LATTO.

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

APPEAL—REVIEW—PARTNERSHIP ACCOUNTING.

1. Where a note for money borrowed is given by one party to the other, and four years afterwards those parties form a co-partnership, and, in one of the settlements of the partnership affairs, said note, being still unpaid, is counted in the business of the firm, this court, in a proceeding to review the action of the court below, cannot say as a matter of law that said note should not have been included in the final settlement of the firm business.

2. Where the referee found that the plaintiff's claim for interest on money advanced by him should be offset by and balance the defendant's claim for commission on collections and other equities in his favor, and this finding is approved by the trial court, this court cannot say as a matter of law that it was error.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by David E. Latto against John Latto. Judgment for plaintiff. Defendant brings error. Affirmed.

J. H. Mahan and Geo. D. Abel, for plaintiff in error. O. L. Moore and C. B. Daughters, for defendant in error.

WELLS, J. This action was originally begun in the district court of Dickinson county by David E. Latto against John Latto for an accounting of a partnership business which began in April, 1882, and continued something over four years. On the 5th day of March, 1890, the matter was referred to a referee to report his findings and the evidence in support thereof to said court. Afterwards said referee made his report, which was on June 27, 1892, approved, and confirmed by the court, except as to the disallowance of a claim for money loaned defendant by plaintiff in 1878. The report of the referee was set aside as to that item, and the case was continued for further hearing thereon. On the 19th and 20th of March, 1893, a hearing upon this item was had before the court, and on the 25th day of

May its judgment rendered, sustaining the validity of said claim and modifying the report of the referee accordingly, to which said defendant excepted. A motion for a new trial was made, and overruled, and the matter brought here for review. There are two assignments of error made by the plaintiff in error herein: First. The sustaining of plaintiff's exception to that part of the report of the referee rejecting said claim of \$880 and interest, and permitting the plaintiff below to establish the same, and rendering judgment thereon against said defendant below. Second. The refusing to allow the defendant below compensation for his services as claimed in collecting the assets outstanding of the firm and discharging its obligations.

In relation to the first assignment of error, there was competent evidence introduced tending to prove that said item was taken into consideration and included in their partnership business in the settlement of February 1, 1893; and, if the partners mutually agreed to and did incorporate it into their firm business, this court is not required as a matter of law to say that it did not belong there. If John Latto had borrowed of the firm the amount of the note, paid off the note to his partner, had then added the sum to his share of the capital stock of the firm, and all this was done by the consent and agreement of both partners, can there be any question of the legality of the transaction? And wherein is the difference, except that in the one case there is done directly, in one transaction, the same as would have been accomplished in the other by three? The case of Railroad Co. v. Bell, 1 Kan. App. 71, 41 Pac. 209, is referred to by plaintiff in error as squarely in point, but we do not think it is decisive of this case. The question in this case is not as to whether the court would be controlled by the allegations of the pleadings or not, but as to whether or not the item in controversy ever was incorporated into the partnership business. If it was so incorporated, then it was covered by the pleadings. This issue was decided by the court in favor of the defendant in error, and, as there was some evidence to sustain that finding, we cannot review it.

On the matter referred to in the second assignment of error the referee found, in substance, that the plaintiff's claim for interest on money advanced at sundry times should be offset by and balance the defendant's claim for commission on collections, and the benefits the firm derived by defendant's excess of the original capital stock. This seems to us to be equitable and just, was approved by the trial court, and we cannot say it was error. The judgment of the court below will be affirmed.

McELROY, J., concurs. MAHAN, P. J., having been of counsel, not sitting.

(6 Kan.App. 325)

ATCHISON, T. & S. F. R. CO. v. PEARSON.

(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

DEPOSITIONS—NOTICE—CERTIFICATE OF NOTARY—
WAIVER OF DEFECTS—PREJUDICIAL ERROR.

1. In the absence of any showing of prejudice, a notice to take depositions that designates the place as "at the office of R. L. McDougal, in the city of Marysville, in the county of —, in the state of Missouri," will be held sufficient.

2. "Our statute requires the certificate of an officer before whom a deposition has been taken to show that the deponent was first sworn 'to testify the truth, the whole truth, and nothing but the truth.' A certificate by such officer, which shows that the deponents were sworn 'to testify the whole truth of their knowledge touching the matter in controversy,' is defective, and it is error to overrule a motion to suppress such deposition, alleging such defect as ground therefor." *Telegraph Co. v. Collins*, 45 Kan. 88, 25 Pac. 187.

3. A certificate of a notary, annexed to a deposition stating that the witness "was examined, and his examination reduced to writing, and subscribed by him in my presence," is not substantial compliance with the statute requiring that the certificate must show "that the deposition was reduced to writing by some proper person, naming him."

4. Where a deposition is taken in the absence of the opposing party, nothing is waived, and the absent party has the right to presume that the deposition will be taken in strict conformity with the statute.

5. The evidence contained in the deposition examined. *Held*, that the admission of the same was prejudicial to the substantial rights of the defendant.

(Syllabus by the Court.)

Error from district court, Edwards county; S. W. Vandivert, Judge.

Action by P. A. Pearson against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. F. Dumont Smith, for defendant in error.

SCHOONOVER, J. The defendant in error commenced his action in the district court of Edwards county against the plaintiff in error, alleging, in substance, that on the 18th day of September, 1891, he delivered to defendant below, at its office in the city of Topeka, one Poland China boar, the property of plaintiff; that said boar was of full-blooded Poland China breed, and as such was registered in the Standard Poland China Record as No. 5,442; that the defendant received said property to be by it safely carried from the city of Topeka to the city of Kinsley, state of Kansas; that the defendant did not safely carry and deliver said boar to plaintiff, but willfully, wrongfully, and negligently failed to do so, whereby the said boar was killed or lost, to the damage of plaintiff in the sum of \$2,500. The case was tried at the January term, 1892, to a jury, and resulted in a verdict and judgment in favor of the defendant in error and against the plaintiff in error for the sum of \$900 and

costs of suit. The defendant below brings the case here for review.

The serious question presented is the overruling by the trial court of the motion to suppress, and the exceptions to the deposition of Ira K. Alderman, filed by defendant below, and in admitting in evidence said deposition, for the reason that the notice to take said deposition, served upon the defendant below, does not contain sufficient information as to the time and place where said deposition was to be taken, and for the further reason that the deposition is not duly certified by the officer before whom the same purports to have been taken, as required by law. The motion was supported by the following affidavit: "A. A. Hurd, of lawful age, being first duly sworn, deposes and says that he is one of the attorneys of the above-named defendant, and as such has entire charge of its legal business in the state of Kansas; that the attached notice, marked 'Exhibit A,' and made a part hereof, was served upon him on the 11th day of January, 1892; that said notice does not contain sufficient information as to the time and place when and where it is intended to take depositions in said cause to enable this affiant to attend or provide for the attendance of some other attorney to cross-examine such witnesses as might be produced in said cause; and that said notice hereto attached is the only paper served upon this affiant for the taking of any depositions in the state of Missouri on the day named in said notice. And further affiant saith not." The objectionable portion of the notice reads as follows: "The defendant, or A. A. Hurd, its attorney, will take notice that on Wed., the 20th day of January, A. D. 1892, the plaintiff above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause at the office of R. L. McDougal, in the city of Marysville, in the county of —, in the state of Missouri." It will be observed that the notice does not state the county in which the depositions were to be taken. Paragraph 4447, Gen. St. 1880, provides: "Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of residence." No particular description of the place where the depositions will be taken is required by this section. If the law provided that the county should be stated in the notice, a strict compliance with the provision would be required. It is sufficient compliance with this section if the place is specified with such certainty as to enable the opposite party to know just where the depositions are to be taken. In the absence of any showing of prejudice, the notice is sufficient. That portion of the notary's certificate to which objection is made reads as follows: "Ira K. Alderman, who was by me first sworn to testify the

whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined, and his examination reduced to writing, and subscribed by him in my presence." Paragraph 4454, Gen. St. 1880, provides: "The officer taking the deposition shall annex thereto a certificate, showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing by some proper person, naming him; that the deposition was written and subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place specified in the notice." In construing this section of the statute, our supreme court, in the case of *Telegraph Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, say: "Our statute requires the certificate of an officer before whom a deposition has been taken to show that the deponent was first sworn 'to testify the truth, the whole truth, and nothing but the truth.' A certificate by such officer which shows that the deponents were sworn 'to testify the whole truth of their knowledge touching the matter in controversy' is defective, and it is error to overrule a motion to suppress such deposition, alleging such defect as ground therefor." The language of the certificate in the case cited and in the case under consideration is identical. No further examination on this point is necessary.

The certificate states that the witness "was examined, and his examination reduced to writing, and subscribed by him in my presence." The statute requires that the certificate must show "that the deposition was reduced to writing by some proper person, naming him." Did the witness reduce his own examination to writing? This is the question. Looking at the last two sentences of that portion of the certificate objected to from a grammatical standpoint, the question may be answered either in the affirmative or negative, with about equal propriety, there being nothing in the grammatical construction to determine whether the phrase "by him," in the last sentence, should be understood as modifying the predicate of the preceding sentence. The first sentence of the certificate says that the witness was examined. By this we are to understand that he was asked and answered certain questions. The next sentence states that his examination was reduced to writing. This implies that in its original form it was oral. Now, is it more likely that the witness, after submitting to an oral examination, was asked or required to make a statement in writing of the questions that had been asked him, and his answers thereto, or that, while the oral examination was in progress, a written record of the same was made by some one other than the witness? Certainly, the latter is more probable, and, if it was actually done, the fact could have been appropriately stated. On the whole, it appears very improbable that the witness reduced his own examination to

writing, and, if he did not, who did? The certificate is too indefinite to meet the requirements of the statute.

No one representing the plaintiff in error was present at the time the depositions were taken. They waived nothing required in the statute. They had the right to presume that the deposition would be taken in strict conformity with the statute. In the case of *Goodhue v. Grant*, 1 Pin. 556, the court says: "A deposition cannot be read in evidence unless it plainly and satisfactorily appears from the certificate of the justice that all the requirements of the statute have been fully complied with; and no presumption will be indulged in to supply any defect." In the states having statutes requiring what facts the certificate must show, the authorities require a strict conformity to the statutory requirements; but in states where depositions may be taken under a commission or rule of court, greater laxity prevails. Weeks, in his work on the Law of Depositions (section 454), says: "In order to prevent injuries to suitors from this mode of taking testimony, in which the opposite party is often not present to cross-examine, and which by unfair and fraudulent practices may be perverted in writing it down, or altered after it has been written, it has been the uniform rule in all the courts to exclude a deposition where anything required by the words of the statute authorizing it to be taken has been omitted. If such omission can possibly produce injury to the opposite party. But if it appear that no injury can possibly result from the omission, the courts have generally determined that it shall not exclude the deposition. * * *

A strict and literal compliance with the statute is necessary, and the courts have refused to permit parties to avail themselves of such testimony, although the forms required may have been strictly pursued, where there has been deceit or fraud practiced in the taking. The certificate of the magistrate is not conclusive. But, on the other hand, if it is defective, parol testimony is not admissible to supply the omission." The motion to suppress the deposition should have been sustained. The evidence contained in the deposition has been examined. It is not covered by the testimony of any other witness, and the admission of the same was prejudicial to the substantial rights of the defendant.

Other questions arise in the case, but for the errors enumerated the judgment of the court below is reversed, and a new trial granted. All the judges concurring.

(6 Kan.App. 1)

BUSENBARK et al. v. PARK et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

MORTGAGE FORECLOSURE—PARTIES—ADVERSE INTERESTS—TRIAL BY JURY.

1. In an action to foreclose a mortgage the plaintiff may join as defendant one claiming an

adverse and paramount title to the mortgaged premises, for the purpose of determining such adverse interest.

2. Where a party defendant in a foreclosure suit claims an adverse title paramount to the mortgagor and the mortgagee in possession of the property, and the plaintiff seeks to litigate and determine such adverse title, the defendant is entitled as of right to a trial by jury.

(Syllabus by the Court.)

On rehearing. Reversed.

For former opinion, see 47 Pac. 824.

J. F. Tufts and J. M. Hagaman, for plaintiffs in error. W. W. & W. F. Guthrie and Jackson & Jackson, for defendants in error.

MAHAN, P. J. The consideration of this case upon rehearing should be limited to the questions presented by the petition upon which the rehearing was allowed. There was a motion to dismiss for want of necessary parties by revivor, which the court in its former opinion in effect overruled, and decided the case apparently upon its merits. The only question demanding our serious consideration upon this rehearing is the refusal of the court to allow a jury to the defendants in this case. Upon a careful examination of the record, it is apparent that although the action is in form one to foreclose a mortgage, and to obtain judgment upon a promissory note which the mortgage was given to secure, the ulterior purpose was to determine the right of the plaintiffs in error to the property, or, in other words, to recover the property from them, they being in possession. The fifth section of the bill of rights declares that "the right of trial by jury shall remain inviolate." The Civil Code (section 260) provides that, on "all questions of fact arising in actions to recover money or specific personal or real property," either party shall have a right to trial by jury of course; and it is provided that, in cases for the recovery of real property, either party has a right to two trials to two juries at two different terms of the court. It is true that in the petition in this case the plaintiff alleges that the defendants (plaintiffs in error) claimed some title to or interest in the land, which he avers is inferior and subject to his mortgage lien, yet it is apparent from the record, from his own statement, and from the evidence introduced, that he knew when he commenced this suit, and knew when he took the mortgage on this property, that the plaintiffs in error were in possession of this land, claiming title thereto. The plaintiffs in error answered, averring ownership and possession; that they were not proper parties to the foreclosure proceeding; asked, on several appropriate occasions, to be dismissed, which was by the court refused. They asked for a jury as a matter of right. Being refused that, they asked the court for a jury to try the issues presented by their answer, which contained, in addition to their claim of title to the land, allegations of fact in defense, viz. that the plaintiff was not the real party in interest,

that he had no interest in the note and mortgage, that there was no consideration paid for the mortgage at the time of the execution and delivery, and that at the time the plaintiff took the mortgage he had actual knowledge of their claim of title and of their possession of the property. This was likewise denied.

At common law adverse titles could not be adjudicated or tried in an action to foreclose a mortgage, and it is only by the terms of our very liberal Code that it has been held by our supreme court that a plaintiff seeking to foreclose a mortgage could join a party claiming an adverse title, and litigate that title in a suit to foreclose. However, the decision of the supreme court is to the effect that parties claiming adversely to the mortgagor and mortgagee, and anterior to their title, may be joined, and the right to the property litigated; that is, that a cause of action to recover real property may be joined with an action to foreclose a mortgage upon the same property. See *Bradley v. Parkhurst*, 20 Kan. 462. Justice Brewer, in discussing this question, on page 469 et seq., says: "The courts of law and equity have been abolished, and now all actions, whether legal or equitable, are triable in one tribunal. The forms of procedure are simplified and unified; so that, if the foreclosure and the litigation of the adverse title were necessarily in separate actions, they would each be brought in the same court and the same form of action. So far as uniting two causes of action, in one of which defendant may be entitled to a jury as a matter of right, and in the other not, we reply that, so far as the foreclosure is concerned, it was long ago held in this court that defendant was entitled to a jury; it being an action for the recovery of money, though not one for the recovery of money only;" citing *Clemenson v. Chandler*, 4 Kan. 558; Gen. St. 1888, p. 680, § 206. And he proceeds: "Further, that if the mortgagor be in possession, and the holder of the adverse title out of possession, the litigation of such adverse title would not be in the nature of an action for the recovery of real property, or give a right to a jury; and finally that as the uniting of such causes of action is a matter of choice, and not of necessity, the mortgagee cannot, by uniting, deprive either defendant of any right he would be entitled to in case the actions were separately brought. This last remark is applicable to the objection that, if the holder of the adverse title be in possession, the action is tantamount to an action for the recovery of the possession, in which the statute gives the defendant a right to two trials." And, I might add, likewise a right to two trials by two juries. As I previously said, the plaintiffs in error, claiming title to this property adverse to the mortgagee and mortgagor, were not only in possession at the time the action was begun and tried, but were in possession at the time the mortgage was made. And, in the language of Judge Brewer, there was a second cause of

action stated in this petition tantamount to an action to recover the possession of the plaintiffs in error. The plaintiffs in error were entitled, as a matter of right, to a trial by jury, and not only to one trial, but to two trials by jury; and the court erred in—First, refusing to award a jury upon the trial of the case; and, second, in overruling the motion of the plaintiffs in error for a new trial. The judgment is reversed, and the case remanded to the district court, with directions to the district court to award a new trial in the case. All the judges concurring.

(6 Kan. A. 919)

HALE v. ALDAFFER.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

On petition for rehearing. Denied.
For former report, see 47 Pac. 320.

PER CURIAM. An opinion by the majority of the court was handed down in this case on the 29th day of December, A. D. 1896, in which the judgment of the trial court was reversed, and case remanded, with directions to enter judgment on the special findings in favor of the plaintiff in error. An application for rehearing was allowed on petition of the defendant in error. The case was again argued and submitted to this court at the June, 1897, term. After a full examination of the record, we are satisfied with the former decision of this court. We fail to see any reason for setting aside or modifying either the syllabus or opinion of the court. The judgment of the trial court is reversed, and the case remanded, with directions to enter judgment on the special findings in favor of the plaintiff in error.

(6 Kan. A. 67)

GUILD v. OHIO LODGE, NO. 132, I. O. O. F.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

CONSTRUCTION OF LEASE—PROPERTY CONVEYED—PLEADING AND PROOF.

1. The following clause is in a lease: "Also demise, set over, and lease to the same parties, as a part of said contract, and for the same consideration, an entry and stairway on the west side of the said building, situated as above described; the said entry and stairway leading from the ground floor and street to said second story. The said entry and stairway to be of the width of four feet." *Held* that, the leased premises being on lot 7, the words "leading from the ground floor * * * to said second story" mean "from the ground floor" of such building, and that the words "situated as above described" refer to the stairway upon the leased premises; that said clause in said lease does not in terms grant any rights in lot 8.

2. The plaintiff in error must recover upon the allegations of its petition. The petition alleges no other basis of claim to the stairway in question than the written lease. No oral contract, agreement, or right by prescription is alleged. The defendant in error says: "The defendant in error relies upon the contract as set out in its petition for its right to an easement over the east four feet of lot 8, upon the stairway there

erected as a means of access to and from its lodge room, and to and from Railroad street." It cannot prevail upon another contract than the written lease. The lease does not in terms give any rights in and to lot 8. The leased premises are stated to be on lot 7, and, under this lease, its rights are confined to lot 7.

(Syllabus by the Court.)

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by Ohio Lodge, No. 132, Independent Order of Odd Fellows, against Joseph Guild. Judgment for plaintiff and defendant brings error. Reversed.

Keeler, Welch & Hite and E. A. Wagener, for plaintiff in error. Bradford & Huron, for defendant in error.

McELROY, J. This was an action begun by Ohio Lodge, No. 132, I. O. O. F., against Joseph Guild, for an injunction to enjoin the defendant from taking down, destroying, or closing up a stairway on lot 8 on Railroad street, in the city of Silver Lake, Shawnee county. The case was tried by the court, without a jury, and the court found for the plaintiff, and against the defendant. A motion for a new trial was made, overruled, and exceptions saved, and the case is brought to this court for review.

There is little conflict of testimony in this case. On October 25, 1880, John F. Johnson and David Boswell were the joint owners of lots 7 and 8 on Railroad street, in the city of Silver Lake. Lot 7 was on the corner of Railroad and Medora streets, and lot 8 adjoined it on the west. Both lots fronted on Railroad street. About this time, Johnson and Boswell erected the first story of a stone building upon lot 7, covering the entire front of the lot, and, in consideration of the erection of the second story by said lodge, made to the lodge a 99-years lease of said second story, and of an entry and stairway thereto. The language of the lease concerning such entry and stairway is as follows: "Also demise, set over, and lease to the same parties, as a part of said contract, and for the same consideration, an entry and stairway on the west side of the said building, situated as above described; the said entry and stairway leading from the ground floor and street to said second story. The said entry and stairway to be of the width of four feet." This lease was not acknowledged, but it was delivered to the register of deeds, and was by him recorded on November 3, 1880. The lodge shortly afterwards constructed the second story of the building, and placed its stairway on the outside of the building, over and upon a portion of the adjoining lot 8, which up to that time was a vacant lot. After the construction of said building and stairway, and on March 4, 1881, David Boswell, by a quitclaim deed, conveyed his interest in lots 7 and 8 to Robert A. Richards; and on March 12, 1881, Robert A. Richards and John F. Johnson, by quitclaim deed, conveyed their interest in lots 7 and 8 to Charles

E. Frost. On February 23, 1882, Charles E. Frost and wife, by warranty deed, conveyed lot 7, except the west half of the west wall of the building thereon, to Alfred Pratt; and afterwards, in the spring of 1882, by warranty deed, conveyed lot 8 to Alfred Pratt. On May 23, 1883, Alfred Pratt and wife, by warranty deed, in consideration of \$2,400 then paid by Joseph Guild conveyed to Joseph Guild said lot 8. On May 29, 1891, Charles E. Frost and wife, by warranty deed, conveyed to Joseph Guild the west half of the west wall of the building on lot 7. At the time of the commencement of this action, the lodge was the owner of lot 7 and the building thereon. The stairway erected by the lodge commenced about 20 feet south of the street, and extended upward and southward to a door through the wall of the second story, near the south end of the building. At the top of the stairs was a wide landing, extending upon lot 8. The lodge continued to use this stairway as a means of access to its lodge room until 1882, when Alfred Pratt erected a building on lot 8, covering the entire front of the lot, and using the west wall of the building on lot 7 as a party wall. In constructing this building, he took away the stairway erected by the lodge, and in his building he put in a stairway on the side next to lot 7, commencing near the street, and with a hallway extending from the top of the stairs southward beyond the door into the second story of the building on lot 7. From the erection of Pratt's building the lodge used his stairs and hallway as a means of access to its lodge room, and have had no other way of access. It has sublet its lodge room to other societies, and all of them together have used said stairway and hall an average of two evenings in each week. At the time of Mr. Guild's purchase of lot 8, he did not know that the lodge used, or claimed the right to use, the stairway and hall in the building thereon. Up to the time of his purchase, he resided in the East. While Mr. Guild was making an extended visit at his farm, he was induced to purchase said lot 8. At the time of purchase he says that he looked the building over on the outside, and saw the inside of the lower story. About two months afterwards, he visited the building to collect rent, and then went upstairs, and saw the doorway into the other building; and he was then told that his stairway was used as a means of access to the lodge room over lot 7. He did not learn that the lodge claimed the right to use it until the spring of 1889, when he was informed for the first time that the lodge claimed the right to use the stairway under the lease set up in this action. Some of the trustees of the lodge testified that they understood Mr. Guild to state "that the time when he went upstairs, and saw the door into the other building, was before he purchased lot 8"; but both Mr. Guild and his son testify "that this visit to the upper story of the building took place

afterwards, when he went there to collect rent," and that Mr. Guild so stated to such trustees. When Mr. Pratt erected the building on lot 8, the lodge contributed towards the erection of the stairway under an arrangement that "he was to build that stairway, and finish and plaster the walls leading to the doorway, and was to give the lodge the use of it."

The plaintiff in error relies upon the lease for its rights in the stairway on lot 8. The petition alleges no other basis of claim to the stairway in question than the written lease. No oral contract, agreement, or right by prescription is alleged. The original stairway is alleged to have been constructed by the lodge "by the terms of said written lease," and the stairway "subsequently" erected in the building on lot 8 is alleged to have been constructed by Alfred Pratt, "in accordance with the terms of said lease." The lodge's possession or use of the present stairway is alleged to have been "for the purposes mentioned in said lease." The defendant in error in its brief says: "The defendant in error relies upon the contract set out in its petition for its right to an easement over the east four feet of lot 8, upon the stairway there erected, as a means of access to and from its lodge room, and to and from Railroad street." The lodge cannot recover in this action unless the written lease gives it the rights it contends for. It cannot prevail upon another contract than the written lease. The lease does not, in terms, give any rights in and to lot 8. The leased premises are stated to be on lot 7, and lot 8 is not mentioned. Even in describing the location of the entry and stairway, it adds "situated as above described." If this refers to the building, and not to the entry and stairway, it is a senseless repetition. If the parties are given credit for using language with any purpose, they must have meant that the entry and stairway were to be situated on lot 7. The stairway is described as a "stairway leading from the ground floor * * * to said second story." The only building, and consequently the only "ground floor" then contemplated, was on lot 7. By the terms of the lease, there was leased an "entry * * * leading from the street." According to Webster, an "entry" is "a passage leading into a house or other building or to a room; a vestibule." A "passage" is defined as "a common avenue to various apartments in a building; a hall; a corridor." Under this lease, the lodge was entitled to a covered and inclosed entry hall or vestibule upon lot 7 for an entrance to the lodge room. The written instrument was a lease of an entry and stairway, and not mere easement over or right to use and occupy them with other occupants of the premises. By the terms of the lease, the lodge's right to the exclusive use of the entry and stairway is as certain and absolute as its right and exclusive use of the second story of the build-

ing on lot 7. Under the lease, the lodge has the exclusive right to the entry and stairway on lot 8, or else has no right whatever on that lot. It is unreasonable to presume that the parties to the lease intended, without saying so, to have it convey such an important interest in lot 8. Even if the written lease could be construed according to the lodge's contention, the lodge must fail in this action, because Mr. Guild was an innocent bona fide purchaser of lot 8, and had no notice of the existence of such lease. It was not acknowledged, and hence the writing of it in the books of record by the register of deeds does not give notice to any one who does not actually see it. In *Sanford v. Weeks*, 38 Kan. 324, 16 Pac. 467, the court says: "As the written contract of December 8, 1879, was not acknowledged, it being filed for record did not impart notice."

But the lodge says: "The building was so constructed that Guild was bound to take notice." We submit that Mr. Guild was not bound to inspect the building on lot 7 to see if there was an inside or back stairway to the second floor of the building. He was purchasing lot 8 and the building thereon. He visited the first floor, and saw that a stairway on lot 8 led to the second floor. There was apparently no occasion for further inquiry. Even had he made the inspection the lodge claims he ought to have made, he would not have discovered that the lodge claimed the right to use his stairs and hallway by reason of the lease set up. The lease does not in terms give any right in lot 8. Whatever the fact was about the contract with Mr. Pratt, it could not now affect Mr. Guild's rights. The law has provided the means by which an owner of an interest in real estate can give notice of his rights. To allow such "arrangement" as the one now contended for by the lodge to be successfully asserted against "bona fide purchasers without notice" would introduce into real estate transactions an unnecessary element of uncertainty, and would open the door to numberless contentions and fraud. No purchaser could know with certainty that he was getting what he paid for. The judgment of the trial court is against the evidence. The court erred in overruling the motion for a new trial. The judgment is reversed, with directions to the trial court to sustain the motion for a new trial. All the judges concurring.

(6 Kan.App. 919)

BUCK v. GALLIENNE.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

PARTIES IN ERROR.

Where a joint judgment is rendered against three persons, and one of them brings error, and the other parties to the judgment are not before the court, the petition in error will be dismissed.

Error from circuit court, Shawnee county; J. B. Johnson, Judge.

Action by P. Gallienne against Jacob Buck and others. Judgment for plaintiff, and defendant Buck brings error. Dismissed.

H. C. Root, for plaintiff in error. A. W. Dana, for defendant in error.

MAHAN, P. J. This motion must be sustained, upon the authority of *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911. There was a joint judgment in this case against three parties,—one as maker of the note and mortgage sued upon, and against two others as parties to contracts assuming the payment of the indebtedness. It was a joint judgment against the three, and but one of the parties to this judgment, to wit, the plaintiff in error, is before the court. The petition in error will be dismissed. All the judges concurring.

(6 Kan.App. 94)

STATE v. EATON.

(Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.)

CRIMINAL LAW—APPEAL—MOTION TO CORRECT RECORD—REHEARING.

1. A motion to correct the record of a case brought to this court on appeal will not be considered after the case has been submitted on the record to this court, and the judgment of the court below affirmed, unless a motion for a rehearing is allowed upon proper application and grounds therefor.

2. An application for a rehearing of a cause will not be granted unless it clearly appears that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, or which has been overlooked by the court.

(Syllabus by the Court.)

On rehearing. For former report, see 47 Pac. 317.

McGrew, Watson & Watson, for plaintiff in error. S. C. Miller and L. C. Boyle, for the State.

WELLS, J. This was a criminal action, prosecuted by the state of Kansas against the defendant, charging him with certain violations of the so-called "Prohibitory Liquor Law." The defendant was convicted in the court of common pleas of Wyandotte county, from which an appeal was taken to this court, and by this court, on December 29, 1896, the judgment of the court below was affirmed. See 47 Pac. 317. The case is now upon the docket upon a motion for rehearing and a motion to correct the record. We presume that it will be conceded that, unless a new trial should be granted, no consideration of the motion to amend the record should be had. It may be that exceptional cases will arise in which it would be proper to allow the appellant to amend his record after the case has been decided against him, upon the case as originally filed, but in the interest of justice and the dispatch of the business of the court this cannot be allowed as a rule. In other words, an ap-

pellant is expected to embody in his record all that is necessary to have there when he brings a case to this court, and if by accident, mistake, or inadvertence he omits anything necessary, he must make the discovery and ask the relief before the final decision is rendered, or he is too late.

This leaves only the motion for a rehearing to consider. Rule 13 of this court reads as follows (41 Pac. v.): "An application for a rehearing of any cause shall be by petition, signed by counsel, particularly setting forth the grounds thereof, and showing either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called either in the brief or oral argument, or which has been overlooked by the court; and the question, statute or decision so overlooked must be distinctly and particularly set forth in the petition. Such petition must be filed within twenty days from the date of the decision, and a copy thereof must be served on the opposite party. No argument or brief will be allowed on the petition, but if the application is granted, the case will be assigned for rehearing, and such time given for argument or brief as the court may allow." In this case there was no attempt to conform to this rule. The paper filed was styled a motion instead of a petition. Perhaps this is not material, but our attention is not called "distinctly and particularly" to any "question decisive of the case, and duly submitted by counsel," that has been "overlooked by the court," nor to any "statute or controlling decision" in conflict with the decision herein "to which the attention of the court was not called either in the brief or oral argument, or which has been overlooked by the court." In justice to the public and litigants, the time of this court cannot be taken up by the review of matters already considered and decided, and, if the losing party thinks that any particular point or authority decisive of the case in his favor has been overlooked, he must call our attention "distinctly and particularly" to the point or authority that he thinks did not receive the proper attention. It has not been customary to write opinions in this class of cases, but to informally sustain or refuse the application; but it seems to us, in view of the recent frequency of such, that the attention of the bar should be specifically called to the matters herein considered. Both of the motions will be denied. All the judges concurring.

(6 Kan. App. 22)

BRENNEKE et al. v. DUGENAN.

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

GARNISHMENT—MORTGAGE ON HOMESTEAD—JUSTICES OF THE PEACE.

1. The proceeds of a mortgage given upon a homestead are not subject to garnishment for the

payment of an ordinary judgment indebtedness. The husband and wife have a right to sell or mortgage the homestead, and the money derived from such sale or mortgage is exempt.

2. The provisions of chapter 151, Laws 1889, are applicable only to procedure in the district court. The first section of the act reads: "Section 1. Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person. * * *

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by M. J. Dugenan against Henry Brenneke and Theo. H. Polack. On appeal from the justice there was a judgment for plaintiff, and defendants bring error. Affirmed.

Theo. H. Polack and W. S. Glass, for plaintiffs in error. Mann & Redmond, for defendant in error.

McELROY, J. This was an action originally commenced by M. J. Dugenan, as plaintiff, against Henry Brenneke and Theo. H. Polack in justice court. The case was afterwards appealed, and tried in the district court of Marshall county. At the trial of the case in the district court, Dugenan recovered a judgment against defendants for \$131.60 and costs, and defendants filed motion for new trial, and bring the case to this court for review.

A. C. Holst and wife executed a mortgage to Henry Brenneke for \$400 on their 80-acre tract of land, which was used and occupied as the homestead of the mortgagors. The mortgagee at the time of the execution of the mortgage paid Holst a portion of the money, and gave him duebills for the remainder, \$130, as follows:

"Marysville, 1-5-1894. Seven days after date I promise to pay to C. A. Holst one hundred dollars (\$100). Henry Brenneke. Theo. H. Polack."

"Marysville 1-5-1894. Thirty days after date I promise to pay to C. A. Holst thirty dollars (\$30). Henry Brenneke. Theo. H. Polack."

A few days after the execution of the duebills they were each assigned to M. J. Dugenan, as follows: "I hereby assign the within to M. J. Dugenan. C. A. Holst." Prior to the assignment of the duebills the Hanover State Bank brought its action against C. A. Holst in justice court, and procured service of garnishee proceedings upon Brenneke and Polack. The answer filed by Brenneke disclosed that M. J. Dugenan had an interest in the duebills, but did not disclose the fact that the duebills were given as a part of the consideration for a mortgage upon the home of the debtor, Holst. Thereupon notice was issued and served on Dugenan under the provisions of chapter 151, Laws 1889. Holst failed to make any appearance in any of the proceedings had in the case. Dugenan appeared in court, and agreed to a continuance of the case. This was the only appearance made by him in the proceedings of garnishment. In this proceeding

of garnishment, judgment was rendered for the payment of the duebills into court for the use of the judgment creditor. The plaintiff in error offers this judgment as a defense to the action of Duigenan. This judgment cannot defeat the action of defendant in error. There are two questions discussed in the brief of plaintiff in error:

1. "Are the proceeds of the mortgage given subject to garnishment for the payment of an ordinary judgment indebtedness?" The homestead was exempt, and Holst and wife had a right to sell the homestead or mortgage the same, and the money derived from such sale or mortgage would be exempt. This fund was exempt. It was not subject to garnishment. The mortgagors had a right to mortgage their home, and use the money in any manner that they saw fit, and this fund was not subject to the garnishment proceedings.

2. "Are the provisions of chapter 151, Laws 1889, applicable to proceedings in justice court?" We are of the opinion that it was the intention of the legislature that the provisions of such chapter should be applicable to procedure in the district court only. The first section of the act reads: "Section 1. Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person. * * *" It was evidently the intention of the legislature that this chapter should be confined in its operation to procedure in the district court. There is nothing in the act itself inconsistent with the declarations of the legislature. The judgment of the trial court will be affirmed. All the judges concurring.

(6 Kan. App. 219)

**CLOUD COUNTY BANK OF CONCORDIA
v. GERMAN INS. CO. OF FREE-
PORT, ILL.**

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

**DIRECTING VERDICT—INSURANCE—TERMS OF
POLICY—OTHER INSURANCE.**

1. In an action upon a fire insurance policy, where it appears that the insured has by his own act forfeited his right to recover under the policy according to its very terms, and no waiver being pleaded or shown, it is not error for the court to instruct the jury to return a verdict for the defendant.

2. Additional insurance taken out upon the property covered by such policy in the name of the owner thereof, with an indorsement that the loss, if any shall occur, shall be payable to a mortgagee named therein as his interest may appear, is not an insurance of the mortgage interest owner, but is an insurance of the property for the benefit of the owner, and, if taken out without notice or consent, is a violation of the condition in the prior policy, avoiding it in case the owner shall take out additional insurance without the knowledge or consent of the company.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by the Cloud County Bank of Concordia against the German Insurance Company

of Freeport, Ill. Judgment for defendant, and plaintiff brings error. Affirmed.

Kennett & Peck, for plaintiff in error. G. W. Barnett, I. A. Rigby, and C. S. Botsford, for defendant in error.

MAHAN, P. J. This is an action upon a policy of \$1,500, upon a livery barn and contents. The defendant answered in avoidance of its liability on the policy—First, the existence of a mortgage on the barn at the time the policy was issued, and not indorsed on or expressed in the policy, without the knowledge or consent of the defendant or its agent; second, that the plaintiff in error permitted foreclosure proceedings upon the property, without the defendant's knowledge or consent; and, third, that the plaintiff in error took out additional insurance upon all the property, without the defendant's knowledge and consent, not permitted by the policy, and in violation of its terms. The provision of the policy to which the first defense is applicable is as follows: "If the property above described is incumbered in any manner, it must be so represented to this company and expressed in this policy in writing; otherwise, this insurance contract shall be void and of no effect." The clause in the policy to which the second defense is addressed is as follows: "If the property hereby insured be levied upon or taken into possession or custody, under any legal process, or if the title or possession be disputed in any proceedings at law or equity, or if the property be advertised for sale under a deed of trust or mortgage, or if a suit be commenced to foreclose a mortgage on the property insured, this policy shall at once cease to be binding upon this company." The provision of the policy to which the third defense is addressed is as follows: "The consent of this company to all additional insurance contracts relating to the property herein specified as insured must be obtained, and indorsed on this policy, or this policy will be void and of no effect, whether such additional insurance contracts shall be valid or not, and whether such other companies shall be solvent or not." A copy of the policy was attached to the plaintiff's petition, and made a part thereof. The plaintiff introduced his evidence, showing the loss and the amount thereof or value of the property, and rested. It developed during the examination of the plaintiff in error upon his case that, at the time the policy was issued, the property was mortgaged to the plaintiff for the sum of \$5,000 and accrued interest. The defendant offered evidence in support of its several defenses, and, at the conclusion of the evidence, the court instructed the jury to return a verdict for the defendant. The only assignment of error is this action of the court in giving to the jury a binding charge to return a verdict for the defendant. Was there anything in the case developed by the evidence to submit to the jury? Or could a verdict for the plain-

tiff have been sustained upon the evidence contained in the record?

Upon the first defense there was evidence tending to show that the company, through its general agent, who issued the policy, knew of the existence of the mortgage at the time the contract was made and delivered. It is true, the agent denied all knowledge of the existence of the mortgage, but it was a question to go to the jury; and upon this defense the case should have gone to the jury to determine whether or not, at the time the contract was made, the insurance company, through its agent, had knowledge of the incumbrance, the existence of which is pleaded to avoid the policy, and particularly if that had been the only defense.

Upon the second defense—viz. that the insured permitted the mortgage upon the property to be foreclosed, that is, a judgment of foreclosure entered, with an order of sale, and a subsequent advertisement for sale, which was, however, suspended before the loss, and further time given to the insured thereon—there was sufficient evidence to go to the jury, to the effect that the defendant company had waived its right to claim of forfeiture upon this ground by having knowledge of the fact brought to it, without any effort on its part to cancel the policy, but, on the contrary, permitting the plaintiff to go on, on the theory that it was indemnified by the policy. Upon this defense the case should have been submitted to the jury, to determine the fact as to whether there was a waiver upon the part of the company of this ground of forfeiture, if there were no other reasons to avoid the contract.

Upon the third defense, the evidence showed that the insured and the plaintiff, to whom the cause of action was assigned, after the loss, procured two other policies, in the sum of \$1,000 each, to be taken out in favor of the insured upon the property. Under the provision of the policy above recited, this would avoid the policy, unless notice thereof was given to the company or to its agent, or unless, by the terms of the policy, the insured was permitted to take out other insurance. There is an entire absence of any evidence that this additional insurance was noticed to the defendant company. Indeed, it is not claimed that any such notice was given to it. The plaintiff relies—First, upon the clause in the policy permitting concurrent insurance; and, second, that the subsequent policies were not policies to the insured upon the property, but policies to the mortgagee upon the mortgagee's interest. The policies were introduced in evidence, and upon their face they insure the owner of the property to whom the policy in suit was issued. There is a clause inserted in the body of the policies to the effect that in case of loss, if any should occur, the indemnity should be paid to the mortgagee, as its interest might appear. But this is an insurance, not of the mortgagee's interest, but

of the property itself, and would not entitle the insurance company to subrogation to the rights of the mortgagee under the mortgage in case of loss and payment by the company, but would authorize, by the terms of the policy, a recovery of the loss by the owner in case he showed that the mortgage was satisfied or the rights of the mortgagee to the funds released. So that the additional insurance is, in fact, to the insured, under the policy in controversy.

There is some contention between counsel as to what, in fact, constitutes the clause in the policy in suit permitting additional insurance. After that written part of the policy designating the amount of insurance and the property upon which it is given, there is this clause: "Twelve hundred and fifty dollars on barn, and two hundred and fifty dollars on feed. Concurrent insurance permitted." Now, it appears from the record that, at the time this policy was issued by the defendant company, another policy in another company was issued by the same agent to the insured for the amounts specified in this permit, upon the property therein specified. It is contended by the plaintiff in error that the permission for additional insurance was without limit. Upon the other side it is contended that the permit referred to the \$1,250 on the barn, and the \$250 on the feed; and it is contended by counsel for the defendant in error that the period appearing after the word "feed" was inserted by the stenographer, and does not appear in the original policy. However this may be we cannot determine, nor would it make any difference. It was before the trial court, and that court must have determined from an inspection of the policy that the permit was limited to the \$1,500 expressed in the entire clause, and this is the correct interpretation thereof. The action of the court in instructing the jury to find for the defendant can be sustained upon no other ground; and assuming that the permit was limited to the \$1,500, as expressed in the entire clause, the action of the court in instructing the jury to find for the defendant can be sustained, and ought to be sustained upon the third defense. By the very terms of the policy, the insured agreed, and his assignee is bound by the agreement, to give notice to the defendant company of any additional insurance, and obtain its consent thereto. There is no claim of notice, as above stated, and there is no evidence of any fact that would amount to a waiver of that condition. It is expressly provided that a failure to so give notice, and obtain the consent of the defendant company, should work a forfeiture of this policy. Upon this third defense, had the case been submitted to the jury by the trial court, and a verdict returned for the plaintiff, it would have been the duty of the trial court to have set it aside, upon the ground that there was no evidence to sustain it.

It is further contended by counsel for plaintiff in error that, although the court might have been justified in directing a verdict so far as loss by the burning of the barn was concerned, yet that it was error for the court to instruct the jury to return a verdict for the defendant as to the personal property in the barn. This contention cannot be sustained, for the reason that the additional insurance taken out by the insured covered the personal property, as well as the barn itself. Judgment affirmed. All of the judges concurring.

(6 Kan. App. 831)

COMSTOCK-CASTLE STOVE CO v.
GALLAND. (No. 140.)

(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

TRIAL—ABSENCE OF PLAINTIFF—DISMISSAL OF ACTION.

Where an action is commenced upon a promissory note, an answer filed, stating a good defense, to which the plaintiff files a reply, and thereafter fails to appear on the trial, it is not error for the trial court to permit the defendant to proceed to trial upon the issues joined.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by the Comstock-Castle Stove Company against S. Galland. Judgment for defendant, and plaintiff brings error. Affirmed.

D. B. Vansyckel, for plaintiff in error. Sutton & McGarry, for defendant in error.

SCHOONOVER, J. The plaintiff in error commenced this action against defendant in error to recover \$972.89, the amount due on four promissory notes. The defendant's answer contained: First, a plea of payment; second, a claim of surety and an avoidance; third, a general denial. The plaintiff denied the first, and demurred to the second, cause of defense. The demurrer was overruled, and plaintiff replied. On the issues the case was tried by the court without a jury, and judgment rendered for the defendant for costs. The plaintiff brings the case here for review.

The contention is over the second cause of defense, which is as follows: "For the second cause of defense against plaintiff's petition this defendant says that the defendants James Langton and I. A. Utterback were the principals in the making of said notes, and this defendant was simply surety thereon; that after the execution of the same, and on the 16th day of August, 1888, the defendants James Langton and I. A. Utterback, having failed in business, executed and delivered to this defendant and Geo. B. Cox and W. G. Sherlock a chattel mortgage to secure the payment to this defendant and said Cox and said Sherlock of certain sums of money by said Utterback and Langton owing to this defendant and said Cox and said Sherlock, and to secure the payment to this defendant for the use and benefit of this plaintiff the note sued on in this action, upon a large

amount of personal property consisting of the general hardware, implements, and other merchandise in Dodge City, Kansas, of the value of \$17,000, which sum was largely in excess of all the indebtedness secured by said chattel mortgage; that soon after the execution and delivery of said chattel mortgage this defendant, said Cox, and said Sherlock took possession of said personal property, and by an agreement properly entered into by and between this defendant, said Cox, and said Sherlock, the said Cox was constituted the agent of all the mortgagees named in said chattel mortgage, to hold, sell, and dispose of said personal property for cash, and to apply the proceeds of the sale thereof in payment of the indebtedness secured by said chattel mortgage as aforesaid; that soon thereafter this defendant informed this plaintiff fully of the execution and delivery of said chattel mortgage, and the appointment of said Cox as the agent of the mortgagees for the purpose aforesaid, and that this defendant had instructed said Cox, as said agent, to pay the notes sued on in this action out of the proceeds of such sales at as early a date as practical, and that this defendant authorized this plaintiff to consider said Cox as the agent of this plaintiff for the purpose of collecting the amount of the notes sued on in this action from the proceeds of the sales of said personal property, and the payment of the same direct to this plaintiff; that thereafter this plaintiff treated said Cox as its agent in the collection of the amount of said notes from the sales of said personal property, and the payment of the same to it, and this plaintiff thereby became subrogated to all the rights of this defendant under and by virtue of said chattel mortgage, so far as the collection of the notes sued on in this action were concerned, and the payment to it of the money so collected, and this defendant was thereby relieved from all liability on said notes, if the money for the payment of the same was so collected thereafter from the proceeds of the sales of said personal property by said Cox, acting as aforesaid as the agent of this plaintiff by reason of the arrangement entered into by and between this defendant and this plaintiff concerning said agency as aforesaid; that thereafter said Cox, acting as the agent of this plaintiff in the manner aforesaid, collected the amount due upon the notes sued on in this action from the proceeds of sales of said property, and whether said Cox ever paid the same to this plaintiff or not is a matter unknown to this defendant, and for which he is no way liable. This defendant therefore alleges the fact to be that said Cox, acting as the agent of this plaintiff as aforesaid, did collect for this plaintiff the amount due upon said notes, from the proceeds of the sales of said personal property, under and by virtue of said chattel mortgage, and under and by virtue of the arrangement concerning the agency of said Cox entered into by and between this defendant and this plaintiff." A demurrer to this defense was overruled. Thereupon the plaintiff filed the

following reply, which was not verified: "Comes now the plaintiff, and, for reply to the second count of defendant S. Galland's answer, says that he denies each and every, all and singular, the material allegations in said second count contained that are inconsistent with the allegations of plaintiff's petition."

A cause of defense is stated in the answer, and no error was committed in overruling the demurrer. There is also a sufficient allegation of appointment or authority, which must be taken as true unless a denial of the same be verified by affidavit of the party, his agent or attorney. On the issues so settled the case was tried by the court without a jury. The evidence introduced is not brought to this court, but plaintiff insists that the court had no authority to try the case in the absence of the plaintiff or his attorney. The plaintiff neglecting to bring on the trial as limited by the course of practice, the court could only dismiss the case. We cannot agree with counsel for plaintiff in error. This action was commenced to recover upon four promissory notes. In the absence of defendant, judgment could have been taken against him without further proof on the part of the plaintiff. From the nature of the answer, it is clear that evidence other than of the defendant would be necessary to establish his defense. Can it be said that in an action to recover upon a note, where an answer is filed, a defense stated, and thereupon plaintiff replies, the trial court is required, in the absence of the plaintiff on the trial, to dismiss the case over the objection of defendant? If this is the practice, a plaintiff may commence his case, and have it dismissed by the court from time to time until such time as the defendant fails to appear, or his evidence is lost, and then take judgment. Upon the facts as they appear in the record, there was no violation of section 4493, Gen. St. 1889, which provides that "an action may be dismissed by the court, where the plaintiff fails to appear on the trial." The cause of defense arises out of the transaction set forth in the petition as the foundation of plaintiff's claim. It is connected with the subject of the action, existed at the time the action was commenced, and sufficient facts are set forth to constitute a defense. Evidence was introduced at the trial, but is not before us. No error was committed, so far as this court is able to review, in rendering judgment for defendant for costs. The judgment will be affirmed. All the judges concurring.

(6 Kan. A. 531)

DAY v. FIRST NAT. BANK OF GARDEN CITY.¹

(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

JUDGMENT—COLLATERAL ATTACK—FINAL ORDER

1. Where a justice of the peace renders a judgment against the defendant, and makes an order requiring the garnishee to pay certain

money into court, such judgment and order cannot be attacked by the judgment debtor in a collateral proceeding, although the property in controversy may be exempt.

2. "Where a motion is made before a justice of the peace to vacate and discharge proceedings in garnishment after final judgment, and said motion is overruled, said ruling by the justice is a final order, and may be taken to the district court on error." *Carlyle v. Smith*, 36 Kan. 614, 14 Pac. 156.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by Simpson W. Day against the First National Bank of Garden City. Judgment for plaintiff before a justice. From a judgment in favor of defendant in the district court, plaintiff brings error. Affirmed.

A. J. Hoskinson, for plaintiff in error. Milton Brown and H. F. Mason, for defendant in error.

SCHOONOVER, J. On the 20th day of February, 1891, Brown, Bierer & Cotteral commenced an action against Simpson W. Day before L. E. Payne, a justice of the peace, to recover the sum of \$280.66, and on the same day caused a summons in garnishment to issue to and against the First National Bank of Garden City, Kan. The garnishee answered. A trial was had. Judgment for plaintiffs, Brown, Bierer & Cotteral, for \$280.66, with interest and costs, and an order issued requiring the First National Bank, the garnishee, to pay the amount of said judgment into court. A motion for a new trial was overruled; also, a motion to vacate the order of garnishment. No further proceedings were had before Justice Payne. Afterwards, on the 16th day of March, 1891, Simpson W. Day commenced his action against the First National Bank of Garden City, before J. P. Zimmerman, a justice of the peace in Finney county, Kan., to recover the money ordered paid into court by Justice Payne to satisfy the judgment of Brown, Bierer & Cotteral. Judgment was rendered in favor of plaintiff, Day. The defendant bank filed its petition in error in the district court. The case was tried, and judgment rendered for the defendant bank. The plaintiff, Simpson W. Day, brings the case here for review.

The judgment rendered by Justice Payne against Simpson W. Day in favor of Brown, Bierer & Cotteral, and the order requiring the First National Bank to pay the amount of said judgment into court, stand unchallenged, and cannot be attacked in a collateral proceeding, although the property in controversy is exempt. The motion to vacate and discharge the proceedings in garnishment before Justice Payne was made after final judgment. The order of court overruling the motion after judgment was final, and could have been taken to the district court on error. The judgment of the district court will be affirmed. All the judges concurring.

¹ Rehearing denied.

(6 Kan.App. 833)

**COMSTOCK-CASTLE STOVE CO. v.
GALLAND.**

(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

**NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—
DILIGENCE.**

A new trial will not be granted where the alleged newly-discovered evidence was in the possession of the party applying at the time, the issues were made up, and at the time of trial. It must be shown that the existence of such evidence came to the knowledge of the party applying after the trial, that it is material, and that the party applying has been diligent. It must further appear to the court that, if a new trial should be granted, a different judgment would probably be rendered.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by the Comstock-Castle Stove Company against S. Galland. Judgment for defendant, and plaintiff brings error. Affirmed.

Emmons & Wells, J. M. Kirkpatrick, and D. B. Vansyckel, for plaintiff in error. Sutton & McGarry, for defendant in error.

SCHOONOVER, J. On the 4th day of April, 1893, the plaintiff filed its petition in the court below for a new trial in case No. 140, same title, just affirmed by this court. Several grounds for a new trial are alleged, all of which have been considered in case No. 140, except the grounds of newly-discovered evidence, and that the decision of the court is not sustained by sufficient evidence.

On the 24th day of June, 1891, in case No. 140, the defendant filed his answer, alleging the agency and authority of one George B. Cox to act for plaintiff. To this answer plaintiff filed a demurrer, which was overruled. Thereafter he filed a reply, which was not verified. Upon the theory that the court will permit the plaintiff to verify its reply if a new trial is granted, we consider the newly-discovered evidence, which relates to the agency and authority of George B. Cox. Plaintiff now contends that, if it is permitted to have a new trial, it will prove by newly-discovered evidence "that the answer filed by the defendant, Galland, was false and untrue, and that it was well known to be false and untrue at the time it was filed." The alleged evidence consists of certain letters written and payments made by defendant to plaintiff more than a year before plaintiff filed its reply. This evidence was in the possession of plaintiff at the time its reply was filed, and has been ever since; so cannot be considered as newly discovered. Our attention is called to certain statements of counsel for defendant alleged to have been made long after the trial. These statements cannot be construed to be an admission of defendant through his attorney. A new trial will not be granted where the alleged newly-discovered evidence was in possession of the party applying at the time the issues were made up, and at the time of trial. It must be shown

that the existence of such evidence came to the knowledge of the party applying after the trial, that it is material, and that the party applying has been diligent. It must appear to the court that, if a new trial should be granted, a different judgment would probably be rendered. We have read the evidence attached to plaintiff's petition, upon which the judgment was rendered, and cannot say, under the pleadings, that the court erred in rendering judgment for defendant for costs. The judgment will be affirmed. All the judges concurring.

(6 Kan.App. 820)

KANDT v. CHICAGO, R. I. & P. RY. CO.

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

WRIT OF ERROR—TAXATION OF COSTS.

A controversy over the taxation of costs alone cannot be taken to this court by proceedings in error.

(Syllabus by the Court.)

Error from district court, Dickinson county; O. L. Moore, Judge.

Action by William Kandt against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. From a further judgment that he pay the costs, he brings error. Dismissed.

J. H. Mahan and C. S. Crawford, for plaintiff in error. Stambaugh & Hurd, for defendant in error.

WELLS, J. This action was originally brought in a justice's court by the plaintiff in error against the defendant in error for \$205 damages, attorney's fee, \$20, and costs. The defendant filed its offer to confess judgment for \$25, and costs to March 8, 1895. An appeal was taken from the justice to the district court of Dickinson county, where an amended bill of particulars was filed, claiming a judgment for \$205, and for reasonable attorney's fee and costs. A general denial was filed by the defendant, and the case tried to a jury on February 11, 1896, who returned a verdict for the plaintiff for \$2.50, and their answers to special questions of fact submitted to them by the court. On February 13, 1896, plaintiff filed his motion for a new trial, which was heard on February 26, 1896, overruled, and excepted to. Thereupon judgment was rendered for said plaintiff and against said defendant for \$27.50, and costs up to March 8, 1895, taxed at \$5.20, and a further judgment that the plaintiff pay the costs in said case since March 8, 1895, taxed at \$232.15; to which last ruling and judgment plaintiff excepted, and asked and was allowed 60 days to make and serve a case-made for the court of appeals. What appears to be a journal entry of the trial and subsequent proceedings of the court in said action, from which the foregoing recitals are taken, appears on pages 23 to 27, inclusive, of the

record, followed by the approval of the judge and the file mark of the clerk of date February 13, 1896; while on page 35 is another recital of what appears to be the same proceedings, under date of March 5th, and refers to pages 23 to 27 of the case-made as the place where the judgment rendered is set out. We shall not attempt to untangle this matter of dates, as we do not think it necessary. The case is before us at this time only on a motion to dismiss the proceedings in error. And as we think this court is without jurisdiction to try said case, under paragraph 4642, Gen. St. 1889, we shall consider that question only. The only exception saved by the plaintiff to the judgment below was as to that part against him for costs. There is nothing in the record from which either of the 13 grounds of error alleged in the motion for a new trial could be reviewed. A controversy over the taxation of costs alone cannot be taken to this court on proceedings in error. *Railway Co. v. Yawger*, 52 Kan. 691, 35 Pac. 814. The motion will be sustained, and the action in this court dismissed, at the costs of the plaintiff in error.

McELROY J., concurs. MAHAN, P. J., having been of counsel, not sitting.

(6 Kan.App. 240)

SNYDER v. HAMM et al.

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

PLEADING PAYMENT—REVIEW OF EVIDENCE.

1. The answer in this case examined, and *held*, that such answer raises the issue of payment. It is evident the defendant intended to plead payment. The court tried the case with the understanding and upon the theory that the answer raised the issue of payment. A fair construction of the statements in the answer justified the court in saying that payment was pleaded.

2. The findings of fact examined, and *held*, that such findings are supported by the evidence, and were sufficient to justify the court in rendering judgment for the defendant and against the plaintiff.

(Syllabus by the Court.)

Error from district court, Jewell county; Cyrus Heren, Judge.

Action by J. H. Snyder against A. H. Hamm and W. S. Canan. Judgment for defendants, and plaintiff brings error. Affirmed.

T. S. Kirkpatrick and Ira. F. Hodson, for plaintiff in error. Geo. H. Bailey, for defendants in error.

McELROY, J. This was an action brought by J. H. Snyder, as plaintiff, in the district court of Jewell county, against A. H. Hamm, and W. S. Canan, receiver of Hulbert Bros., as defendants, on a promissory note bearing date of May 12, 1891, executed and delivered by A. H. Hamm to Hulbert Bros. for the sum of \$1,180, due and payable six months after date, and payable to Hulbert Bros. or

order. This note was sold and delivered without indorsement by Hulbert Bros. to the plaintiff in error before maturity. Hulbert Bros. were bankers at Burr Oak, and on or about the 15th day of May, 1891, they became indebted to J. H. Snyder in the sum of \$600, and as security for the payment of this indebtedness Hulbert Bros. assigned and delivered without indorsement the promissory note sued on. The defendant A. H. Hamm filed an answer, alleging, among other things: "First, Comes now the defendant A. H. Hamm in the above-entitled action, and for his amended answer to plaintiff's amended petition denies each and every material allegation therein set out, except what is specifically hereinafter admitted. Defendant admits that he, A. H. Hamm, and Sarah Hamm, his wife, made, executed, and delivered to the said Hulbert Bros., Burr Oak, Kansas, their joint promissory note bearing date of May 12, 1891, for the sum of eleven hundred eighty dollars, due in six months after date, said note being secured by chattel mortgage. Defendant alleges that he paid said note of eleven hundred dollars (bearing date of May 12, 1891, due in six months after date, made, executed, and delivered by the said A. H. and Sarah Hamm to the said Hulbert Bros., Burr Oak, Kansas) on or about the 12th day of August, 1891, in full of account, and that said note was the only note ever given by the said defendant to the said Hulbert Bros., Burr Oak, Kansas, bearing date of May 12, 1891, for the aforesaid amount." The reply of plaintiff was general denial. The case was tried by the court without a jury. The court made special findings of fact and conclusions of law as follows: "That on the 12th day of May, 1891, the defendant A. H. Hamm executed a note, which is sued upon in this action, dated on the said 12th day of May, 1891, for the sum of \$1,180 whereby the said defendant promised to pay to Hulbert Bros., or order, said amount at the Bank of Burr Oak, Kansas, with interest at the rate of 10 per cent. from due; that said note was due six months after date; that some time after the execution of said note, and before maturity thereof, to wit, about the 13th day of May, 1891, it was transferred to the plaintiff herein, J. H. Snyder, by delivery only, there being no indorsement or assignment of any kind upon the back of said note; that at the time of said delivery of said note, and ever since, the said Hulbert Bros. were indebted to the said J. H. Snyder, and are still indebted to the said J. H. Snyder, upon the obligations for which said note was delivered to secure as collateral security; that on the 12th day of August, 1891, the said A. H. Hamm and Sarah Hamm executed their promissory note to the said Hulbert Bros. in the sum of \$1,828.50, and that the mortgage securing the \$1,180 note was thereafter surrendered to the defendant; that part of the consideration of this \$1,828.50 note was the said note of \$1,180, now in question; that

said defendant A. H. Hamm afterwards paid a portion of the said \$1,828.50 note, and executed a note for the remaining portion thereof, and the said note of \$1,828.50 was thereupon delivered to the said defendant A. H. Hamm; that as a part of the said indebtedness the said A. H. Hamm executed to the Saxton National Bank of St. Joseph a note of \$600, being the balance of said indebtedness, which is still outstanding and unpaid; that at the time of the execution of the said \$1,828.50 note said A. H. Hamm had no knowledge or information that the said \$1,180 note had been transferred to any person, but that shortly before the execution of the \$600 note to the Saxton National Bank one T. B. Carpenter told the said A. H. Hamm that he had a note against him, which he had received from one Snyder; that the receipt by the said Hulbert Bros. of the \$1,828.50 note, including as part of the consideration the \$1,180 note, and the surrender of the mortgage securing said \$1,180 note, and the subsequent surrender of the said \$1,828.50 note to the said A. H. Hamm, amounted to a payment of the said \$1,180 note." As conclusions of law the court found "that the plaintiff ought not to recover in this action; that the defendant ought to recover his costs."

The first question presented to this court is as to whether or not the defendant pleaded payment. It is apparent from an examination of this answer that the defendant Hamm intended to plead payment. The court tried the case with the understanding and upon the theory that this answer raised the issue of payment. While it is somewhat difficult to say just what is meant and intended by the pleader, we think that a fair construction of his statements will justify the court in saying that payment was pleaded, and that the issue of payment is raised by this answer. We do not believe that it will do violence to the language used to say that the issue of payment is raised by the pleadings.

As to the second assignment of error,—that the court erred in rendering judgment for the defendant upon the findings of fact,—an examination of the findings of fact will show that, if such findings are supported by the evidence, no other judgment could have been rendered by the trial court. It is contended by the plaintiff in error that the defendant Hamm had notice at the time of the execution of the note for \$1,828.50, and prior to the time thereof, that plaintiff in error was the holder of the note sued on. There is no evidence in the record showing that Hamm had notice of Snyder's interest in the note until long after he executed the note in payment of the note in suit. The trial court heard the testimony of the witnesses, and had an opportunity to see the witnesses and observe their conduct, and a better opportunity to judge of the fairness of the witnesses than has this court. There is some

evidence tending to establish each of the findings of fact. We will not examine the evidence for the purpose of weighing the same. If there is competent evidence to support each finding of fact, we are content. This has been uniformly held by courts of last resort to be sufficient. From what we have said, it follows that the trial court committed no error in overruling the motion for a new trial. The judgment of the lower court will be affirmed. All the judges concurring.

(6 Kan.App. 320)

SHOCKEY et al. v. Akey.

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

APPEAL—RECORD—NUNC PRO TUNC ENTRY.

On the hearing of the motion for a nunc pro tunc entry the question is, what order was in fact made at the time by the trial court, and upon such question the minutes on the court's docket and the testimony of the presiding judge are ordinarily controlling. *Aydelotte v. Brittain*, 29 Kan. 99.

(Syllabus by the Court.)

Application by Jane Akey for a nunc pro tunc journal entry. Motion allowed.

Stambaugh & Hurd, for the motion. C. S. Crawford, opposed.

MCELROY, J. This is an application by Jane Akey for a nunc pro tunc journal entry to show the action and judgment of this court on the 7th day of June, 1895, on an application to substitute Jane Akey for E. A. Akey as defendant in error. At the June term, 1895, of this court, held at the city of Topeka, this case was on the docket for hearing on the motion for a substitution. The only question presented to this court is, what order, if any, was in fact made June 7, 1895, by this court, upon such motion? A. D. Gilkeson, who was presiding judge of this court, testified: That on motion of plaintiffs in error Jane Akey was substituted for the defendant in error; that on the trial docket for the June term, 1895, of this court for the Eastern division, begun and held in the city of Topeka, the following entries appear: "Isaac Shockey et al. vs. E. A. Akey," "Motion submitted and allowed." "Send order to Central division." That these entries are under date of June 7, 1895, and that such entries were made by him, as presiding judge, in conformity to the order of the court. There are numerous affidavits offered in evidence, from which it appears that on the 7th day of June, 1895, the plaintiffs in error submitted to this court a motion asking for the substitution of Jane Akey as defendant in error, for the reason that E. A. Akey was then dead, and that prior to his death he had assigned the judgment to Jane Akey. Plaintiffs in error appeared by their attorneys, and Jane Akey appeared by her attorneys, Stambaugh & Hurd, and confessed the motion. The court ordered that

said Jane Akey be substituted as defendant in error. The plaintiffs in error made and filed their brief and argument in the case on August 28, 1896. This court afterwards examined the record in said case, and affirmed the judgment of the trial court. 47 Pac. 562. This was all done evidently with the understanding that such substitution had been made. From the evidence we find that on the 7th day of June, 1895, said substitution was made by the order and judgment of this court, and that the nunc pro tunc journal entry should be recorded. Within the authority of the case of *Aydelotte v. Brittain*, 29 Kan. 109, the motion is allowed, and the clerk of this court ordered to file and record the nunc pro tunc journal entry as prayed for.

WELLS, J., concurs. MAHAN, P. J., having been of counsel, not sitting.

(6 Kan.App. 225)

EATON v. McELHONE, Sheriff.

(Court of Appeals of Kansas, Northern Department, C. D. July 20, 1897.)

EXECUTION—DISTRIBUTION OF PROCEEDS.

Money in the hands of a sheriff, by him collected upon execution, before the same is returnable or returned, is not subject to be taken by such sheriff on other writs, or applied by him in satisfaction of other writs against the plaintiff in the execution, and which such sheriff may hold against him.

Wells, J., dissenting.

(Syllabus by the Court.)

Error from district court, Smith county; Cyrus Heren, Judge.

A. S. Eaton moved to amerce P. H. McElhone, sheriff of Smith county. From an order denying the motion, he brings error. Reversed.

B. H. Tracy, for plaintiff in error. L. C. Uhl and Webb McNall, for defendant in error.

MAHAN, P. J. Eaton, the plaintiff in error, recovered a judgment against Whittemore & McDowell in the Smith county district court. Execution was issued to the defendant, McElhone, as sheriff of Smith county, on this judgment. The sheriff collected and received from the judgment debtor McDowell \$328.34, being the amount due on the judgment, with interest and costs. Without the consent of the plaintiff, the defendant in error, as such sheriff, applied \$173.82 of the money so collected by him on this execution to the payment of a tax warrant held by him, as such sheriff, issued by the treasurer of Smith county, and returned into court \$154.42, the remainder of the money, and his receipt, as such sheriff, for the taxes, purporting to be a receipt to Eaton therefor. There was a demand upon him made by Eaton's attorneys of record for the \$173.82 so disposed of by him, which demand was refused, and a motion was made in the district court of Smith county, from which the execution was

issued, to amerce the sheriff in the sum of \$173.82 so collected and withheld. Amercement was denied by the district court, for the reason that the sheriff had applied the money to the payment of the tax warrant, which he had a right to do. The plaintiff in error excepted, made a motion for a new trial, which was overruled, and now brings the case here upon a case-made, setting forth the facts as above for review, and assigns for error that the court erred in overruling the plaintiff's motion for an order of amercement against the defendant in error; and, second, in rendering judgment against the plaintiff for costs; and, third, in overruling the motion of the plaintiff for a new trial.

The only question involved in the case is the right of the sheriff to appropriate money which he had collected upon execution, during the life of the execution, and before its return, to the satisfaction of another writ then in his hands for execution. The money was in the custody of the law, and could not be seized upon execution. The sheriff had no specific money or other property of the plaintiff, Eaton, upon which he could levy. He was not indebted to Eaton, so that he might, under the provisions of section 486 of the Civil Code, pay the tax warrant out of the fund, if such a tax warrant comes within the provisions of that section, which is doubtful. But this he does not claim to do. He claimed, as is shown by the record, to have levied upon the money by virtue of the tax warrant. It is contended by the defendant in error that the plaintiff in error waived his right to proceed against the sheriff in this summary manner by accepting the \$154.42 which the sheriff did pay into court. This claim is not tenable. He had a right to take from the court whatever the sheriff returned, and he could be amerced for withholding the remainder. See sections 472 and 474 of the Civil Code. Section 474 says: "When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten per cent. thereon." The court erred in denying the motion for amercement. *Scott v. Smith*, 2 Kan. 438; *Turner v. Fendall*, 1 Cranch, 117; *Dawson v. Holcomb*, 1 Ohio, 275; *Clymer v. Willis*, 3 Cal. 364; *Freem. Ex'ns*, 130. The case of *Turner v. Fendall*, 1 Cranch, 117, seems to be the first decision upon the question rendered in this country, and it is approved by our supreme court in 2 Kan. 438, in the case referred to above. It is true that there are courts that have held to the contrary, but, as a matter of public policy, if for no other reason, a sheriff or other officer collecting money on a writ issued by a court ought not to be permitted to dispose of the money, except as he is directed by the writ, or by turning the money into court, that the court itself may make such directions concerning the fund as accords with justice and the rights of the parties connected therewith. Judgment is reversed, with direc-

tions to proceed in accordance with the above opinion.

WELLS, J. (dissenting). I am not prepared to concur in the opinion of the court in this case. It seems to me that the reasoning is faulty, and the conclusion inequitable and unjust. If the sheriff had money in his hands belonging to said debtor, he had a right to take it under his execution. This is admitted in *Turner v. Fendall*, 1 Cranch, 117, in which the eminent chief justice argued that the money did not become the property of the execution creditor until it was actually paid him, but previous to its delivery it was a debt. While this reasoning was sound, and in harmony with the strict rules of construction maintained at that time, it does not seem to me to accord with our more liberal practice under our statutory proceedings in aid of execution; but, admitting its correctness, then, if it was a debt, the debtor had a right to pay it on the execution, under section 486 of the Civil Code. It seems to me a gross injustice and wrong to compel a sheriff who has honestly and fairly used his best endeavors to enforce all the judgments of the court to suffer for so doing, and be required to pay a sum of money to the execution creditor which has already been applied to the payment of a valid judgment against him. I am fully aware that under the rigor and strictness of the old practice this has often been sanctioned, but I do not believe that it is in harmony with the more liberal policy of our present laws, and I am unable to find any decision of our supreme court that gives any sanction to this contention of the plaintiff in error. The case of *Scott v. Smith*, 2 Kan. 437, does not touch this question in the least. This was an action brought against the plaintiff in error for the recovery of an amount due on a general deposit with the defendants as bankers. They answered that the balance had been levied upon by the sheriff under an execution against the plaintiff, and the court below held that, as the deposit was general, there was no specific money in the hands of defendants on which a levy could be made, and this was sustained by the supreme court. No question was raised or involved as to the right of the sheriff to use money in his hands belonging to the execution debtor to pay said debt, and the reference to *Turner v. Fendall*, 1 Cranch, 117, was solely upon the proposition that, as the deposit was general, there was no specific money upon which a levy could be made. In the case of *Scott v. Smith*, supra, the court plainly intimates that, if they had brought themselves within the provisions of section 475 (being our present section 486), it would have been a complete defense, but they relied upon a levy, and afterwards asked to change their defense, which was not allowed. The supreme court of Missouri, in *Ex parte Fearle*, 13 Mo. 467, and the supreme court of Tennessee, in *Dolby v. Mullins*, 3 Humph. 437, held that money belonging to the judgment debtor in the hands of a sheriff may be used by him

to satisfy an execution in his possession; and, while I am willing to concede that the weight of authority is the other way, it seems to me these are more in harmony with later laws, and more correct theories.

(6 Kan.App. 306)

FINANCIAL ASS'N v. STATE.

(Court of Appeals of Kansas, Northern Department, C. D. June 16, 1897.)

INTOXICATING LIQUORS—UNLAWFUL USE OF REALTY—KNOWLEDGE OF OWNER—LIEN—ESTABLISHMENT.

1. In an action to establish a lien upon real property, under section 2538 of the General Statutes, knowledge of such unlawful use of the property may be shown by showing that the agent of a nonresident owner had knowledge of such unlawful use, where such agent is in charge of the property, renting and collecting the rents thereof, notwithstanding the direction of the principal to such agent not to rent the property for such unlawful purpose.

2. In order to authorize the enforcement of such lien in behalf of the state for fine and costs for the violation of the prohibitory law, it is not necessary that the tenant convicted of such offense shall be kept in confinement under sentence of the court until after the establishment of such lien; it is sufficient that he be adjudged to be committed to the jail until fine and costs are paid, and that he be actually and in good faith committed thereto; and a release from such commitment by order of the board of county commissioners, after such action to enforce the lien is begun, will not defeat the state's right to such lien.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by the state against the Financial Association. From a judgment for plaintiff defendant brings error. Affirmed.

J. G. Slonecker, for plaintiff in error. J. P. Otis, F. P. Harkness, and R. C. Miller, for the State.

MAHAN, P. J. This was an action in the Clay county district court to enforce a lien on the real estate of the defendant, plaintiff in error, under the provisions of section 2538, Gen. St., the same being a part of the prohibitory law. There was a trial to a jury. In fact, it appears from the record and briefs of counsel that there had been three trials to juries, and three verdicts for the plaintiff, two of which had been set aside by the trial court, and a motion to set aside the last one, which was denied by the court, and the case is here for review upon a case-made.

At the conclusion of the plaintiff's evidence in its case in chief the defendant filed a demurrer thereto, which was overruled by the court, and this order overruling the demurrer to the evidence is the basis for the first assignment of error. Under this assignment of error the plaintiff contends that the evidence did not show that the plaintiff in error knowingly suffered the premises against which the state sought to enforce this lien to be used or occupied for the sale of intoxicating liquors, contrary to the law. The defendant (plain-

tiff in error) is a domestic corporation, and the knowledge sought to be imputed to it of the fact that the premises were used as a place for the sale of intoxicating liquors was through its agent, one Stratton, a resident of Clay Center, in whose charge the premises were, as agent for the defendant, to lease and collect the rents, and look after the property generally, except that he had no authority, according to the evidence, to make general repairs, without first submitting the matter to his principal. The contention is that the knowledge of an agent will not bind the principal in such case; that it is necessary to bring home such knowledge to some officer of the corporation. This position is untenable. There is no reason in law why a corporation should be exempt from such rules of law as apply to private citizens, and, happily for this court, the supreme court of this state has twice determined that such knowledge is the knowledge of the principal in cases involving the construction of this statute. See *Hardten v. State*, 32 Kan. 640, 5 Pac. 212, and *Koenig v. Adams*, 37 Kan. 52, 14 Pac. 439, to the effect that such knowledge may be proved by circumstantial evidence, and that knowledge sufficient to put a prudent man upon inquiry would be equivalent to knowledge of the ultimate fact.

It is also contended that the evidence is not sufficient to sustain the finding of the jury that the agent, Stratton, had knowledge of the fact, or knowledge of such circumstances as would have put him upon inquiry, which inquiry would have led him to a knowledge of the fact. Upon a careful examination of the evidence in the record, we find that the weight or preponderance of the evidence sustains the verdict of the jury in this respect.

The next contention under this assignment is that it appeared from the evidence that at the time of the last trial the defendant, who had been convicted of the sales of liquor in the premises, had been released from confinement in the jail. The judgment of the court was that he be confined in the county jail until the fines and costs assessed against him should be paid. The defendant Mantell, the occupant of the premises, was convicted on four separate counts for sales of liquor unlawfully upon the premises under his tenancy with the defendant, and the fines and costs amounted to nearly \$1,200. He had been released from imprisonment under the sentence of the court by order of the board of county commissioners, under the authority given to them by the statute. But this release was not until after this action against the Financial Association had been begun, and after it had been once or twice tried. So that the cause of action had not only accrued to the state, but had been actually commenced, and was in progress, at the time he was released. The reasonable construction to be given to that proviso of the statute which says that the person against whom such fine and costs are assessed shall be

committed to the jail of the county until such fine and costs are paid is that there shall be a judgment, in good faith, of commitment, and that the judgment shall be put into execution. It is not necessary, in order to give the state this right to enforce the fine against the property, that the defendant convicted of the offense shall be kept in jail until such time as there is a recovery from the property owner,—a satisfaction of the judgment. This proviso was so construed, in effect, in the supreme court in the case of *State v. Pfefferle*, 33 Kan. 718, 7 Pac. 597. The court in that case say: "That it was the purpose of the legislature, in adding the proviso to the section, to prevent thereby the person who violates the law from being relieved or discharged from commitment on account of the fine and costs being made a lien upon the real estate of the person knowingly suffering and permitting him to sell liquor thereon in violation of law." How long must the defendant in such case be imprisoned in order to give the state a cause of action, and the right to enforce the fine and costs against the property? The court further say in that case that the action to enforce the lien may be commenced any time after the judgment, within the statute of limitations. The proviso was sufficiently complied with to authorize the recovery.

The second assignment of error is that the trial court erred in the admission of testimony. It is not necessary to go into a critical examination of this question, as there is no merit in it. The facts admitted in evidence were competent, and tended to prove the knowledge of Stratton of the fact that liquor was being sold upon the premises in violation of law.

The third assignment of error is that the court erred in giving and refusing instructions to the jury, and the first contention under this assignment is that the third, fourth, fifth, and sixth paragraphs of the instructions of the court were erroneous. This contention is based upon the previous contention that the knowledge of the agent could not be imputed to the principal. The instructions embody the law correctly in relation to such knowledge of the agent binding his principal, and the contention is therefore without merit.

The next contention under this assignment is that the court erred in refusing to instruct the jury, first, that the jury must be satisfied of every fact necessary for the state to recover beyond a reasonable doubt. This is not a criminal case, but a civil action. It has been so decided by our supreme court, and a mere preponderance of the evidence is sufficient to authorize a recovery as in any other civil case. The next instructions asked and refused by the plaintiff in error were, in effect, that it was necessary to show that some officer of the defendant had knowledge, or that some officer of the company was a party to a lease made purposely and knowingly in violation of the law, and that the

knowledge of a local agent of a nonresident owner of such violation of the law is not knowledge of the owner, unless such agent is the general agent of the owner, without limitation as to authority to rent the property, unless such owner assented to this lease or use for such purpose, or connived at the same. This is not the law applicable to this case. The agent, Stratton, had authority to lease the property, collect the rent, and manage the property generally in the absence of the corporation owner, with but two limitations, so far as the evidence discloses. The first was that he was not authorized to lease it for any unlawful purpose. Such a restriction was useless and nugatory. The other was that he was not authorized to make any extensive repairs without first submitting the matters to the officers of the company. But he had authority to lease the property to such person or persons as he saw fit, at such rates as he saw fit, to collect the rents, to look after the interests of the owner of the property in all respects regarding it; and it was while he was in the discharge of his duty in this respect, which he owed to the principal, that he came into possession of the knowledge of its unlawful use. And the instruction was therefore misleading, and inapplicable to the case, and was properly refused.

The fourth assignment of error is that the court erred in overruling the motion of the defendant for a new trial. This assignment is predicated, to be sure, upon errors preceding the motion; and, as no errors are pointed out in the record which would require or justify the court in granting a third new trial, this assignment is without merit.

It follows that, there being no error apparent in the record, that the defendant has had three trials, and that three different juries have found against it, and the court has approved the verdict, the judgment ought to be affirmed, and is affirmed. All the judges concurring.

(6 Kan.App. 645)

HATCH v. SMITH.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

CHANGE OF RESIDENCE—EVIDENCE.

A residence once shown to have been established is presumed to continue until it is clearly shown to have been abandoned. The residence of a man having a family, which he maintains, is *prima facie* where that family dwells. A man's acts and conduct are more to be considered, in determining the question of a change of residence, than any mere declaration of intent; and when the question of residence or nonresidence is doubtful the question should be so determined as will best secure the rights of creditors and others having dealings with such party. *Keith v. Stetter*, 25 Kan. 70.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Hiram F. Hatch, receiver of the

American National Bank of Arkansas City, against S. C. Smith. Judgment for defendant, and plaintiff brings error. Reversed.

Stanley & Vermillion, for plaintiff in error.

SCHOONOVER, J. In this case an attachment affidavit was filed, alleging that the defendant was a nonresident of the state, an order of attachment was issued, a stock of groceries levied upon, and a motion filed by defendant to discharge the attachment for the reason that the grounds of attachment stated in the affidavit of plaintiff were untrue. The motion was tried before the judge. No evidence was introduced, except in the form of affidavits and depositions, all of which are contained in the record. The court found for the defendant, and the plaintiff brings the case here for review.

The question presented is whether or not the defendant in error, S. C. Smith, was at the time the attachment was issued (June 13, 1892) a nonresident of the state of Kansas. It appears from the testimony that at the time the attachment was issued, and for many years prior thereto, the defendant had a wife and family residing in Jamestown, N. Y., in a large, brick dwelling, with 12 or 14 rooms, well furnished, the doorplate bearing the name of S. C. Smith. This residence was owned by Julia A. Smith, wife of defendant in error. The defendant had been doing business in Arkansas City at different times since 1880. He built the Gladstone Hotel, and under the firm name of S. C. Smith & Co. the defendant personally assisted, as a member of the firm, in conducting the business of said hotel. During all this time, and until after the goods attached in this action were purchased (March 4, 1892) by Sarah U. Miller, daughter of defendant, he continued to claim Jamestown, N. Y., as his place of residence. In the purchase of the goods attached, by Sarah U. Miller from Frank & Homer, the defendant in error acted as the attorney in fact for his daughter, Sarah U. Miller. On the 30th day of April, 1892, Sarah U. Miller sold the goods attached, to her mother, Julia A. Smith. In this transaction the defendant in error acted as the agent of his wife, Julia A. Smith. In relation to the last transaction, Julia A. Smith testified as follows: "I don't know of my own knowledge what the consideration was. Mr. Smith did the business. I think I did not tell him to buy this stock of groceries for me. Mr. Smith said when he went to Arkansas City, in April, that he was going to take charge of these goods. I don't think that he told me how he was to be paid for his services. He did not tell me of any other means of any livelihood there. I didn't understand that Mrs. Miller was to transfer the goods to me when they were shipped West." It appears that the defendant in error was in possession and had absolute control of these goods at all times; that from a part of the proceeds he purchased a business property in Arkansas

City in his wife's name. But, so far as the record discloses, the purchase was without her authority, knowledge, or consent. No steps were ever taken by the defendant in error to move his family from New York to Kansas. The only evidence is the declarations of the defendant in error and his wife in the month of April, after the purchase of these goods by his daughter, that they intended to make their home in Arkansas City. These declarations were made to several parties, whose affidavits appear in the record. In this relation the defendant testifies as follows: "Q. How long have you been a resident of Arkansas City, Cowley county, Kansas? A. From the last of April. Q. Where did you live prior thereto? A. Jamestown, New York." Cross-examination: "Q. Have you made any arrangements to dispose of your house there,—either to sell or to rent it? A. No. Q. Any arrangements for moving your goods from there here,—your household goods? A. What we need to when the time comes. Q. Have you, as yet, made any arrangements for moving? A. Yes; by talking,—that's all. Q. Who did you talk with? A. My wife. She says she will come the 1st of September. Q. Does she say she will bring all her household goods with her? A. No; not all of them. Q. Expect to bring only a part? A. Will sell anything we do not want. Q. Have you had a talk of that kind? A. No; I do not know as we did, but that is what we will do. Q. How do you know if they belong to your wife? You cannot very well sell them without talking to your wife, can you? A. Well, I would advise her to do it. I do not own the things, of course. Q. But you made no definite arrangements for making any removal, have you? A. No, sir. Q. Except this talk that you speak of? A. That is all." The bill of sale from the daughter, S. U. Miller, made April 30, 1892, while S. O. Smith was acting as the agent of his wife, Julia A. Smith, is as follows: "Otoe, O. K. Territory, April 30, '92. For valuable consideration, I hereby sell, transfer, and assign all my right, title, and interest to all goods, merchandise & fixtures to Julia A. Smith, Jamestown, N. Y., being the same goods bought of Frank & Homer as per a certain contract made by S. O. Smith, attorney, & Frank & Homer, dated March 4/92, and according to invoice made by Wm. Frank and S. O. Smith. Witness my hand this thirtieth day of April, A. D. 1892. S. U. Miller." Julia A. Smith, in her deposition of June 20, 1892, says: "I reside in Jamestown, New York." "I should say my husband resides in Arkansas City, Kansas." "Mr. Smith and myself were married in October, 1852, and have lived together as husband and wife, and always expect to."

It is clear from this evidence and the recital in the bill of sale that the wife of the defendant still resides in the home occupied by the family, in Jamestown, N. Y.; that no definite arrangements of any kind have ever been made to move the family or the household

goods from New York to Kansas. There has been no act upon the part of the defendant in error, except the purchase of a business property, to accompany and verify the intent. A residence once established is presumed to continue until it is clearly shown to have been changed. This presumption cannot be overcome by mere talk. The fact and the intent must concur. The term "residence" is construed by our statute to mean "the place adopted by a person as his place of habitation, and to which whenever he is absent he has the intention of returning." In determining the residence of a voter, our statute provides (paragraph 2668, Gen. St. 1889): "(5) The place where a married man's family resides shall be considered and held to be his residence." In the case of *Adams v. Evans*, 19 Kan. 174, it is held that: "In order to effect a change of residence, there must exist both the intention to change and the fact of removal. Neither is sufficient alone." Applying to the evidence in this case the rule given by Justices Brewer and Horton in the case of *Keith v. Stetter*, 25 Kan. 70, the order of the district court must be reversed. "A residence once shown to have been established is presumed to continue until it is clearly shown to have been abandoned. The residence of a man having a family which he maintains is *prima facie* where that family dwells. A man's acts and conduct are more to be considered in determining the question of a change of residence than any mere declaration of intent, and when the question of residence or nonresidence is doubtful the question should be so determined as will best secure the rights of creditors and others having dealings with such party." *Keith v. Stetter*, 25 Kan. 70. The order of the district court will be reversed, and the case remanded, with instructions to overrule the motion to dissolve the attachment. All the judges concurring.

(6 Kan. A. 607)

REXROAD v. JOHNSON, Constable.

(Court of Appeals of Kansas, Southern Department, O. D. July 21, 1897.)

FRAUDULENT CONVEYANCE—CONSIDERATION.

A mortgage which, upon its face, purports to secure an absolute indebtedness, when in fact it is given in good faith to secure the mortgagee against a contingent liability as surety, is not void as to creditors of the mortgagor.

(Syllabus by the Court.)

Error from district court, Reno county.

Action by William Rexroad, administrator of the estate of John Rexroad, against H. N. Johnson, constable. Judgment for defendant. Plaintiff brings error. Reversed.

Wright & Stout, for plaintiff in error. W. H. Lewis and D. H. Martin, for defendant in error.

DENNISON, P. J. This is an action in replevin, commenced on May 20, 1889, in the dis-

strict court of Reno county, Kan., to recover the possession of certain personal property. The property had been levied upon by Johnson as constable, under an execution issued upon a judgment against J. A. Rexroad. The plaintiff in the court below, John Rexroad, claimed to be entitled to the possession of the property under a chattel mortgage executed and delivered to him, and by him duly recorded, about four months prior to the levy by the defendant. The plaintiff, John Rexroad, died after this case had been filed in this court, and the action has been revived in the name of William Rexroad, the administrator of the estate of John Rexroad. The mortgage was given to secure the payment of a note of \$1,000, which was also executed and delivered to the plaintiff, John Rexroad. The evidence of the plaintiff disclosed the fact that said plaintiff had signed as surety some three notes for J. A. Rexroad, who was his son, and that they had been frequently renewed. The notes aggregated about \$1,180, and the property included in the mortgage was of the value of \$598. At the close of the evidence of the plaintiff, the defendant interposed a demurrer thereto, upon which the court made the following ruling, as shown by the journal entry thereof: "And thereupon the defendant introduced a demurrer to the plaintiff's evidence on the ground that said evidence did not state facts sufficient in law to constitute a cause of action, and that the chattel mortgage introduced in evidence was null and void, because it shows on its face to secure an absolute indebtedness, and the evidence shows it was given to indemnify plaintiff for signing notes of mortgagor as surety. The court, having fully considered the demurrer and evidence, and being fully advised in the premises, doth sustain said demurrer, and doth hold that the evidence on the part of the plaintiff is insufficient to constitute a cause of action against the defendant." The plaintiff brings the case to this court for review, and asks for a reversal of this ruling.

Several questions are raised by the defendant in error in his brief, but the only one necessary to be considered in this case is the question raised by the demurrer, namely: Is a mortgage null and void which purports to secure an absolute indebtedness, when in fact it is given to indemnify the mortgagee against loss in signing notes of the mortgagor as surety? If such a mortgage is void, then the demurrer was properly sustained. If it is not void, then the court erred in sustaining the demurrer, and the plaintiff is entitled to a new trial. The trial in this case was had on May 20, 1890, and the evidence tends fairly to show the following state of facts: The note and mortgage were executed September 6, 1888, and became due September 1, 1889, and the mortgage was filed for record January 25, 1889. J. A. Rexroad testified that he gave the note

and mortgage to his father, this plaintiff, to indemnify him against loss upon three notes which his father had signed for him, all of which were then outstanding. One of these notes was for the sum of \$400.80, payable at the People's Savings Bank; another was for something over \$500, payable to J. Redhead & Co.; and the third was for the sum of \$250, payable to the Phelps-Biglow Windmill Company. He further testified that when his father signed with him, he had promised to protect him with a chattel mortgage upon his property, and that when he began to see that he could not pay the notes, and that his father would have to pay them, he executed and delivered to his father the note and mortgage to secure him against loss. John Rexroad testified that in the spring and summer of 1888 his son, J. A. Rexroad, was building the Howard House in Hutchinson, and wanted him to sign some notes as security for said J. A. Rexroad, who promised to indemnify him against loss by executing to him a chattel mortgage upon his personal property, and that upon the strength of said promise he signed as security, with said J. A. Rexroad, one note, of about \$430, to the People's Savings Bank; another, of about \$500, to the Redhead Bank; and another, of \$250, to the windmill company, of Kansas City. He further testified that he had paid the Redhead note, and also introduced in evidence a note for \$500 and interest, dated November 20, 1888, due in 30 days, and upon said note is the following receipt: "Dec. 9, 1889. Pd. in full by John Rexroad. \$556 prin. and int.; \$8.30 costs; \$564.30 total." He further testified that he had renewed the note at the People's Bank twice in his own name, after paying the interest, and had given a chattel mortgage upon his own property to secure it. He also testified that the other note had not been paid, as it was not yet due. The right of John Rexroad to recover is, therefore, clearly shown unless the mortgage is void for the reason that it purports to secure an absolute indebtedness, when in fact it is given to indemnify the mortgagee against loss in signing notes of the mortgagor as surety. No authority decisive of this point is cited in the brief of either party, but we have made a limited examination of the authorities, and find that they hold such a mortgage valid. "The fact that a chattel mortgage appears on its face to be given to secure an absolute debt, but in fact was in good faith given to secure against a contingent liability as surety, does not avoid it as to creditors of the mortgagor." 3 Am. & Eng. Enc. Law, 188. See, also, Sims v. Mead, 29 Kan. 124. We approve the doctrine enunciated in these authorities, and find that the court erred in sustaining the demurrer of the defendant to the evidence of the plaintiff. The judgment of the district court is reversed, and the case remanded for a new trial. All the judges concurring.

(8 Kan. App. 630)

CITY OF EMPORIA v. WAGONER.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

CITY ORDINANCE—REGULATION OF BICYCLE RIDING.

Where the power to regulate the riding of bicycles on streets of a city devoted to the passage of vehicles is vested in municipal councils of cities of the second class by act of the legislature, this court will not say as a matter of law that an ordinance requiring every person using a bicycle to ring an alarm bell upon approaching any and all crossings or cross walks is unreasonable.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

E. W. Wagoner was convicted of a violation of a city ordinance, and appeals. Affirmed.

E. N. Evans, City Atty., for plaintiff in error. L. B. and J. M. Kellogg, for defendant.

SCHOONOVER, J. The defendant was convicted in the police court of the city of Emporia for not ringing the alarm bell attached to his bicycle, as required by section 1 of an ordinance of said city, and fined the sum of \$1 and costs. From this conviction he appealed to the district court of Lyon county, where a jury was waived, and a trial had by the court. The defendant was again convicted, and a fine of \$1 and costs imposed. He now brings the case here for review, and challenges the validity of the ordinance, for the reasons that "the ordinance is unreasonable, oppressive, inconsistent with the laws of the state, makes special and unwarranted discriminations upon the users of the public streets of the city and the different kinds of vehicles in use thereon, and contravenes the common rights of the citizen." The following is a copy of section 1 of the ordinance: "Section 1. It shall be unlawful for any person or persons to use any bicycle or tricycle on any street, avenue, alley or public park within the city of Emporia, unless there be securely attached thereto a good and sufficient bicycle or tricycle repeating alarm bell not less than 2¼ inches in diameter, or to use any such vehicle in the nighttime unless there be also attached thereto a good and sufficient bicycle or tricycle lamp or lantern well lighted for a warning of approach. Upon approaching any and all crossings or cross walks at the intersections of Commercial, Mechanic and Merchants streets with Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth avenues, and at a reasonable warning distance therefrom, every person so using any such vehicle shall ring the alarm so attached, whether or not

pedestrians be thereon at the time; and upon approaching any and all other walks or other crossings in this city whereat or whereon pedestrians may at the time be every such person shall ring such alarm bell in such manner and at such distance as fully as to warn such pedestrians of the approach." The power of a city of the second class to pass an ordinance regulating the riding, driving, or passing of horses, mules, oxen, or other teams, or any vehicle drawn thereby, over or upon or across sidewalks, or upon any of its streets, is vested by the act relating to cities of the second class. Gen. St. 1880, par. 809. The bicycle was not in common use as an instrument of conveyance at the time this act was passed (1872). It is a "new and improved method of transportation," now extensively used for convenience, pleasure, and business. Its right to the road and street has been determined. It is a vehicle; and a person riding a bicycle has no rights superior to those of a person riding or driving a horse, and the rules of law applicable to the hack, the dray, and the carriage apply with equal force to the bicycle. To forbid a citizen riding on a bicycle the freedom of a public street devoted to the passage of vehicles would be void as against common right, but to regulate implies that the act controlled is lawful, but that certain restrictions are necessary to preserve the public from harm. To ride a bicycle through the public streets of a city is not unlawful, but when ridden at a high rate of speed may be dangerous, and, for the safety of the public, should be regulated and controlled. This power has been conferred by the legislature of this state upon the municipal councils of cities of the second class. The motive of the council in passing this ordinance is not questioned or reviewed. The contention is that it is unreasonable and oppressive. From the record it is disclosed that at the time the defendant was tried in the district court between 200 and 300 bicycles were in use in the city. This is sufficient, in our opinion, to challenge the attention of the council. The manner in which these bicycles were ridden and controlled, their rapid and noiseless turn at corners and approach at crossings, the probable danger to other vehicles and pedestrians, and the crowded conditions of the streets at certain crossings, were all matters for the consideration of the council. The power to regulate the riding of bicycles on the streets of a city devoted to the passage of vehicles having been vested in the governing bodies of cities of the second class by the legislature, we cannot say, as a matter of law, that the requirements of section 1 are unreasonable. The judgment of the district court will be affirmed. All the judges concurring.

(6 Kan.App. 667)

STATE v. SHELTON.

(Court of Appeals of Kansas, Southern Department, C. D. July 27, 1897.)

CRIMINAL LAW—ARGUMENTS OF COUNSEL—
PERSONAL ABUSE.

1. In determining the effect of improper statements made by a county attorney in his closing argument to the jury, the strength of the testimony offered against the defendant will be considered.

2. In this case, the strength of the testimony considered, *held*, that the improper statements made by the county attorney in his closing argument to the jury may have determined the verdict.

(Syllabus by the Court.)

Error from district court, Cowley county; J. A. Burnette, Judge.

A. J. Shelton was convicted of larceny, and appeals. Reversed.

L. C. Boyle and J. C. Stanley, for appellant. Joseph O'Hare, for the State.

SCHOONOVER, J. The defendant was arraigned in the district court of Cowley county on the information of the county attorney, charging him with the crime of burglary and grand larceny. He entered a plea of not guilty, and on trial before a jury was convicted of petit larceny, and adjudged and sentenced to pay a fine of \$100 and costs of the suit, and stand committed until such fine and costs were paid. The defendant appeals, and in his fourth specification of error complains of misconduct on the part of the county attorney in his closing argument to the jury; that his language was abusive; that he appealed to the prejudice of the jury, and improperly alluded to the fact that the defendant did not testify. He said: "You are farmers, and wheat has been stolen in this county, and two of the jurors have lost wheat by theft; and you owe it to yourselves and to the farmers of this county to see to it that an example is made of one of them." Defendant claims this language was repeated in different forms several times; that he said at another time: "Wheat stealing has been going on in this county, and farmers are having their wheat stolen by these wheat thieves, and two of the jurors on this jury have had wheat stolen by them; and you owe it to yourselves and to the people of this county to see to it that this wheat thief is punished." This language was calculated to create prejudice against the prisoner. There is nothing in the record to justify its use. It was personal abuse. The court of its own motion should have interfered, reprimanded the county attorney, and instructed the jury to disregard the language in their deliberations. In *State v. Comstock*, 20 Kan. 655, it was said: "Courts ought to confine counsel strictly within the facts of the case,

and, if counsel persistently go outside of the facts in their argument to the jury, then the court should punish them by fine and imprisonment; and, if they should obtain a verdict by this means, then the court should set such verdict aside." In *State v. Gutekunst*, 24 Kan. 252, it was said: "It is the duty of the district courts to interfere of their own motion in all cases where counsel, in argument in jury trials, state pertinent facts not before the jury, or use vituperation and abuse, predicated upon alleged facts not in evidence, calculated to create prejudice against the prisoner."

The defendant contends that the county attorney improperly alluded to the fact that the defendant did not testify; that the prosecuting officer in his closing argument said: "We find this stolen wheat in the defendant's possession in front of his house, on the morning of August 31st; and he sold it to Grice, early that morning, in Arkansas City. Now, if he is an honest man, why does he not show or prove where he got that load of wheat, or how he come by it?" Paragraph 5280, Gen. St. 1889, provides: "That the neglect or refusal of the person on trial to testify * * * shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." In *State v. Mosley*, 31 Kan. 357, 2 Pac. 783, Justice Horton said: "We understand the statute is explicit that, when a defendant in a criminal case declines to testify in his own behalf, absolute silence on the subject is enjoined on counsel in their argument on the trial, and that the court will hold the prosecuting attorneys to a strict observance of their duty in this respect." It was held in the case of *State v. Graham* (Iowa) 17 N. W. 192: "The statute is explicit that the district attorney shall not refer to the fact that the defendant did not testify in his own behalf, and for him to do so, expressly or in substance, is misconduct that warrants the granting of a new trial." We cannot say that the language used by the county attorney, considered alone, is such a violation of the statute above quoted as to require a reversal of this case; but his closing argument was well calculated to prejudice the jury against the defendant. The state relied for a conviction upon circumstantial evidence alone. The case is a close one, and the strength of the testimony offered against the defendant has been carefully considered in arriving at a conclusion. We are agreed, the strength of the testimony considered, that the improper statements made by the county attorney in his closing argument to the jury may have determined the verdict. The judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

(6 Kan.App. 636)

WILLIAMS, Constable, v. MILLER et al.
(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

ATTACHMENT OF MORTGAGED PROPERTY—MORTGAGEE IN POSSESSION—PLEADING AS EVIDENCE.

1. A mortgagee in possession is the owner of the personal property described in the mortgage, as against an officer who takes the property under an attachment as the property of the mortgagor.

2. Such possession cures any defect which may arise from authorizing the mortgagor to sell the property.

3. A person in possession of a chattel mortgage and the notes secured thereby, who has renewed the mortgage, collected a large portion of said notes, and taken possession of the mortgaged property under the mortgage, will be held to be the owner thereof for the purpose of recovering the mortgaged property from an officer who attaches it as the property of the mortgagor.

4. A verified answer in another action cannot be introduced by one party as part of the cross-examination of a witness for the adverse party to contradict or impeach such witness.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county.

Action by Amanda Miller and R. A. Sankey against J. C. Williams, constable. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. V. Daugherty, for plaintiff in error.

DENNISON, P. J. This is an action in replevin, brought in the court of common pleas of Sedgwick county, Kan., by the defendants in error, to recover the possession of certain personal property. Miller and Sankey claimed the right to the possession of the property as the mortgagees of the prior owners, and they claimed to have been in possession of the property when Williams, as constable, levied an attachment upon it as the property of George D. Martin, one of the mortgagors. Amanda Miller introduced in evidence a chattel mortgage from Pattee and Martin to Weller and Miller, and she claims that the notes which it secured had been assigned to her. R. A. Sankey introduced a note and chattel mortgage executed and delivered by George D. Martin to said Sankey. Each of these mortgages contained a description of the property levied upon under the attachment. After the plaintiffs had introduced their evidence, and rested, the defendant demurred to the evidence, and the second ground of the demurrer was that two causes of action were improperly joined. This part of the demurrer was sustained, and the defendants, after having first obtained leave of the court, dismissed the action as to R. A. Sankey, and proceeded with the case as to Mrs. Miller. There was no error in this dismissal. The jury found in favor of Mrs. Miller, and judgment was rendered on their verdict, and Williams brings the case here for review. The plaintiff in error contends that the court erred in receiving the chattel mortgage offered in evidence by Mrs. Miller, and argue three reasons for such error:

First, because the mortgage offered was not relevant to any issue made by the pleadings; second, because the mortgage purported to have been given to Weller and Miller, and there was no assignment of the mortgage to Amanda Miller, and no evidence of a transfer to her of the notes secured by the mortgage; third, because the mortgage offered showed upon its face that it was fraudulent as to creditors, and void. The first reason is predicated upon the fact that, while the petition alleges that the plaintiffs below were the absolute owners and entitled to the immediate possession of the property, the mortgage tended to prove a special ownership therein. The third reason is predicated upon the fact that a clause in the mortgage allowed the mortgagor to retain possession and sell the goods in the ordinary course of trade, and to apply the proceeds to the payment of the notes secured, and in keeping up the stock. These objections are both overcome by the fact that the plaintiffs below had reduced the goods to possession prior to the levy of the attachment. The question of the possession of the goods by the plaintiffs below was made an issue in the pleadings. Each side introduced evidence upon such issue, and the general finding of the jury, having been approved by the court, settled such issue in favor of Mrs. Miller. The second objection is overcome by the fact that the mortgage which was introduced in evidence had been renewed by Mrs. Miller as assignee, and the notes and mortgage were in her possession, and a large portion of them had been paid to her, and that she was in possession of the stock under the mortgage. The plaintiff in error also contends that the court erred in refusing to permit him to introduce in evidence a verified answer of Mr. Sankey, filed by him in the case of *Pierce & Bushnell Manuf'g Co. against Martin, Sankey et al.* There was a dispute between Mr. Sankey and the deputy constable as to whether Mrs. Miller and Mr. Sankey were in possession of the stock on the evening of October 23d, when the levy was made. The plaintiff in error sought to introduce the answer in evidence as part of the cross-examination of Sankey, claiming that the facts set forth in the answer did not correspond with the evidence then being given by him. It might have been proper to have interrogated Mr. Sankey as to whether he had not made different statements in the answer from those he was then making, and then have introduced the answer for the purpose of impeaching this testimony; but it cannot be seriously contended that the plaintiff in error could have introduced the answer as part of the cross-examination of Mr. Sankey. There are other assignments of error argued, but, when analyzed upon the theory that Mrs. Miller was in possession of the stock at the time of the levy, it appears that no material error was committed. The judgment of the court of common pleas is affirmed. All the judges concurring.

GERMAN INS. CO. OF FREEPORT, ILL., v.
WRIGHT.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

EXECUTRIXS—RIGHTS OF ACTION—PLEADING
—TIME OF FILING—TRIAL—ACTIONS—
WHEN COMMENCED—INSURANCE—
INCREASE OF RISK.

1. When a petition alleges that the plaintiff is the duly qualified and acting executrix of the last will of a person who procured a policy of insurance upon a dwelling house, but who died before the loss occurred, *held*, that such executrix is the proper person to maintain an action to recover upon a loss occurring under the policy, and that the allegations of the petition are sufficient to show her right to maintain the action.

2. The case of *Rice v. Hodge*, 26 Kan. 164, and others, cited and followed, as to the time the issues are made up and the case is triable.

3. When a fire insurance policy contains a clause which provides that the policy shall be null and void if the risk be increased in any manner, except by the erection and use of ordinary outbuildings, such clause applies to anything done, either directly or indirectly, by the insured, and not to those things which are done by another, and over which the insured has no control, and of which, possibly, he may not even have had notice.

4. Where an attempt is made to commence an action on January 29, 1891, by filing a petition in the district court, and causing the issuance of a summons thereon, the service of which is afterwards set aside, and where an alias summons is issued on February 12, and properly served February 14, 1891, *held* that, under paragraph 4097 of the General Statutes of 1889, the action will be deemed to have been commenced on said January 29th.

(Syllabus by the Court.)

Error from district court, Butler county.

Action by Mary J. Wright, executrix of the will of Joseph F. Wright, deceased, against the German Insurance Company of Freeport, Ill. From a judgment for plaintiff, defendant brings error. Affirmed.

Winne & Sanders, for plaintiff in error.
E. N. Smith for defendant in error.

DENNISON, P. J. This action was brought in the district court of Butler county, Kan., by Mary J. Wright, as executrix of the last will of Joseph F. Wright, deceased, as plaintiff, against the German Insurance Company of Freeport, Ill., defendant, to recover for the loss by fire of a dwelling house upon which said company had written a policy. The house, when the policy was written, was located upon a farm; and permission was given in the policy to the insured to remove the house to lot 8, block 5, Hightower's addition to Beaumont, Kan. The house was so removed, and afterwards another house was built upon an adjoining lot, within 21½ feet of the insured house; and said other house caught fire, and was the immediate cause of the burning of the insured house. The other building was erected without the knowledge or consent of said insurance company, and was erected upon a lot not owned or controlled by the assured, and without any fault upon his part. The policy

provides that if the risk be increased in any manner, except by the erection and use of ordinary outbuildings, without consent indorsed thereon, the policy shall be null and void. It also provides for immediate notice of loss, and proof thereof to be furnished within 30 days, and, if such proof is not furnished within 60 days from date of loss, the claim shall not be due and payable, and the policy to be null and void and of no effect. It also provides that no suit shall be brought against the company unless commenced within 6 months after the loss shall have occurred. The policy is dated May 27, 1886, and expired May 24, 1891. Joseph F. Wright died June 28, 1890. The loss under the policy occurred August 5, 1890. On September 24, 1890, Mary J. Wright was duly appointed executrix of the last will of Joseph F. Wright by the probate court of Butler county, Kan., and she immediately qualified and entered upon the discharge of the duties imposed by said appointment.

The plaintiff in error contends that the demurrer to the petition should have been sustained, because it contains no allegation of the probate of the will, and that, the devisee being an assign or assignee of the insured, said devisee, and not the executrix, is the proper party to bring suit. The petition alleges that this defendant in error is the duly appointed, qualified, and acting executrix of the last will of Joseph F. Wright. The allegations of the petition are sufficient, and the executrix is the proper party to maintain the action. *Insurance Co. v. Curran*, 8 Kan. 9.

The answer in this case was filed on the 24th day of March, 1891. On the 20th day of October, 1891, the parties announced themselves ready for trial. After the jury was impaneled and sworn to try the case, the defendant moved the court for judgment, stating that no reply was filed in the case. The plaintiff asked leave to file a reply, which request was granted, and the motion of the defendant for judgment was overruled. The defendant then objected to the introduction of any evidence in the case, for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The plaintiff then offered in evidence an agreement between the parties, marked "Exhibit A." The defendant then objected to the trial of the case at that time for the reason that the issues were not made up 10 days before the commencement of the term. The court stated to the counsel for the defendant, "If the defendant is prepared to make a showing that this is a surprise. I will give you until morning." The counsel for the defendant asked for the delay, and the case went over until the next morning, when the trial was proceeded with over the objection of the defendant, but without any showing having been made by him. The defendant claims that the court

erred in permitting the reply to be filed out of time, and in forcing it to go to trial the next day after the filing of the reply. These matters rest in the sound discretion of the trial court, and there was no abuse of judicial discretion. Paragraph 4189 of the General Statutes of 1889 authorizes the court, or a judge thereof in vacation, to allow pleadings to be filed after the time fixed by the statute. See *Wright v. Bacheller*, 16 Kan. 259; *Rice v. Hodge*, 26 Kan. 164. The issues in this case were made up as soon as the plaintiff defaulted by not filing a reply, and the case stood for trial at any term begun 10 days thereafter. The provisions of paragraph 4410, Gen. St. 1889, had spent their force. This position is clearly argued in *Rice v. Hodge*, 26 Kan. 164. See, also, *Taylor v. Hosick*, 13 Kan. 518; *Grant v. Pendery*, 15 Kan. 242.

The next contention is that the court erred in overruling the demurrer to the evidence introduced by the plaintiff below. This contention is based—First, upon the fact that an exposure had been erected upon a lot adjoining the one upon which the insured house was located; second, that no proof of loss had been furnished; third, that suit had not been commenced within six months after the fire occurred.

In answering the first proposition, it will become necessary to determine whether the clause in the policy which provides that the policy shall become null and void if the risk be increased in any manner, except by the erection and use of ordinary outbuildings, without consent indorsed thereon, shall be held to apply to a case where a building is erected upon an adjoining lot, which belongs to another party, and is in no manner under the control of the insured. No authorities are cited by either party upon this question. It would seem to us to apply to anything done either directly or indirectly by the insured, and not to those things which are done by another, and over which the insured has no control, and of which, possibly, he may not even have had notice.

In answering the second proposition, it is only necessary to state that Mr. Winne is admitted by the pleadings to be the duly-authorized agent of the company, and there was some evidence tending to establish the fact that prior to the expiration of the 60 days he denied the liability of the company, giving as a reason therefor that the fire caught in the other house. It has been repeatedly held by the supreme court of this state that this, if true, obviates the necessity of proof of loss being furnished.

In answering the third contention the following facts are to be considered: The loss occurred August 5, 1890. The petition was filed January 29, 1891, and two summonses were issued upon that day. On February 11, 1891, the defendant specially appeared, and moved the court to dismiss the action because no legal summonses had ever been served upon it;

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and on March 4, 1891, the service was set aside, and the costs taxed to the plaintiff. On the 12th day of February, 1891, the plaintiff had an alias summons issued, which was duly served upon the defendant. An action is commenced by the filing of a petition, and causing a summons to be issued thereon. Gen. St. 1889, par. 4136. It is not contended that the six-months limitation is not binding upon the parties. This question has been settled in this state by repeated decisions of our supreme court. See *McElroy v. Insurance Co.*, 48 Kan. 200, 29 Pac. 478; *Insurance Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Insurance Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099. In *Insurance Co. v. Stoffels*, supra, the court says: "A stipulation in a policy of insurance limiting the time within which suit may be commenced thereon is binding on the policy holder; and, where the provision in the policy is that 'no action shall be sustained thereon unless commenced within six months next after the fire,' the limitation shall commence to run from the date of the fire, and not from the expiration of the period within which the company may pay the loss." The petition in this case was filed January 29, 1891, being several days prior to the expiration of the six-months limitation. The service of the summons only was set aside on March 4, 1891. On February 12, 1891, an alias summons was issued and properly served. This is a full compliance with the requirements of the statutes. The plaintiff certainly attempted to commence her action on January 29, 1891, and faithfully, properly, and diligently endeavored to, and did, procure a service upon the company within 60 days. See *Thompson v. Manufacturing Co.*, 29 Kan. 476. "An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service, but such attempt must be followed by the first publication or service of the summons within sixty days." Gen. St. 1889, par. 4097. Not only this, but the defendants entered their general appearance in the case on February 24, 1891, by filing a demurrer to the plaintiff's petition. In *Insurance Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479, the summons and the service thereof were set aside, and the action was held to have been commenced too late; but in that case no attempt had been made to procure service, and service of the summons was not made within 60 days from the filing of the petition. The judgment of the district court is affirmed. All the judges concurring.

(6 Kan. App. 617)

MILLER v. FORBES et al.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

SUMMONS—SERVICE—FAILURE OF SHERIFF TO RETURN.

Where a summons is made returnable in nine days from the day of its issuance, and is

served one day before the day upon which it is made returnable, and twenty-one days before the defendants are required to answer, the summons and the service thereof, and a judgment rendered thereon upon default by the defendants, are neither void nor voidable because of the failure of the sheriff to return such summons and file the same with the clerk of the district court until the day after the return day. (Syllabus by the Court.)

Error from district court, Harper county.

Action by O. R. Miller against William Forbes and James Hammers. Judgment for defendants, and plaintiff brings error. Reversed.

Crooker & Anthony, for plaintiff in error. W. S. Cade and Noah Allen, for defendants in error.

DENNISON, P. J. This proceeding in error was brought in this court to review the order of the district court of Harper county, Kan., setting aside the summons and the service thereof and the judgment rendered in the case of Miller against Forbes et al., then pending in said court. C. R. Miller brought suit upon a note made by Forbes, and indorsed by James Hammers, and delivered to said Miller. The petition and præcipe for the summons were filed on the 15th day of November, 1887, and the summons was made returnable on the 24th day of November, 1887, and the defendants were required to answer on or before the 14th day of December, 1887. The summons was served on the 23d day of November, and was returned and filed by the sheriff on the 25th day of November, 1887. Judgment by default was rendered on the 4th day of January, 1888. On April 6, 1891, the defendants filed in the office of the clerk of the district court of said county their motion to set aside the summons and service thereof in the above-entitled action, for the reason that the return of the sheriff was not made on or before the day stated in the summons as the return day thereof, and on April 6, 1891, the defendants also filed a motion to set aside, vacate, and hold for naught the judgment heretofore rendered in said cause, because the same is void, for the same reasons, and for the further reason that said judgment was for \$490, when the petition showed that the plaintiff was entitled to only \$390, conceding all claimed therein. On the 20th day of April, 1891, the summons, together with the sheriff's return thereon, and the indorsements and file marks of the clerk thereon, were presented to the court by the defendants in support of said motion, and this was all the testimony offered on the hearing thereof, and the court set aside the summons and the service thereof, and the court also vacated, set aside, and held for naught the judgment rendered in the action, although the plaintiff offered in open court to remit the sum of \$105 from the amount of the judgment. These motions having been filed more than three years after the rendition of the judgment, but one question could have been considered by the district court, and but

one question will be considered by us, and that is, is the judgment void? The summons in this case was made returnable within nine days after its date, and was served by the sheriff on the day before the return day thereof. Our supreme court has held in the case of Clough v. McDonald, 18 Kan. 114, that a summons of this kind is never void. They say, however, that if the officer should take the 10 days given him by law within which to serve it upon the defendant, it might be voidable for the reason that it shortens the time within which the defendant may answer or demur; but where the officer serves the summons before the return day, the summons or the service is neither void nor voidable. In such a case the defendant has lost nothing. He has his full 20 days after the return day of the summons within which to answer or demur, and that is all that the law gives him in any case. It is the time of the officer, and not that of the defendant, that is shortened by making the return of the summons less than 10 days from its date. In the case at bar, if the summons or the return thereof is void, and should have been set aside, it is because the sheriff failed to return the summons, and file it with the clerk, upon the day mentioned in the summons. In the case of Smith v. Payton, 13 Kan. 366, our supreme court says: "We suppose that it will not be claimed that a writ or the service thereof becomes void by reason of a failure of the sheriff to return the writ on the return day. It is the general practice of sheriffs not to return writs until after the return day." And in this case they uphold a writ which was returned 21 days after it was issued. In the case at bar the defendants were personally served with summons on the 23d day of November, 1887, and had until the 14th day of December within which to answer or demur to the petition filed therein. This was 21 days after the service of the summons, and 20 days after the return day mentioned in the summons. Clearly, the defendants lost nothing, were deprived of no rights, by the failure of the sheriff to return and file the summons on the day mentioned therein as the return day, and the court erred in setting aside the summons or service thereof, or the judgment heretofore rendered in this case. The judgment of the district court is reversed, and the case remanded, with instructions to overrule the motion to set aside the summons, and the service thereof, and the judgment heretofore rendered in this case. All the judges concurring.

(6 Kan. App. 654)

KEYSTONE IRON-WORKS CO. v.
WILKIE.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

DEMURRER TO EVIDENCE—SHERIFF'S DEED—PROPERTY CONVEYED.

1. Where a demurrer to the evidence of the plaintiff is improperly sustained, the error can-

not be cured by the evidence which may be given by the defendant, under paragraph 4267 of the General Statutes of 1889.

2. The plaintiff is entitled to have conflicting evidence submitted to the jury.

3. Where the pleadings, judgment, order of confirmation, and sheriff's deed limit the description of the property conveyed by said deed to a tract of land, and the buildings, machinery, appurtenances, and fixtures situated thereon, the purchaser cannot claim, under such sheriff's deed, the boilers, pumps, pipes, and other machinery located upon the land of strangers, and used in supplying water for the use of the mill on the land described, as well as for the use of the city.

(Syllabus by the Court.)

Error from district court, Butler county.

Action by the Keystone Iron-Works Company against Alma Wilkie. Judgment for defendant, and plaintiff brings error. Affirmed.

Angevine & Cubbison, for plaintiff in error. Bedden & Schumacher, for defendant in error.

DENNISON, P. J. This is an action in replevin, brought in the district court of Butler county, Kan., to recover the possession of a steam boiler, pumps, pipes, and other machinery used for the purpose of pumping water, and situated at or near Douglass, in said county. The plaintiff below, who is the plaintiff in error in this court, claims title to the property under and by virtue of a sheriff's deed, executed June 30, 1890, to block 5, Wilkie's addition to the city of Douglass, in said county. The defendant claims the right of possession as the agent of D. T. Henderson, who claims title under a chattel mortgage executed by the Douglass Sugar Company to him on October 20, 1888, which was filed for record October 22, 1888, and renewed by affidavit on October 16, 1889, the possession of said property having been taken by said defendant as such agent prior to the commencement of this action. The Douglass Sugar Company purchased block 5 in Wilkie's addition to the town of Douglass, in Butler county, Kan., in May, 1888, and began the erection of a sugar mill, which they completed on or about the 15th day of October, 1888. In June, 1888, the sugar company executed a mortgage to N. F. Frazier to secure the sum of \$10,600, and became indebted to different persons for material furnished for the erection of said mill. In June, 1888, it was ascertained that the well which had been dug on the premises did not furnish a sufficient quantity of water to operate the sugar mill, and the sugar company constructed a pumping station at the Walnut river, consisting of steam boilers and pumps, and connected this pumping station with the main plant by means of iron pipes. The pumping station was also used to supply the city of Douglass with water. Action was brought in the district court of Butler county, Kan., to foreclose one of the mechanics' liens, and all of the lienholders, including the Merchants' Bank of El Dorado, the assignee of the Frazier mortgage, were made parties defendant, which action was taken upon a change of venue to Cowley county, where the case was tried, and

judgment rendered against the Douglass Sugar Company. An order of sale was issued upon said judgment, and the property sold to this plaintiff, the Keystone Iron-Works Company, for the sum of \$10,001. In the answers and cross petitions in the original suit, which are introduced in evidence in this case, the parties, including this plaintiff, ask for liens upon block 5 in Wilkie's addition to Douglass, Butler county, Kan., and "the buildings, improvements, and machinery thereunto belonging, and situated and being on said real estate." The judgment upon which the order of sale issued, which is also in evidence in this case, commands the sheriff of Butler county, Kan., "to cause to be appraised, and to advertise and sell according to law, the lands and tenements in said plaintiff's petition described, and in the several answers and cross petitions of said defendants herein described, to wit, block No. five (5) in Wilkie's addition to the city of Douglass, Butler county, Kansas, together with all the buildings, fixtures, machinery, and other appurtenances thereto belonging and thereon situated." The order of the court confirming the sale, which is also in evidence, directs the sheriff to execute to the purchaser a deed, conveying "all of block 5 in Wilkie's addition to the city of Douglass, Butler county, Kansas, together with all the appurtenances, fixtures, and machinery thereon situate." The granting clause in the deed, which is also in evidence, is "all of block 5 in Wilkie's addition to the city of Douglass, Butler county, Kansas, together with all the buildings, fixtures, machinery, and other appurtenances thereunto belonging and thereon situate, and all the estate, right, title, and interest whatsoever of the Douglass Sugar Company and the defendants in the above-entitled suit." In the judgment upon which the sheriff's deed is based, the court refused to declare the claims of the parties who furnished material for the construction of the pumping station and pipes to be mechanics' liens upon the real estate of the sugar company. After the plaintiff had submitted its evidence, the defendant demurred thereto, which demurrer was by the court sustained, and the defendant thereupon introduced her evidence in support of her right of possession, in accordance with the provisions of paragraph 4267 of the General Statutes of 1889. Judgment was rendered in the case at bar in favor of the defendant, for a return of the property, or, in case a return cannot be had, for the value thereof, fixed by the jury at the sum of \$410.

The defendant contends that even if the evidence of the plaintiff tended to establish its claim, because her evidence introduced under paragraph 4267 of the General Statutes of 1889 established her claim, the error in sustaining the demurrer is immaterial. We are cited to *Stephens v. Scott*, 43 Kan. 235, 23 Pac. 555, and *Goddard v. Donaha*, 42 Kan. 754, 23 Pac. 708, in support of the proposition that, where a demurrer to evidence offered by the plaintiff is overruled when it should have been

sustained, yet, if the defendant's evidence cures the defects, then it is immaterial. It is argued that the converse of this proposition follows from the same reasoning. We do not allow this contention. If the defendant is entitled to have a demurrer sustained, he may waive the error committed in overruling it, by introducing evidence showing that it ought to be overruled; but, where the plaintiff is entitled to have a demurrer to his evidence overruled, the error in sustaining it is not cured by the evidence of the defendant, given under paragraph 4267, *supra*, showing that he, and not the plaintiff, is entitled to the property. In such a case there is a conflict in the evidence, which the plaintiff is entitled to have submitted to the jury.

The view we take of this case renders it unnecessary to consider but one question, and that is, did the evidence of the plaintiff tend to show its right to recover? If so, the demurrer should have been overruled. If not, it was properly sustained. In the consideration of this question, it is not necessary to decide whether the pumping station under some circumstances would be an appurtenance or fixture to the sugar factory. The answers and cross petitions of this plaintiff and the other lienholders, the judgment, the decree confirming the sale of the sheriff, and the sheriff's deed, all limit the description to the block of ground, and the buildings, machinery, appurtenances, and fixtures situated thereupon. It was probably not necessary to use the word "appurtenances," as the deed to the real estate would carry with it the appurtenances belonging to it; but having used the word, and restricted its application to the tract of land embraced within block 5, as aforesaid, the plaintiff can claim nothing under its deed except the property necessarily included in the description in the deed. This is the real estate, machinery, appurtenances, and fixtures contained and located within the boundaries of block 5 in Wilkie's addition to Douglass, Butler county, Kan., and therefore does not include the property in controversy, which was located upon the lands of strangers, and was used for supplying both the sugar factory and the city of Douglass with water. The judgment of the district court is affirmed. All the judges concurring.

(117 Cal. 484)

HARRIS et al. v. KELLOGG et al. (Sac. 192.)
(Supreme Court of California. July 8, 1897.)

MINING — ACTION FOR CLAIM — CITIZENSHIP —
PLEADING AND PROOF — FORFEITURE OF RIGHTS
— AFFIDAVIT OF LABOR AND IMPROVEMENTS.

1. Complaint in an action, based on title, to recover a mining claim, need not aver that complainant is a United States citizen, or has declared his intention to be such; though, if his ownership is based on a location under United States laws, he must prove such citizenship or declaration.

2. It is for defendant to prove that plaintiff, who has made a valid location of a mining claim, has lost right of possession by abandonment, or failure to do requisite work.

3. Act March 31, 1891 (St. 1891, p. 219), providing for filing with the recorder of deeds, by the owner of a mining claim, an affidavit describing labor and improvements performed and made by him, within 30 days after time limited for such labor and improvements, and declaring that on failure to do so the mine shall be open to relocation, does not allow of relocation within the 30 days.

Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by James A. Harris and others against W. L. Kellogg and others. Judgment for plaintiffs, and new trial granted defendants. Plaintiffs appeal. Affirmed.

George L. Hood and W. P. Thompson, for appellants. Harris & Hubbard, for respondents.

HARRISON, J. The plaintiffs brought this action to recover from the defendants the possession of a mining claim, and to restrain them from committing waste thereon. The cause was tried by the court, and findings were made sustaining the allegations of the complaint, and judgment was rendered in favor of the plaintiffs. Upon motion of the defendants a new trial was afterwards granted, and from this order the plaintiffs have appealed.

In the statement upon motion for a new trial the only errors assigned are the insufficiency of the evidence to justify the decision, and the particular specifications of this insufficiency are: (1) The evidence fails to show that plaintiffs, or any of them, were or are citizens of the United States, or had bona fide declared their intention to become such citizens, or that they are, or were ever at any time, qualified or entitled to locate any public land as a mining claim. (2) The evidence shows that the plaintiffs have not filed or caused to be filed in the office of the county recorder of Madera county, or with the recorder of the Fresno mining district, an affidavit or statement showing the amount or value of work done on the claim in controversy at any time. The respondents also urge upon this appeal that, in order to enable the plaintiffs to show title to the mining ground, it was necessary for them to aver in their complaint, as well as to prove, that they were citizens of the United States, or had declared their intention to become such, at the time of making their location. In support of this latter proposition they have cited *Iba v. Association* (Wyo.) 40 Pac. 527, on rehearing, 42 Pac. 20; *Rosenthal v. Ives*, 2 Idaho, 243, 12 Pac. 904; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522; *Lee Doon v. Tesh*, 68 Cal. 44, 6 Pac. 97, and 8 Pac. 621; *Golden Fleece Co. v. Cable Consolidated G. & S. M. Co.*, 12 Nev. 312. These were cases, however, brought by virtue of the provisions of section 2326 of the Revised Statutes of the United States, under which, after an application has been made for a patent to mineral land, an adverse claimant is required to commence proceedings to determine the question between him and the applicant of the right of possession to the claim. Upon this contest the ownership of the mineral land

is admittedly in the United States, and the right of possession is the ultimate fact to be ascertained for the purpose of determining to whom this ownership shall be transferred, and, as this right depends upon citizenship, it is essential that the fact upon which the right depends should be both averred and proved. The reason for this rule ceases, however, when the ownership of the land is the ultimate fact in issue, upon whose determination the right of possession follows as a legal sequence. The respondent has also cited *Bohanon v. Howe*, 2 Idaho, 417, 17 Pac. 583, in which, in an action similar to the present, it was held that the citizenship of the plaintiff should have been alleged in the complaint. No argument in support of such holding is presented in the opinion, and the cases cited in support thereof were actions brought under the provisions of section 2326, Rev. St., supra, and, as the opinion is not in conformity with the general rules of pleading, it does not commend itself to our approval. A mining claim is real estate, and the rules of pleading relative to real estate are applicable to it. In the ordinary action of ejectment it is sufficient for the plaintiff to allege that he was the owner of the land in question. Such an averment carries with it all the facts essential to establish his ownership, and the means by which he became the owner would be only evidence of his ownership, and should not be alleged. For the purpose of proving ownership, however, when it appeared upon the trial that the allegation of ownership was to be established by virtue of a location under the laws of the United States, it became necessary for the plaintiffs to prove all the facts necessary to qualify them for such location, one of which was citizenship, or a declaration of intention to become such; and the finding of the court that the plaintiffs were the owners, without any proof of such citizenship, was not sustained by the evidence. After a valid location has been made, the locator need not keep an actual possession of the claim. His right of possession will continue until he has in fact abandoned it, or has forfeited it by failure to do the requisite amount of work within the prescribed time (*Belk v. Meagher*, 104 U. S. 279), and the burden of proving such forfeiture or abandonment is on him who would attack this right (*Hammer v. Milling Co.*, 130 U. S. 291, 9 Sup. Ct. 548; *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1040).

We do not mean to decide that, if the plaintiffs had been in the peaceable and actual possession of the mining claim at the time of the entry by the defendants, and had been evicted therefrom by them, they could not have maintained an action based upon such possession. The present action is based upon the title of the plaintiffs. They allege that on the 2d day of January, 1895, they were the "owners and entitled to the possession" of the mining claim, and at the trial based their right of recovery upon evidence in support of this allegation.

Each of the witnesses for them testified that on the 2d day of January, 1895, the defendants occupied said mine, and were mining the same. There was a conflict of evidence of a location as to whether the plaintiffs had abandoned the mine prior to the entry by the defendants, but there was no evidence that they were in actual possession of it when the defendants entered thereon. Section 910 of the United States Revised Statutes provides: "No possessory action between persons in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States, but each case shall be adjudged by the law of possession." In such an action no greater proof of a right to recovery can be required in a state court than would be required in a court of the United States, unless by virtue of some statute of the state. See, also, *Haws v. Mining Co.*, 160 U. S. 317, 16 Sup. Ct. 282.

The other specification of insufficiency of evidence arises upon a consideration of the provisions of section 1 of an act of the legislature, passed March 31, 1891 (St. 1891, p. 219), which provides for filing by the owner of a mining claim with the county recorder of deeds of the county in which the mine is situated an affidavit describing the labor performed or improvements made by him, and their value, when such improvements or labor are required for the location or ownership of the mine, within 30 days after the time limited for performing such labor or making such improvements, and that upon failure to do so the mine shall be open to relocation. There was evidence before the court tending to show that the plaintiffs did the requisite amount of work to preserve their location, but it was admitted that they had not filed any affidavit thereof in the county recorder's office of Madera county, or in the office of the recorder of Fresno mining district in said county, for any work during the year 1894. The defendants made their relocation January 2, 1895, and claim their right to make such relocation by virtue of the foregoing section of the statutes of this state. There is an evident misprision in this statute in omitting the word "affidavit" as the instrument to be filed with the county recorder, and it may be doubtful what construction should be given to the statute; but, giving to it all the construction which is claimed on behalf of the respondents, they would not have acquired a right to relocation by reason merely of the failure to file this affidavit. The statute gives to the occupant 30 days after the time within which the labor is to be performed within which to file the affidavit, and the mine is not open to relocation until after the expiration of said 30 days. The order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(117 Cal. 587)

McKEANY v. BLACK et al. (S. F. 500.)
(Supreme Court of California. July 22, 1897.)

STATUTE OF FRAUDS—CONTRACT OF EXECUTOR.

1. An oral agreement by an executor with an executrix, that, if she would execute and deliver her note, payable "on or before three years after date," to a creditor of their decedent, in consideration of the release of his claim against the estate, he would pay such note "at its maturity," was invalid as to the holder of such note, under Civ. Code, § 1624, subd. 1, as an agreement that "by its terms" was not to be performed within a year from the making thereof.

2. It was also invalid, under Code Civ. Proc. § 1812, as a special promise of an executor to pay a debt of the testator out of his own estate.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by Peter McKeany against Mary F. Black and another. From a judgment of nonsuit in favor of defendant Lillenthal, plaintiff appeals. Affirmed.

George W. Langan and C. O. Hamilton, for appellant. Jesse W. Lillenthal, for respondent.

HAYNES, C. This action is upon a promissory note made by the defendant Mary F. Black to the plaintiff April 15, 1891, payable "on or before three years after date," for \$1,223. A judgment by default was taken against her, and no question is made as to that judgment. As to the liability of defendant Lillenthal, the complaint, after alleging the making of said note by defendant Black, alleged, in substance, that at the time said note was made the defendants were the executrix and executor of the estate of Joseph F. Black, deceased; that the plaintiff was the owner of a claim against said estate which had been duly allowed by the defendants and approved by the court for said sum of \$1,223; that Mary F. Black was the sole legatee of said testator; that defendant Lillenthal was the owner of an undivided one-third of all the real estate of which Joseph F. Black died seised; that defendant Lillenthal promised and agreed with defendant Black that if she would execute and deliver said note to the plaintiff, "and the plaintiff would accept said promissory note, and withdraw, release, and discharge his claim aforesaid as against the said estate of Joseph F. Black, deceased, he, the said E. R. Lillenthal, would pay the said promissory note and the interest thereon to the owners and holder thereof at its maturity"; that in consideration of said promise the plaintiff executed and delivered to defendants, as such executors, a full release and discharge of his said claim against said estate, and accepted said promissory note and the said promise and agreement of the defendant Lillenthal to pay said note at its maturity. A demurrer to the complaint was overruled, and defendant Lillenthal answered, and, in addition to denials, pleaded several special defenses, among which were: (1) That the alleged agreement was not expressly made or intended for the benefit of the plaintiff; (2) that by its terms it was not

to be performed within a year, and was not in writing; and (3) that the promise alleged is a special promise to answer for the debt, default, or miscarriage of defendant Black, and is not in writing. The cause was tried by the court without a jury, and at the conclusion of plaintiff's evidence defendant Lillenthal moved for a nonsuit upon several grounds; among others, that no legal evidence was introduced in support of the allegations of the complaint, because no agreement or note or memorandum thereof in writing signed by said defendant or his agent had been offered or given in evidence; that it was an agreement which, by its terms, could not have been performed within one year; and because it was a promise to answer for the debt, default, or miscarriage of another. Other grounds, including the want of consideration, and that it was not an agreement expressly intended for the benefit of the plaintiff, were also specified.

It is not necessary to rehearse the evidence, nor comment upon the interest or motives of respondent in inducing his co-defendant to execute her note, and procure a release of the plaintiff's claim against the estate of her deceased husband. It is sufficient for the purposes of this opinion to say that the evidence showed that the promise made by respondent to Mrs. Black was oral, that he told her not to inform the plaintiff of his said promise, but that she did tell plaintiff in order to induce him to accept the note and release his claim against the estate, at the same time telling him that she was instructed not to tell him of said promise. Section 1624 of the Civil Code, so far as pertinent here, provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged or by his agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof; (2) a special promise to answer for the debt, default or miscarriage of another, except in cases provided for in section 2704 of this Code." It is contended by appellant that the promise in question is not within the first subdivision above quoted, because it was possible to perform it within a year. This contention is based upon the fact that the note was made payable "on or before three years after date." The learned counsel cite several cases to the proposition that, if a verbal contract may be performed within a year, the fact that it may not be performed or is not likely to be performed within that time does not render it void. But counsel have omitted three important words found in the statute, viz. "by its terms." If the contract, by its terms, is not to be performed within a year, it is void; but if it may, "by its terms," be performed within a year, it is not, even though it may not be performed, or is not likely to be performed, within that time. But counsel imports the terms of Mrs. Black's contract, expressed on the face of the note, into the verbal promise or agreement of respondent. By her contract she was at liberty to pay the note at

any time, and compel the plaintiff to accept payment and surrender the note, though the plaintiff could not maintain an action upon it until the expiration of three years from its date; and that is the date of its maturity, notwithstanding the option given to the maker of the note to pay it at any time, and which she might do within a year. The promise of Lillenthal, the respondent here, is explicit. The allegation in the complaint is that he "would pay the said promissory note and the interest thereon to the owner and holder thereof at its maturity," and the proof, in this regard, corresponded with the allegation. If the promise had been to pay the note according to its terms, a different contract would have resulted, and the verbal promise would have been good so far as subdivision 1 of said section 1624 is concerned. By accepting the promise, with the note, plaintiff agreed to accept payment from Lillenthal at the maturity of the note, and did not agree to accept payment from him before that date; and the test is not whether the plaintiff might not have been willing to accept payment sooner, but whether, under the terms of the contract, made by the promise and its acceptance, he could have been compelled to accept payment from the respondent before the expiration of three years from the date of the note. I think it clear that he could not, and that, therefore, the promise was within the statute and void.

In view of the conclusion reached, it is not necessary to consider appellant's second point, viz. that respondent's promise was an original one, under the exceptions to subdivision 2 of said section 1624, Civ. Code, specified in subdivision 3 of section 2794, Id., since said subdivision 1 of the first-named section embraces all agreements, whether original or collateral. *Browne, St. Frauds* (5th Ed.) § 272.

It is further said that, the estate being discharged from the claim of the plaintiff, the promise of the executor is binding without being in writing, and several cases from other jurisdictions are cited. But this circumstance does not take the agreement out of said subdivision 1, since there are no exceptions to that provision. Besides, section 1612 of the Code of Civil Procedure would seem to be a sufficient answer to this contention. That section provides that "no executor or administrator is chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized."

Certain rulings upon the trial were made by which the plaintiff was prevented from proving certain facts tending to show that the agreement, under which defendant Lillenthal acquired from said Joseph F. Black a one-third interest in the real estate of which he afterwards died seised, required said defendant to pay the debt of said J. F. Black to the plaintiff. Such

evidence was properly excluded. If any such liability existed, it was not alleged in the complaint, nor could it have affected the verbal promise upon which the action was based. I find no ground for reversal, and therefore advise that the judgment be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(117 Cal. 263)

In re WILSON'S ESTATE.

WILSON et al. v. McCONNACHIE et al.
(L. A. 233.)

(Supreme Court of California. July 17, 1897.)

PLEADING—AMENDMENT.

Where undue influence by a certain person was charged in the original contest of a will after probate, an amendment charging such undue influence on the part of certain others is only an amplification of such original charge.

On rehearing. For former opinion, see 49 Pac. 172.

PER OURIAM. The opinion heretofore rendered is modified by striking out that part thereof which declares that the amendment to the written contest which charges undue influence on the part of Michael and Mary Curran was improperly allowed. On further consideration, we are of the opinion that the amendment may be considered as only an amplification of the original charge on that subject. This modification, however, does not affect the judgment of reversal, for, as stated in the opinion, there was no sufficient evidence to support "any finding of undue influence by any person."

(117 Cal. 583)

PEOPLE v. GRIFFIN. (Cr. No. 226.)¹

(Supreme Court of California. July 20, 1897.)

RAPE OF FEEBLE-MINDED WOMAN.

1. The fact that defendant did not know that the woman was too feeble-minded to give consent is no defense to a charge of rape, which, by Pen. Code, § 261, subd. 2, is defined as intercourse with a female incapable of giving consent through mental unsoundness.

2. Where defendant is charged with raping a woman who, by reason of long-standing mental infirmity, was incapable of giving consent, evidence of her feeble state of mind six months after the commission of the crime may be given.

Department 2. Appeal from superior court, Contra Costa county; J. P. Jones, Judge.

Thomas Griffin appeals from a conviction of rape and from an order denying him a new trial. Affirmed.

W. S. Tinning and J. P. Abbott, for appellant.
W. F. Fitzgerald, Atty. Gen., for the People.

HENSHAW, J. The defendant, charged with the crime of rape, was convicted of an attempt to commit rape. From the judgment,

¹ Rehearing denied.

and from the order denying him a new trial, he prosecutes these appeals.

By the evidence of the people it appeared that the victim was a feeble-minded girl about 18 years of age. She and her brother were alone upon their ranch when defendant and a companion by the name of Love drove up. To accomplish their design, they inveigled the brother away from his home. He, returning, heard his sister crying, and entering her bedroom discovered defendant in flagrante delicto. At common law, where the elements of force upon the part of the assailant and resistance upon the part of the woman were always regarded as essentials to the crime, much difficulty was experienced by the judges in bringing many cases calling aloud for punishment within the strict definition of the offense. The result, as may be conceived, was that the courts, between their natural desires, upon the one hand, to punish the wicked, upon the other to maintain the integrity of the law, were driven to extreme niceties of distinction. The books are thus full of cases which are to-day of more interest for the acumen displayed than for any light which they shed upon the matter. For in this state all these questions have been solved and finally disposed of by the express language of our statute. This, while still entitling the crime rape, embraces in its subdivisions offenses not cognizable as such at common law, and others which, only after much stress and perturbation upon the part of the judges, were finally determined to come within the purview of this crime. Of these offenses grouped by our statute under the name of rape the one with which we are here particularly concerned is that designated in subdivision 2, § 261, Pen. Code: "Sec. 261. Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: * * * (2) Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent." In this species of rape neither force upon the part of the man nor resistance upon the part of the woman forms an element of the crime. If, by reason of any mental weakness, she is incapable of legally consenting, resistance is not expected any more than it is in the case of one who has been drugged to unconsciousness, or robbed of judgment by intoxicants. Nor will an apparent consent in such a case avail any more than in the case of a child who may actually consent, but who by law is conclusively held incapable of legal consent. Whether the woman possessed mental capacity sufficient to give legal consent must, saving in exceptional cases, remain a question of fact for the jury. It need but be said that legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences. This degree of intelligence may exist with an im-

paired and weakened intellect, or it may not.

Defendant proposed the following instruction, which was given by the court with the elimination of the words embraced in parentheses: "Mere weakness of mind on the part of a woman does not disbar or disable her from consenting to an act of sexual intercourse, and one of less degree of intelligence or capacity than is necessary to make a contract may consent to carnal connection so that the act will not amount to rape in the man; but if a woman is, through lunacy or other unsoundness of mind, whether temporary or permanent, (so idiotic) as to be (absolutely) incapable of giving legal consent, the connection with her is rape (if the man be at the time of the connection aware of her mental condition)." Defendant's special complaint is over the elimination of the condition "if the man be at the time aware of her mental condition." It is here insisted that defendant's evidence disclosed that he had no knowledge of her mental incapacity, and such, indeed, is his evidence. It is further contended that, in the absence of such knowledge, or of reasonable means for acquiring such knowledge, he may not be convicted. But with this we cannot agree. It is well and justly settled that one who has intercourse with a child under 14 years of age is guilty of rape, even if she actually consents, and if the defendant bona fide believes, and has good grounds for belief, that she is past the age which establishes the crime. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915. The same principle is uniformly applied in cases of abduction and of placing minors in houses of prostitution, where the fact, and not defendant's knowledge or belief, fixes his responsibility. Not only does the due protection of society demand this, but he who engages in such enterprises is committing a moral wrong, for which there can be neither palliation nor excuse. The illegal motive is present, and that illegal motive becomes a criminal intent when the facts, at whose peril he acts, are shown to exist. The same principle is strictly applicable to the case at bar. Indeed, it may be said that there is even more reason for its invocation and use. It may happen that a female child under the age of 14 may early mature, and present the appearance of one much more advanced in years. But in such a case her undoer is not exculpated. It can scarcely happen that one seeking illicit intercourse with a woman of weakened intellect will not know that fact. If he indulges in niceties as to whether or not she be just so far mentally infirm as to save him from criminal consequences, and so pursues his purpose, he does so at his peril.

The evidence of the people was sufficient to warrant the finding of the jury that the girl, by reason of mental unsoundness, was incapable of giving legal consent. It was shown that she had been feeble-minded from early childhood. The medical superintendent

ent of the State Home for Feeble-Minded testified that she was (at the time of the trial) an inmate of his institution, and was feeble-minded. Objection was made to this evidence as bearing upon her condition six months after the alleged offense, and as not throwing light upon her condition at the time of the offense. A similar point is made upon the court's refusal to give an instruction embodying this objection. But, as the mental infirmity sought to be shown by the people was a long-standing one, evidence of its past, present, and continued existence was admissible as bearing upon her state of mind at the time of the occurrence. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(117 Cal. 551)

In re HEYDENFELDT'S ESTATE. (S. F. 685.)¹

(Supreme Court of California. July 10, 1897.)
APPEAL BY EXECUTORS — PARTIES AGGRIEVED —
REMAND — DUTY OF LOWER COURT.

1. Executors of an estate may appeal from an order requiring them to redeem decedent's land from a foreclosure sale.

2. A lower court has no authority to refuse to enforce a judgment on the ground that the supreme court, in rendering it, was acting under a misapprehension of the facts presented in the record.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Solomon Heydenfeldt, deceased. From an order requiring them to redeem certain land from a foreclosure sale, the executors appeal. Affirmed.

Evans & Meredith and Hillyer & Jacobs, for appellants. T. M. Osment, for respondent.

TEMPLE, J. This appeal is by the executors from an order of the probate court requiring them to redeem certain land from a foreclosure sale. The testator, some time prior to his death, had executed deeds, which he delivered to Charles Ashton, to be delivered to the parties named upon his death. In his will he recognized and confirmed these deeds as a provision made for certain of his children who were the grantees named in the deeds. He also provided that his debts should be paid out of his unproductive property. Before he made and delivered the above deeds to Ashton, and before the making of the will, he had mortgaged portions of the property described in some of the deeds to secure an indebtedness of his own, amounting to about \$40,000. Upon a former appeal (106 Cal. 434, 39 Pac. 788) we held that it was the intent of the testator to exonerate the mortgaged property to the extent of his unproductive property, or, at least, that these mortgage debts were part of the

indebtedness which he directed his executors to pay from that property. The respondent moves to dismiss the appeal on the ground that the executors are not parties aggrieved. The motion is based upon a line of decisions beginning with *Bates v. Ryberg*, 40 Cal. 463. It was there said: "The heirs and devisees or legatees interested in an estate are made parties to the proceedings for a distribution. Any one of them feeling aggrieved may appeal from the final order. The executor, however, does not represent any of these parties, as against the others, and, if they are satisfied with the distribution, he cannot complain because some have received less than they are entitled to. He cannot litigate the claims of one set of legatees as against the others at the expense of the estate." I think there has been a disposition to carry the doctrine of that case beyond its legitimate scope, and further than it should be carried on principle. An administrator or an executor is a trustee of an express trust. He is authorized to sue or to be sued without joining with him the beneficiaries of the trust, but the suits which may thus be brought are suits affecting the trust, and not those in which he is individually interested. Among his beneficiaries are creditors. He not only may, but it is his duty, to defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, or legatees or creditors. He cannot be kept out of such litigation upon the claim that he is not personally injured. In fact, if that were the nature of his grievance, he ought not to litigate at the expense of the estate. When, however, he has administered the estate, and under the statute has called all parties interested into court by a proper notice and petition, his only remaining duty is to deliver the estate over to those designated by the court. The administration has then served its purpose, and the claimants, including creditors, are specially notified and called into court. They are then to protect their own rights, and it is no part of the duty of the administrator to decide between them. If he were to take sides with one claimant as against another, and his views were not sustained, it would result that he has been making an assault upon the estate of his real beneficiary at his expense and in the interest of the spoliator. I cannot see that it matters that a claim is made against the estate under the will, or by one who claims to be an heir, or a part of the family of the deceased, and as such entitled to an allowance. If it may diminish the estate to be finally distributed, or may make the fund from which the creditors are to be paid insufficient for that purpose, the administrator is interested, and, in the event of an adverse ruling, is a party aggrieved. Indeed, although it has been held that the persons who are likely to be distributees may be heard in some matters pending the administration, yet no doubt the logical con-

¹ Rehearing denied.

clusion would be that the administrator is specially intrusted with the duty and power to defend the rights of all beneficiaries until distribution. The case of *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840, is in strict accord with these views. That was really a special proceeding in the distribution of an estate. In some cases the rule laid down in *Bates v. Ryberg*, supra, has been carelessly applied, but I think the court has never intended to push that doctrine beyond the limits above defined. The motion to dismiss is denied.

There was an appeal to this court from a former order refusing to direct the executors to pay the mortgage debt which has since been foreclosed, and under which the petitioner's property was sold. See 106 Cal. 434, 39 Pac. 788. This court reversed the order refusing to order the executors to pay the mortgage debt. It then became necessary to ascertain the rights of the parties under the will of Solomon Heydenfeldt, and in so doing all the questions here involved were presented and were passed upon except that which is presented as to whether, upon the evidence, the court was justified in finding that there was sufficient unproductive property to enable the executors to redeem the mortgaged premises. The order appealed from was made to carry into effect the judgment rendered by this court. The only question that can properly be raised is whether the order was warranted by the judgment of this court. If the supposed defect in the deed from Heydenfeldt would be a reason for denying the relief asked for now, it was equally a reason for denying the relief asked for in the former proceeding, and so in regard to the alleged nondelivery of the deed. All the facts were then in the record affecting the questions which are in this record, and, if this were not so, these questions could not now be raised. No supposed errors in the judgment rendered here can be raised in a proceeding to enforce it in the court below. And certainly the eminent counsel who presented this appeal knew that it was not proper to resist the execution of a judgment of this court on the ground that the judgment was reached through a misapprehension of the facts presented in the record. The attention of this court was called to the alleged mistakes in a petition for rehearing, and this court determined that there was nothing in the claim which called for a reconsideration of the case. The only question presented on this record which can be deemed an open one is whether the evidence justified the finding that there was sufficient unproductive property to pay the mortgage debt. The court so found, and I think the evidence justified the finding. It is not a very easy question to decide, for it involves a determination of the question as to what is unproductive property. The appellants have had about six years to perform this trust. An unusual amount of litigation will no doubt excuse some delay, but since the decision of this court as to their duty the delay may be

held almost contumacious. It would require, under any circumstances, a pretty clear showing to justify us in deciding that the probate court has abused its discretion, and, considering the nice questions of fact to be determined, it would be a task of unusual difficulty in this case. I cannot say, from the evidence, that appellants have not sufficient funds to enable them to redeem the premises belonging to the petitioner, and surely there is sufficient unproductive property in their hands to enable them to redeem all. The order is affirmed.

We concur: **McFARLAND, J.; HENSHAW, J.**

(117 Cal. 577)

HIBERNIA SAVINGS & LOAN SOC. v. LEWIS et al. (S. F. 309.)

(Supreme Court of California. July 16, 1897.)

In bank.

PER CURIAM (BEATTY, C. J., not participating). This cause was submitted to department 1, and on January 23, 1897, the following decision was rendered (see 47 Pac. 602).

Thereafter, upon appellant's motion and showing that the order of submission had been improvidently made, and that he had been deprived of the opportunity orally to argue his case, the judgment was vacated, the order of submission set aside, and the cause was orally argued before the court in bank, and submitted. After due consideration, we are satisfied that the opinion heretofore rendered in department 1 is sound. For the reasons therein set forth, the order appealed from is affirmed.

(117 Cal. 594)

LOS ANGELES FARMING & MILLING CO. v. THOMPSON et al. (L. A. 182.)¹

(Supreme Court of California. July 22, 1897.)

RES JUDICATA—DIRECTING VERDICT.

1. In an action to recover possession of land claimed by plaintiff under a patent granted in pursuance of a decree of confirmation by the board of land commissioners, such decree is conclusive against the government and all parties claiming under it by title subsequent.

2. Where plaintiff's title to the lands claimed by it was conclusively established, and it could not have been found otherwise than that the tract in possession of defendants was within the boundaries of the patent under which plaintiff held, it was proper to direct a verdict for plaintiff.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Los Angeles Farming & Milling Company against one Thompson and certain others. From a judgment on a verdict directed for plaintiff, and from an order denying a new trial, eight of the defendants appeal. Affirmed.

Z. Montgomery, for appellants. S. M. White and Graves, O'Melveny & Shankland, for respondent.

HARRISON, J. This action was brought against a large number of defendants to re

Rehearing denied.

cover possession of certain land in the county of Los Angeles, and to restrain the defendants from injury thereto. The land described in the complaint is the south half of the Rancho ex-Mission de San Fernando, with certain exceptions, and the complaint alleges its ownership by the plaintiff, and the unlawful entry thereon and withholding of the possession by the defendants, and that they are committing injury, both temporary and permanent, to the said land. Most of the defendants suffered default, but eight of them filed answers to the complaint, upon which the cause was tried before a jury. At the close of the trial, upon the motion of the plaintiff, the court directed the jury to find a verdict in its favor against these defendants. From the judgment entered thereon, and from an order denying a new trial, they have appealed.

At the trial the plaintiff introduced in evidence a patent from the United States to Eulogio De Celis for the Rancho ex-Mission de San Fernando, dated January 8, 1873, and showed that the grantor of the plaintiff, who had purchased an undivided half of the rancho in 1869, had, after the issuance of the patent, brought a suit for a partition of the rancho, and by the decree in that suit was awarded the tract described in the complaint. The patent recites that in the petition of the claimant presented to the board of land commissioners he "claimed the confirmation of his title to a tract of land known by the name of 'Mission of San Fernando,' containing fourteen square leagues, situated in the county of Los Angeles, and state of California, said claim being founded on a Mexican deed of grant to the petitioner, made on the 17th day of June, 1846, by Pio Pico, then constitutional governor of the department of the Californias." The defendants offered to introduce in evidence the petition of Eulogio De Celis to the board of land commissioners for the confirmation of his claim to the land, together with copies of the grant from Gov. Pico to him; the decree of confirmation of the claim by the board, with their opinion upon its validity; and stated in connection with their offer that they "proposed to prove by said petition and by such alleged grant that the petitioner did not claim said lands, or any part thereof, by virtue of any right or title derived from the Spanish or Mexican government; that they wished to prove by said documents that said grant was void, for the reason that it was an attempted grant of mission lands reserved from and not subject to grant under the laws and regulations of the Mexican government, and that the facts stated in said petition and in said grant proved that said board had no jurisdiction over the subject-matter of said case, and that the decree confirming said claim was without jurisdiction and void." Upon the objection of the plaintiff that this evidence was irrelevant, incompetent, and immaterial, it was excluded by the court. This ruling is claimed by the appellants to have been erroneous, and in support of their claim

they contend that the only claims to land which the board of land commissioners had jurisdiction to pass upon were such as were "by virtue of any right or title derived from the Spanish or Mexican government," and that, as the petition for confirmation showed that the claim was not by virtue of such right or title, the board had no jurisdiction over it, and that its decree of confirmation, as well as the patent issued thereon, were void, as being the acts of officers without authority over the subject-matter upon which they acted; that it appears upon the face of the petition that the board of land commissioners had no jurisdiction in the matter, for the reason that at the date of the grant the governor of California had no authority to make a sale of this land. In support of the latter proposition appellants cite the cases of *U. S. v. Vallejo*, 1 Black, 541, and *U. S. v. Workman*, 1 Wall. 745. These were cases, however, in which appeals were taken by the United States directly from the decree of confirmation, and were direct attacks upon the validity of the judgments appealed from, whereas the evidence offered in the present case is for the purpose of a collateral attack upon the validity of the decree of confirmation. The board of land commissioners was authorized to adjudicate upon the validity of every claim for lands in California which purported to be derived from the Spanish or Mexican government. The validity of the claim included the authority of the governor to make the grant, as well as the existence or effect of the laws of Mexico concerning the same; and the jurisdiction of the board extended to the determination of each of these questions as fully as to determining whether there had been a full compliance with the forms of law in making the grant, and its judgment thereon cannot be collaterally assailed on account of any error it may have committed in reference thereto. The same question was presented in *Beard v. Federy*, 3 Wall. 478, where, after the patent had been introduced in evidence by the plaintiff, the defendant produced the petition of the claimant before the board of land commissioners, and insisted that it showed a want of jurisdiction in the board for the reason that it did not set forth any right or title derived from the Spanish or Mexican government; but the court said: "The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence;" and in considering the effect of a patent said: "By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government,

this record, so long as it remains unvacated, is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent." In *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, the plaintiffs claimed under a patent of the United States issued to Manuel Antonio Rodrigues De Poli, which recited the proceedings taken before the land commission; the filing of a petition for the confirmation of his title to a tract of land known as the "Mission of San Buena Ventura," his claim being founded upon a sale made on the 8th of June, 1846, by the then governor of the department of California; the decree of confirmation of that claim by the board of land commissioners, and its affirmance by the district court and the supreme court on appeal. It was contended by the defendants that the sale to Poli of the ex-Mission of San Buena Ventura was illegal and void, and that hence no title passed to the patentee on its confirmation, and *U. S. v. Workman*, supra, was cited in support of this contention; but the court said: "It does not follow that there were not exceptional circumstances with reference to the sale to Poli which authorized the governor to make it. We are bound to suppose that such was the case, in the absence of any evidence to the contrary, from the fact that the validity of his claim under it was confirmed by the board of land commissioners, by the district court of the United States, and by this court on appeal. The question of its validity was thereby forever closed, except as against those who might be able to show a prior and better title to the premises."

The appellants also contend that the court erred in directing the jury to find a verdict in favor of the plaintiff. The correctness of this ruling depends upon whether there was any evidence before the jury which would have authorized a different verdict. If upon the trial of an issue there is any conflict in the evidence, or if different inferences of fact may be drawn from the evidence, it is the function of the jury to determine the issue; but if, upon all the evidence in the case, only one conclusion or finding can be made, it is immaterial whether the jury make that conclusion or finding by direction of the court or upon their own deliberation. The verdict must be in accordance with the evidence, and cannot be given from conjecture, or at the arbitrary discretion of the jury; and if the evidence is such that the court would be bound to set aside a verdict in favor of one party as contrary to the evidence, the matter becomes a question of law to be ruled upon by the court, and it is not required to submit the case to the arbitrament of a jury, but may direct a verdict in accordance with its ruling upon the question of law. To authorize a verdict in its favor, the plaintiff was required to establish its title to the lands described in the complaint, and to show that at the commencement of the action the defendants were unlawfully in the possession of some portion thereof. The patent from the United States estab-

lished the title of the patentee to the lands embraced within the survey contained therein, and it was admitted at the trial that whatever title to the property described in the complaint passed from the United States by the patent had become vested in the plaintiff. The defendants sought to show at the trial that there had been no actual survey upon the ground of the tract described in the patent, and that for this reason the patent was invalid; but a patent is an instrument of too solemn a character to be disregarded by reason of evidence of this character. Its issuance by the government foreclosed all collateral attack upon the regularity and sufficiency of any of the steps or proceedings upon which it depended. It was a declaration by the government, as was said in *Beard v. Federy*, supra, that the claim asserted "is correctly located so as to embrace the premises as they are surveyed and described." The survey set forth in the patent had been made in 1838 by Henry Hancock, and in December, 1870, a resurvey of the rancho had been made by one Reynolds for the purpose of the aforesaid suit in partition. The description in the complaint is according to the Reynolds survey, and in 1892, after the commencement of the present action, the rancho was again surveyed by one Ensign, by whose testimony it was shown that the map or plat of the Reynolds survey was a correct delineation of the land described in the patent. It was shown upon the cross-examination of this witness that there were certain variations in the courses and distances given in the Hancock survey from those given in the Reynolds survey, and that some of the monuments named in the Hancock survey could not be found. The defendants also introduced a "comparative map," on which had been platted the lines of the several surveys of Hancock, Reynolds, and Ensign, according to the courses and distances given in their field notes, and which indicated a discrepancy in a certain part of the tract of nearly half a mile in extent. From these facts they contend that Hancock did not make a survey upon the ground according to the courses and distances given in the patent, and that the discrepancy between the several surveys shows that the description of the land given in the patent is so indefinite as to render it void. Whether a particular parcel of land is within the lines of a survey is a question of fact to be shown by evidence, but whether the lines of a survey which purport to describe a tract of land in a deed sufficiently define the land to be conveyed, is to be determined by the court when the deed is offered in evidence. The field notes of a survey are not limited to the courses and distances set forth therein, but include also the monuments referred to, and all the objects mentioned by which the lines of the survey can be ascertained. All of these make up a description in words by which a map or picture of the tract as it appears upon the surface of the earth may be placed upon paper, and presented to the eye. If there is any discrepancy between the monuments and

the courses and distances, the monuments must prevail; and, if these monuments can be ascertained, the lines connecting them will be the lines of the tract, irrespective of their variation from the lines given by the courses and distances. The rancho in question contains upward of 116,000 acres, has 44 exterior lines of boundary, many of them several miles in length, and situated in a mountainous and uncultivated region. It is not to be expected that the lines of any two surveyors in tracing these boundaries according to their courses and distances merely would exactly coincide, or that the measurement and direction between the monuments would, in all instances, be the same. See *Adair v. White*, 85 Cal. 313, 24 Pac. 663. But the description is sufficiently definite if the entire body of field notes afford sufficient data for its location. It may be added that the lands in the possession of the defendants, and which they claimed were not within the boundaries of the lands claimed by the plaintiff, are far within the lines of the patent as shown by the plat of either of these surveys. From the evidence before the jury it could not have been found otherwise than that the tract of land described in the complaint was within the boundaries of the patent. The possession by the defendants of a portion of the lands within the tract described in the complaint was admitted by their answers. Their denial that they unlawfully entered upon the lands, or that they unlawfully withhold possession from the plaintiff, puts in issue only the character of their possession, and their affirmative allegation that they each entered upon 160 acres of the lands claimed by the plaintiff, and that the lands so entered upon by them are within the boundaries of the land claimed by the plaintiff, but that the plaintiff has no title thereto by reason of its being outside of the boundaries of the grant which was originally confirmed to Eulogio De Celis, relieved the plaintiff from the necessity of further proof of their possession. As they did not designate the particular tracts of which they alleged that they were in possession, there was no reason for a separate verdict in reference to each defendant, but the plaintiff was entitled to a verdict for the possession of the entire tract upon showing that it had title to all the land which it claimed in the complaint. This showing, as we have seen, was made by the introduction of the patent and the testimony with reference to the lines of the survey therein contained. The judgment and order are affirmed.

We concur: TEMPLE, J.; VAN FLEET, J.

(117 Cal. 568)

TOMLINSON v. AYRES et al. (S. F. 520.)
(Supreme Court of California. July 16, 1897.)

FINDINGS OF FACT—PRESUMPTION OF WAIVER—
PLEADING NONPAYMENT—REVIEW ON
APPEAL—CHATTEL MORTGAGE.

1. There being no findings of fact, it will be presumed they were waived, the contrary not appearing.

2. Nonpayment is sufficiently pleaded by the allegation in a complaint to foreclose mortgage that the note is "wholly owing and unpaid."

3. On appeal from judgment, only matters shown by the judgment roll can be considered.

4. A chattel mortgage on property other than that included in the list made by Civ. Code, § 2955, the subject of such a mortgage, is valid against a purchaser, with notice, from the mortgagor.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; E. W. Wilson, Judge.

Action by Edwin Tomlinson against William Ayres and others. Judgment for plaintiff. Defendants appeal. Affirmed.

H. L. Ford and J. F. Coonan, for appellants.
E. P. Campbell, for respondent.

CHIPMAN, C. Action to foreclose two chattel mortgages given to secure payment of certain two promissory notes executed by defendants William and W. S. Ayres. Both notes were made payable October 24, 1894. The mortgaged property consisted of a printing office plant used in conducting the newspaper called the Western Watchman, situated in a certain building in the city of Eureka, Humboldt county, "located on the west side of G street, in said city, * * * together with all the right, title, and interest of the said mortgagors of, in, and to the building in which said newspaper is now printed and published, and being on the west side of G street in said city * * * [same location as the said plant]." The Western Watchman Publishing Company was alleged to claim some interest in a portion of the property, and was made a defendant. The complaint is verified. The defendants William and W. S. Ayres demurred to the complaint on various grounds, but withdrew the demurrer, and answered, admitting the execution of the notes and mortgage as alleged, but denied "that the whole of said sum and interest is wholly owing and unpaid from defendants," as alleged in the complaint. These defendants also filed a cross complaint, in which they set out that they executed and delivered to plaintiff the notes and mortgages declared upon in the complaint, and that thereafter, and before the commencement of the action, plaintiff became indebted to them for subscription to the Western Watchman. The defendant the Western Watchman Publishing Company answered, denying that the sums claimed to be due on the notes, or any sums, were unpaid. It set up as a separate defense that about September 24, 1894, the defendants William and W. S. Ayres agreed to sell to it the mortgaged property, and on January 6, 1896, the said agreement was fully consummated "by proper bill of sale in writing, signed and executed by them"; that the sale was in good faith, and with notice to plaintiff; and that this defendant is the lawful owner and possessor of the property, and its title is superior to plaintiff's. The court gave judgment of foreclosure for plaintiff. There are no findings

of fact or conclusions of law except as they appear in the decree. Whether findings of fact were waived does not appear, and they must be presumed to have been waived. *Mulcahy v. Glazier*, 51 Cal. 626. The decree recites that the cause came on regularly to be heard, and that the parties were represented by counsel. Upon the issues joined the court found the amount due and owing the plaintiff from defendants William and W. S. Ayres to be \$1,088.55, and that it is secured by the chattel mortgages set out in the complaint and described in the decree, and that they are "in all respects a valid and a first and best lien upon all the said property for the payment of said sum," and said William and W. S. Ayres are personally liable for the whole of said sum; that the conditions of the mortgages have been broken, and plaintiff is entitled to have them foreclosed, and the mortgaged property sold, and the proceeds applied to the payment of said sum of money, with costs and attorney's fees; that each and all the averments of the complaint are true. The court found that on January 6, 1896, after the commencement of this suit, the Ayres, defendants, sold and transferred all the property mentioned in the complaint to the Western Watchman Publishing Company, and it is the owner of the same, subject to plaintiff's lien, and entitled to any surplus above plaintiff's claim after sale is made. That said company took the property with full knowledge and notice of plaintiff's lien, and subject thereto. A sale of the property was accordingly ordered. The appeal is from the judgment on the judgment roll.

Appellants contend that the complaint does not state facts sufficient to constitute a cause of action, and they rely upon the alleged failure of plaintiff to allege nonpayment of the notes. The allegation is "that no proceedings have been had at law or otherwise for the recovery of said sum and interest, or any part thereof, and that the same is wholly owing and unpaid." Numerous cases are cited by respondent. In *Frisch v. Caler*, 21 Cal. 71, the allegation was, "there is now due," etc., and it was held to be a mere conclusion of law, and not good against a demurrer, but was held sufficient for the appeal. In *Roberts v. Treadwell*, 50 Cal. 520, the allegation was, "the whole thereof is now due." Held not an allegation of nonpayment. In *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678, there was no allegation that no part of the sum for which said note was given, except the sums indorsed upon it, has been paid. Default judgment was rendered. This court reversed the judgment. In *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. 882, the averment was, "has refused and still refuses to pay," and that "there is now due" the sum, etc. Held not an allegation of nonpayment. In *Davanay v. Eggenhoff*, 43 Cal. 395, the allegation was "that there is now due from defendant to plaintiff on the aforesaid note," etc. Held not an allegation that it is due and un-

paid. The word "due" is equivalent to "owing" or "owed." And. Law Dict. The prefix "un" is placed before past passive participles to indicate the absence of the condition or state expressed by the participle. *Webst. Dict.* The allegation, then, is that the notes were due and were unpaid, and they showed on their face they were due. An unpaid note is one not paid. To say that a note is unpaid is equivalent to saying that the note has not been paid, and I can see no practical difference in the meaning of an allegation that a note is "still wholly owing and unpaid" and an allegation that a note is "still wholly due, and has not been paid." None of the cases cited hold, and I have found none holding, that where nonpayment must be alleged the requirement is not fully met by an allegation that the indebtedness is due and unpaid.

2. A large portion of the brief of defendants is devoted to the cross complaint set up in behalf of the defendant the Western Watchman Publishing Company. It is contended that the judgment is erroneous, because it grants a foreclosure of real property; that the chattel mortgage was never recorded in any record of mortgages of real property; that the building included in the mortgage was real property, and defendant was not bound by the record of the mortgage in the record of personal property mortgages; that the building was not subject of a chattel mortgage, and was void; that the defendants the Ayres had possession of the building, and could deal with it as they wished, and could transfer it to a bona fide purchaser; that it was sold and transferred to defendant company, and the court so found. The court found that the transfer to defendant company was after the commencement of this action, and that said company took the property with full notice and knowledge of plaintiff's lien, and subject thereto, and that the defendant company is entitled to any surplus after sale over and above plaintiff's claim. The appeal is on the judgment roll alone. There is no bill of exceptions and no statement, and none of the evidence taken at the trial is before us. There is nothing to enable us to pass upon the sufficiency of the evidence to justify the findings and the judgment. It is thoroughly well settled that on an appeal from the judgment only matters shown by the judgment roll can be considered. *Hayne, New Trial & App. § 229*, and cases there cited. We are in no position to say whether defendants established their cross actions or not. As to the building included in the mortgage, which is the real and only bone of contention, defendant company purchased with notice of plaintiff's lien, as the findings show; and, although it is not included in the list of personal property made by the statute the subject of chattel mortgage, the defendant company got no title that will defeat plaintiff's mortgage. *Bank v. Gibson*, 109 Cal. 197, 41

Pac. 1008. I find no merit in the appeal, and it is recommended that the judgment be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 725)

ROGERS et ux. v. KIMBALL et al. (L. A. 199.)

(Supreme Court of California. July 9, 1897.)

NOTE—RELEASE BETWEEN MAKERS — CONSIDERATION — LIABILITY OF INDEMNITORS — JOINT AGREEMENT.

1. Release of T. and L., two of the signers of a note, by the other signers, in consideration of the agreement of L. to make a conveyance to such other signers, is not invalidated, as to T., at least, by failure of L. to make the conveyance.

2. A release in writing of certain signers of a note by the other signers need have no consideration; Civ. Code, § 1541, providing, "An obligation is extinguished by a release therefrom given by the creditor * * * in writing with or without new consideration."

3. An agreement by certain signers of a note to assume responsibility for its payment, and to indemnify the other signers for any loss or damages they may sustain on account of it, stands on the same footing, as concerns consideration, as a release.

4. A signer of a note, who has been released from liability thereon by the other signers, who also agree to indemnify him for any loss or damage he may in any manner sustain on account of the note, can, on paying judgment rendered against him on the note, recover therefor of the others, though they had paid the note before judgment was rendered against him, and though they had no notice of the action against him; there being no defense which he was informed of and neglected to interpose.

5. The release of one of the signers of a note by the others from liability thereon, and their agreement to indemnify him for any damages on account of the note, being joint, he can recover against them all, though judgment is rendered against him on the note for only the balance thereof remaining after one of them had paid his proportion thereof.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Thomas L. Rogers and wife against Warren C. Kimball and others. Judgment for defendants. Plaintiffs appeal. Reversed.

David L. Withington (Works & Works and Withington & Carter, of counsel), for appellants. W. J. Hunsaker, N. H. Conklin, M. A. Luce, and McDonald & McDonald, for respondents.

HAYNES, C. The complaint alleges that on February 25, 1882, the plaintiffs and the defendants Warren C. Kimball and Moses A. Luce, and James S. Gordon, since deceased, executed their promissory note for \$10,000, payable to the order of the Consolidated Bank of San Diego six months after date, with interest, and that said bank afterwards indorsed said note to Bryant Howard; that plaintiff Ella S. Rogers signed said note at the request and for the accommodation of

said Kimball, Luce, and Gordon; that on February 27, 1882, plaintiff Thomas L. Rogers conveyed and caused to be conveyed to said Kimball, Luce, and Gordon a one-fifth interest in and to a certain concession made by the Mexican government of the right to construct a railroad to be known as the "Sonora and Baja California Railroad," and that in consideration of said conveyance said Kimball, Luce, and Gordon executed and delivered an agreement in writing, of which the following is a copy: "We, the undersigned, for and in consideration of a conveyance to us, of even date herewith, of a one-fifth interest in and to the concession by the government of Mexico of the right to construct a railroad to be known as the 'Sonora and Baja California Railroad,' do hereby assume all responsibility for the payment in full of a note of date February 25, A. D. 1882, made to the Consolidated Bank of San Diego, and signed by the undersigned, together with Thomas L. Rogers and Ella S. Rogers; hereby releasing from any payment thereon, as joint or several payers, the said Thomas L. Rogers and Ella S. Rogers, and hereby agreeing with the said Thomas L. Rogers and Ella S. Rogers to indemnify them in full for any loss or damage they may in any manner sustain on account of said note. Witness our hands this 27th day of February, A. D. 1882. Warren C. Kimball. James S. Gordon. Moses A. Luce,"—and thereby agreed to and did release the plaintiffs from said note; that the said defendants and the said Gordon have paid no part of said note except the sum of \$3,333.33 paid by said Kimball; that said Howard, to whom said note had been transferred by the bank, on the 15th day of May, 1886, brought suit thereon against the plaintiffs herein, Thomas L. Rogers and Ella S. Rogers, in the circuit court of the United States for the district of Massachusetts, and obtained judgment against them on the 14th day of March, 1889, for the sum of \$7,019.97 damages and \$63.12 costs; that on February 20, 1893, an execution thereon was issued, and on February 24, 1893, the plaintiff Ella S. Rogers paid out of her separate property, in full satisfaction of said judgment and execution, the sum of \$7,100; that the plaintiffs are husband and wife; that Ella S. Rogers has demanded payment from the defendants of said sum; that no part of it has been paid; and judgment therefor in her favor is demanded. The death of James S. Gordon on July 29, 1892, the appointment and qualification of defendant Jessie Gordon Whittlesey as administratrix, and the presentation of said claim, are also duly alleged, and are not denied. The defendants, Moses A. Luce and Jessie Gordon Whittlesey, filed a joint answer, in which they (1) deny that Mrs. Rogers signed said note for their accommodation, or at their request, and allege that defendants signed said note at the request and for the benefit of the plaintiffs; (2) deny that Thomas L. Rogers conveyed or

caused to be conveyed said concession, or that in consideration of such conveyance they executed the agreement of release or indemnity set out in the complaint; (3) deny, for want of information, the allegations touching the judgment and execution in the United States circuit court, and its satisfaction. For a second defense they allege that, at the time they executed said indemnity agreement, Thomas L. Rogers agreed to convey to Kimball, Luce, and Gordon a one-fifth interest in said concession, and that said agreement to convey said interest was the consideration for the execution of the indemnity agreement by Kimball, Luce, and Gordon, and that Rogers never did convey, or cause to be conveyed, said or any interest in that or any other concession, and, upon information and belief, allege that Rogers never had or owned or could convey any interest in said concession, whereby the consideration for their execution of the indemnity wholly failed, and aver that they received no consideration whatever for the execution of said agreement; and for a third defense they pleaded that plaintiff's cause of action is barred by section 337, Code Civ. Proc. Defendant Kimball answered separately. His first defense consisted of substantially the same denials as those contained in the answer of his co-defendants, except that he also denied that by said agreement he agreed to release the plaintiffs from their obligations to pay said note, or to indemnify them against it, and also denied, upon information, that no part of said note had been paid except \$3,333.33, and denied that said note was not, long before the commencement of this action, wholly satisfied and discharged. For a second defense he alleged that, at the time the indemnity agreement was executed, Rogers agreed to convey said interest in said concession, and his failure to make said conveyance, whereby the consideration for said agreement wholly failed; and for a third defense he alleged, upon information, that during the year 1886, and soon after the payment made by him mentioned in the complaint, Gordon and Luce paid to the holder of said note the balance remaining unpaid; that the action begun by Howard on said note against the plaintiffs herein (if the same was begun by said Howard at all) was begun without his knowledge or consent, and without authority from him, and was prosecuted by said Howard after the said note had been fully paid and discharged, and that the said plaintiffs, and each of them, had a full and perfect defense thereto, and that the payment of said judgment by Ella S. Rogers, if any such payment was ever made, was voluntary. Defendant Kimball also pleaded the same statute of limitations. This action was commenced October 10, 1893. The cause was tried by the court without a jury, and written findings were filed, upon which judgment was entered for the defendants, and this appeal is by

the plaintiffs from the judgment, and from an order denying a new trial.

The first finding is that plaintiffs and defendants made the promissory note, a copy of which is attached to the complaint as Exhibit A. The remaining findings are as follows: "(2) That the plaintiff Ella S. Rogers did not sign said note for the accommodation and at the request, or for the accommodation or at the request, of said Warren C. Kimball, Moses A. Luce, and James S. Gordon, or for the accommodation or at the request of either of them, but that said plaintiff Ella S. Rogers and said Warren C. Kimball, Moses A. Luce, and James S. Gordon each and all signed said note for the accommodation and at the request of plaintiff Thomas L. Rogers, and that said Thomas L. Rogers received from the Consolidated Bank of San Diego, the payee named in said note, the whole consideration therefor, to wit, the sum of \$10,000, and that neither the plaintiff Ella S. Rogers nor said Warren C. Kimball or Moses A. Luce or James S. Gordon received any part of the consideration for which said note was executed. (3) That on the 27th day of February, 1882, the plaintiff Thomas L. Rogers promised and agreed to convey and caused to be conveyed to said Warren C. Kimball, Moses A. Luce, and James S. Gordon a one-fifth interest in and to a certain concession made by the government of Mexico of the right to construct a railroad to be known as the 'Sonora & Baja California Railroad,' and that in consideration of such promise and agreement to convey such interest in said concession, and upon and for no other consideration whatever, said Kimball, Gordon, and Luce made and executed an instrument in writing, a true copy of which is annexed to and made a part of plaintiff's complaint herein, marked 'Exhibit B.' (4) That plaintiff Thomas L. Rogers did not on the 27th day of February, 1882, or at any other time, either convey or cause to be conveyed to said Kimball, Luce, and Gordon, or to either of them, a one-fifth or any interest in or to said or any other concession; nor did said plaintiffs, or either of them, pay or give to them, or either of them, any consideration whatsoever for the execution of said instrument. (5) That after the execution of said note the Consolidated Bank indorsed said note to one Bryant Howard; and thereafter, upon the 15th day of May, 1886, said Howard brought suit in the circuit court of the United States for the district of Massachusetts against the plaintiffs herein, and obtained a judgment against said plaintiffs upon said note on the 14th day of March, 1889, which judgment was duly entered in favor of said Bryant Howard and against said Thomas L. Rogers and Ella S. Rogers, for the sum of \$7,019.97 damages and \$63.12 costs; and on the 20th day of February, 1893, an execution on said judgment was duly issued, and upon the 24th day of February, 1893, the plaintiff Ella S. Rogers paid out of her separate property the sum of \$7,100 in full satisfaction of

said execution and judgment, and said execution was thereupon returned satisfied. (8) That on the 30th day of September, 1886, defendant Kimball paid upon said note to said Howard, who was then the owner of said note, \$3,527.80, being one-third of the principal and interest then due and unpaid on said note; that thereafter, and prior to the 19th day of January, 1889, the said M. A. Luce and James S. Gordon paid to said Howard the balance then due and owing on said note, and prior to said 19th day of January, 1889, said note had been fully paid and discharged. And, as conclusions of law from the foregoing facts, the court decides that the plaintiffs should take nothing by this action, and that the defendants are each entitled to judgment against the plaintiffs for their costs and disbursements expended herein. Let judgment be entered accordingly."

Exceptions are taken by appellants to each of the findings, or parts thereof, except the first and fifth. The principal question made by appellants is, however, whether the evidence justifies the finding that there was no consideration for the execution of the agreement of release and indemnity upon which the action is based. A copy of that instrument appears in our statement of the complaint, and is referred to in the third finding as "Exhibit B." In the third finding it was clearly found that there was a good consideration for the execution of said instrument, viz. the promise of Thomas L. Rogers to convey to Kimball, Luce, and Gordon a one-fifth interest in the concession there mentioned. It is not necessary to cite authorities to the proposition that such promise is a good consideration. Besides, the same finding also finds that Kimball, Luce, and Gordon "executed an instrument in writing, a true copy of which is annexed to and made a part of plaintiffs' complaint herein, and marked 'Exhibit B.'" That instrument is an express release of the plaintiffs from all obligation, as between the makers of the note, for its payment; and, as the release could not affect the right of the payee to look to the plaintiffs for payment, there was added the clause in which Kimball, Luce, and Gordon agreed and promised to indemnify the plaintiffs in full for any loss or damage they might in any manner sustain on account of said note. This express release, being in writing, is valid and effectual without any consideration. It does not rest simply upon the presumptive evidence of a consideration arising from an instrument in writing under section 1614 of the Civil Code. Section 1541 of the same Code is as follows: "An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, or in writing with or without new consideration." This section gives to a release "in writing" the same effect as was given at common law to a release under seal, which is in general valid without reference to the consideration. This release, of course, could not affect the holder of the note, who was not a party to it, but, so far as the

parties executing it are concerned, it operated to release the plaintiffs from all obligations of ultimate payment, contribution, or whatever may have been their liability as between them and the other parties to the note who executed the release, and this release was immediately operative. Nor does the agreement to indemnify the plaintiffs for any loss or damage they might sustain stand upon any different footing, so far as the question of consideration is concerned, for that agreement itself would have operated as a release. "A bond or covenant to save harmless and indemnify the debtor against his debt is a release of his debt." *Clark v. Bush*, 3 Cow. 151. Said third finding, therefore, found that there was a consideration for said instrument of release and indemnity, and it must follow that, if there is elsewhere a finding that there was no consideration for said instrument, the findings upon that point must be conflicting.

The only other finding in any manner referring to the consideration of said instrument is the fourth. That finding first states that Thomas L. Rogers did not at any time convey said interest in said concession to Kimball, Luce, and Gordon, and adds: "Nor did said plaintiffs, or either of them, pay or give to them, or either of them, any consideration whatever for the execution of said instrument." If we are right in holding that the promise of T. L. Rogers is a good consideration, or in our construction of section 1541 of the Civil Code, the fourth finding, that Rogers did not convey, is wholly immaterial. The failure of Mr. Rogers to make the conveyance he had promised to make, even if the contract of release and indemnity required that promise to support it, would not affect its validity, at least as to Mrs. Rogers, who is the only party who has been injured, or who seeks relief against the defendants. The promise of Mr. Rogers gave the parties to whom he made the promise a right of action to compel the conveyance, and as against Mrs. Rogers, who is found by the court to have been an accommodation maker of the note, and who never received any consideration therefor or therefrom, and who had no interest in the concession or in the railroad mentioned in the third finding, they could not, by their own failure or neglect to enforce their rights against him, create a defense to her action upon their contract by which they released her from all obligations to pay any part of said note, and agreed to indemnify her against loss or damage on account thereof. Rogers' promise to convey was a consideration only because it was a promise which they could enforce, and their failure to enforce it could affect only themselves. There was no evidence tending to impeach the existence of the concession, or of Rogers' ownership. But, aside from this, we have seen that the release, being in writing, required no consideration to support it; and, as the release could not affect her liability to the payee of the note, an indemnity against that

liability was implied in the release, and it is therefore immaterial whether Rogers made the promise or not, or whether or not he performed it. The release was unconditional. It was not that, upon a conveyance being made, they would release, but the language is, "hereby releasing;" and, having thus released her, they could not reimpose upon her even the original obligation of a co-surety to contribute to the payment of the note without her consent. As will hereafter appear, the defendants paid said note to Howard after suit thereon was brought against these plaintiffs, and before judgment, and the suit was thereafter prosecuted by Howard for the benefit of the defendants in this action, but without knowledge on the part of Rogers and wife of those facts.

The fifth finding states the date at which suit was brought upon the note against these plaintiffs in Boston, the date and amount of the judgment, the issuance of the execution, and that the judgment was satisfied by Mrs. Rogers by the payment of \$7,100 out of her separate property on February 24, 1893. The sixth finding shows that on September 30, 1889, after said suit was brought in Boston, Kimball paid one-third of the principal and interest then due on said note, and that prior to January 19, 1889, Luce and Gordon paid the balance due thereon, and that "prior to said 19th day of January, 1889, said note had been fully paid and satisfied." This finding does not state facts from which the legal conclusion that the defendants, or either of them, are not liable in this action, can be drawn. In any event, it can only apply to the issue made by defendant Kimball, who alone pleaded that the note had been fully paid before judgment, and that, therefore, the payment of the judgment by Mrs. Rogers was voluntary, and gave her no right of action. It is contended by respondents "that a surety cannot claim reimbursement from his principal or indemnitor for a payment made after the cause of action has been paid, barred by the statute of limitations, or otherwise extinguished against the principal." This proposition requires qualification. Neither the sixth finding nor this proposition contains the essential fact that the plaintiff knew or had information that the note had been paid.

As before intimated, counsel for respondents seem to think that Mr. Kimball's situation is so far different from that of his co-defendants as to require a separate answer alleging defenses not available to them, and have devoted a portion of their brief especially to his defense. The facts upon which they claim this distinction is based are that his payment was credited in the judgment rendered against the plaintiffs in Boston; that he did not request that they be sued upon the note, or that the suit be prosecuted for the benefit of himself, Luce, and Gordon; that he alone set up in his answer the defense that the note was fully paid before judgment; and that he had no notice of the

pendency of the action. It is not necessary to follow the arguments of counsel upon these points in detail. We do not think any of these facts can avail him as against appellants. The release and indemnity contract was joint, not several. He is as much bound to indemnify the plaintiffs against loss or damage caused by his co-indemnitors as against loss or damage caused by Howard or others. His payment, it is true, reduced the amount of the recovery against them, but he is as much bound to indemnify Mrs. Rogers as to the amount she did pay as he would have been if she had been compelled to pay the whole, and whether he received any part of the money paid by Mrs. Rogers in satisfaction of the judgment is wholly immaterial. Any inequality of payment as between the defendants is a matter of adjustment between themselves, with which plaintiffs have no concern. The only one of the points relied upon to relieve Mr. Kimball, requiring special notice, is that he had no notice of the suit in Boston. Before the note was sent to Boston for collection, Kimball, Luce, and Gordon executed a new note to Howard for the same amount, and which Howard regarded as in the nature of a collateral note, upon which Kimball's payment was made and credited. Luce and Gordon afterwards paid the balance due thereon, and on January, 19, 1889, Howard executed an instrument reciting that Rogers and wife had been sued upon the original note; that since the institution of the suit said note had been fully paid by Kimball, Luce, and Gordon; and that whatever judgment should be recovered in his name should be for their benefit. It is claimed on behalf of Kimball that he had no knowledge of the execution of said instrument, nor of the pendency of the suit. In view of the execution of the said instrument, which was prepared by Mr. Luce, and of which Gordon was informed, it is obvious that they can claim nothing upon the ground that plaintiffs did not notify them of the pendency of the suit. If the want of notice of the pendency of the suit in Boston is essential to Kimball's defense, the fact that he had or had not notice should have been found. As to whether he knew of that suit, the evidence is conflicting, and in such case the appellate court cannot supply a finding to uphold the judgment. *Smith v. Association*, 78 Cal. 289, 20 Pac. 677. But, if it be assumed that he had no notice of that suit, that fact would not avail him in this action, for want of notice would not be a defense "unless it appeared that there was a defense to the suit, which the plaintiffs were informed of and neglected to interpose, or that the judgment was obtained by collusion." *Insurance Co. v. Wilson*, 34 N. Y. 275, 281. See, also, *Brandt*, Sur. § 214. Plaintiffs testified that the only information of the payment made by Kimball was in the deposition of Howard taken in the Boston suit, and that their first information of the paymen's

made by Luce and Gordon was obtained after this action was commenced. No payments appear to have been indorsed upon the original note, and if Mrs. Rogers had paid the full amount of the note upon Howard's demand, without suit, and without knowledge of the prior payment by defendants, no payments being indorsed thereon, we see no reason why she could not recover upon the defendants' express contract to indemnify the plaintiffs for a loss "in any manner sustained on account of said note." The sixth finding, therefore, does not justify a conclusion of law that Mrs. Rogers is not entitled to recover in this action, unless it can be presumed from the bare fact therein stated that the defendants had paid the note in full before judgment; that is, that she must be presumed to have known of facts transpiring 3,000 miles away, and which were carefully concealed from her, or that she permitted judgment to be taken against her knowing that she had a perfect defense. Such presumptions will not be indulged for the purpose of sustaining a judgment which upon the other findings is clearly wrong. These considerations render it unnecessary to consider the sufficiency of the evidence to justify the findings in the particulars specified by appellant. We advise that the judgment and order appealed from be reversed, with directions to the court below to enter judgment on the findings in favor of Ella S. Rogers as prayed for in the complaint.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with directions to the court below to enter judgment on the findings in favor of Ella S. Rogers as prayed for in the complaint.

(9 N.Mex. 31)

EARLY TIMES DISTILLERY CO. et al. v.
ZEIGER et al.

(Supreme Court of New Mexico. Aug. 5, 1897.)

FRAUDULENT CONVEYANCE—CREDITORS' SUIT—
JUDGMENT—EXECUTION—EQUITY JURIS-
DICTION—TRIAL BY JURY.

1. Where a creditors' bill contains such allegations of fact that the court can see that there is no remedy at law, or that such remedy is wholly inadequate, or shows that the creditor claims a trust in his favor, and that the relief can only be made available in a court of chancery, the court will not require him in the first instance to obtain an empty judgment and fruitless execution, as a condition precedent to entertaining his bill.

2. Insolvency Act 1889, § 1, provides that any act by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors, shall operate as an assignment of all his property, and shall inure to the benefit of all his creditors. Section 2 provides that all such transfers as are decreed void are to be subject to the control of a court of equity on a bill filed by any person interested within six months after such conveyance is lodged for record. Held that, where a debtor assigns or mortgages his property

in violation of the statute, the statute converts his property into a trust estate, and any creditor may, without having reduced his demand to judgment and had execution issued and returned nulla bona, proceed in a court of equity to have the trust declared, and the property taken charge of by the court, and administered to all the creditors.

3. Since the act of the debtor in making the fraudulent conveyance creates a trust in behalf of all the creditors, and gives jurisdiction to a court of equity, the debtor cannot object that he is deprived of his constitutional right of trial by jury, since such right never extends to a case of equity jurisdiction.

Appeal from district court, Bernalillo county; before Justice N. C. Collier.

Bill by the Early Times Distillery Company and others against Charles Zeiger and others. From a judgment in favor of defendants, complainants appeal. Reversed.

F. W. Clancy, for appellants. W. B. Childers, for appellees.

HAMILTON, J. This is an appeal from the district court of the Second judicial district for the county of Bernalillo. The complainants filed their bill on the chancery side of the court, as general creditors of the defendant Zeiger, attacking a fraudulent conveyance alleged to have been made by the defendant, and asked for a decree declaring the conveyance for the benefit of all the creditors under the statute. To this bill a demurrer was filed by the defendant Zeiger, based upon the ground that a court of equity had no jurisdiction to entertain a bill of this character. This demurrer was sustained, from which ruling of the court in sustaining the demurrer the complainants appealed.

It will be seen by the record in this case that the sole ground of attack made upon this bill is that the complainants are but simply general, and not judgment, creditors; that a general creditor will not be heard in a court of equity to attack and set aside a fraudulent conveyance made by his debtor until he has first obtained a judgment, issued execution thereon, and had it returned nulla bona; that, by the provisions of the constitution of the United States, the right of trial by jury is preserved in suits at common law when the amount in controversy exceeds \$20, and that the act of the legislative assembly of the territory under which this bill is filed is violative of this provision of the constitution, as it deprives the party of his right of trial by jury, and is, to that extent, void. Stated as a general proposition, there can be no doubt that the well-settled rule is that if the creditor has a legal remedy, which is plain, adequate, and complete, he must exhaust that remedy before he will be allowed admission into a court of equity. He should proceed upon the law side of the court, obtain his judgment, and have execution returned thereon unsatisfied, as a condition precedent to enable him to attack, by a bill in chancery, the fraudulent conveyance of his debtor. While this proposition is true, it is also well settled, by a line of au-

thorities equally convincing and controlling, that if the remedy at law is not plain, adequate, and complete, or if the creditor has a trust in his favor, then, in either event, he is not required to go first into a court of law, but may apply in the first instance to a court of equity for relief. The fact that the remedy at law may have been exhausted, or that it is wholly inadequate and incomplete, may be, and is, clearly and conclusively shown by the judgment, execution, and return of nulla bona. The judgment, execution, and return are but the best evidence of these facts; but they are not the only method or the only evidence by which it may be shown that the remedy at law is wholly inadequate and incomplete. If the bill upon its face contains such allegations of fact that the court is enabled to see that there is no remedy at common law, or that the remedy at law is wholly inadequate and incomplete, or if the allegations of the bill show that the creditor has or claims a trust in his favor, or is seeking to establish his claim as against the trust property, and that the relief can only be made available in a court of chancery, then, upon such a case being made by the bill, the court will not require him in the first instance to hazard his chances of recovery by a useless expenditure of time in obtaining an empty judgment and fruitless execution, as a condition precedent to entertaining his bill. This we understand to be the settled doctrine of the federal courts. In *Case v. Beauregard*, 101 U. S. 688, the court, in discussing this question, observes: "When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process. * * * It may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And, when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference." Also, in the same book (page 690), the court, in discussing this question, uses this language: "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly, the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. 'Bona,

sed impossibilia non cogit lex.' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference." Also, the case of *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 45 Fed. 16, was a bill by a general creditor to set aside an assignment upon the ground of fraud. The same objection was made there as in the case at bar,—that the complainant was not a judgment creditor, and therefore could not maintain the suit. The contention was overruled, and the bill sustained. Judge Phillips, on pages 16 and 17, says: "Looking to the foundation upon which the rule contended for rests, it ought not to apply where the judgment and execution would be fruitless." Also, the case of *Talley v. Curtain*, decided by the United States circuit court of appeals (4 C. C. A. 177, 54 Fed. 43), was also a bill by a general creditor to set aside an assignment upon the ground of fraud; and it was contended in that case that the complainant, not having first obtained a judgment, could not come into a court of equity. This position contended for was overruled, and the bill sustained.

The state of facts, as disclosed by the allegations of this bill, shows that a judgment and execution at law would have availed the complainants nothing. They show that the remedy at law was not only wholly inadequate and incomplete, but that there was no remedy at all. Under this state of facts, a court of equity is not justified in closing its doors, refusing to entertain jurisdiction of a case, and thus deprive the litigant of his only remedy to obtain redress. As we have before stated, if the bill shows that a creditor has a trust in his favor, or if he is seeking to establish an interest in his favor in the property of the debtor, held in trust for his benefit, and is asking to have the distributive share to which he may be entitled paid to him out of that trust property or its proceeds, then it is clear that a proceeding at law could avail him nothing, and a court of equity is the only tribunal capable of rendering him this relief. In the case of *Russell v. Clark's Ex'r*, 7 Cranch, 87, Chief Justice Marshall lays down the rule: "If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law." Also, in the case of *Oelrichs v. Spain*, 15 Wall. 228, the court observes: "Where the remedy at law is of this character [plain, adequate, and complete], the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury. But this principle has no application to the case before us. Upon looking into the record, it is clear to our minds, not only that the remedy at law would not be as effectual as

the remedy in equity, but we do not see that there is any effectual remedy at all at law. Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity." See, also, *Case v. Beauregard*, supra.

What is the case as made by this bill? It alleges, in substance, that the defendant Zeiger is indebted to the complainant the Early Times Distillery Company in the sum of \$6,731.88, evidenced by acceptances; that he is also indebted to other complainants in various sums stated, evidenced by promissory notes. It further alleges that he was also indebted to the First National Bank of Albuquerque in the sum of \$25,000; that he made the deed of trust set out in the bill to Reynolds, as trustee, ostensibly to secure one Besse Lesguereaux for \$15,000, due really to the bank. It is also charged in the bill: "Complainants state that the said deed of trust, in the last paragraph mentioned, was made by said defendant Zeiger, and was an act and device done and resorted to by said Zeiger in contemplation of insolvency, and with the design to prefer the said defendant the First National Bank of Albuquerque, to the exclusion in part of these complainants and all other creditors of said Zeiger; and they further allege that the said deed of trust was not made in good faith, to secure any debt or liability created simultaneously therewith, but for the use and benefit of the First National Bank of Albuquerque aforesaid, on account of the pre-existing indebtedness of said Zeiger to said bank, and that said Zeiger never actually received from the said Lesguereaux the said sum of \$15,000 in said deed of trust mentioned, or any part thereof." The bill prays that a receiver be appointed to take charge of the property covered by the mortgage, and that it may be administered and distributed under the direction of the court, in accordance with the provisions of the act, to all the creditors alike, and asks to have the deed of trust or mortgage decreed void.

The act of the legislature upon which this bill is filed provides, in section 1, Acts 1889: "Every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendants, or any act or device done or resorted to by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion in whole or in part of the others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as hereinafter provided) in proportion to the amount of their respective demands, including those which are future and contingent; but nothing in this act shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record forthwith in the office of the county recorder where the property described therein shall be situated." Section 2 of the act

provides that all such transfers as are decreed void are to inure to the benefit of all creditors generally, and are to be subject to the control of a court of equity upon the bill filed by any person interested, and that such suit must be brought within six months after such conveyance is lodged for record. Section 3 provides that a number of creditors may unite in the filing of said bill. Viewing this act of the legislature as a whole, it must be regarded as an insolvency or bankruptcy law. The clear intent and purpose of the act are to prevent an insolvent and failing debtor from making a fraudulent transfer of his property, and from giving a preference to one creditor. It is intended by this act to secure an equal distribution of all of the failing debtor's property between all of the creditors. To accomplish this end, a court of equity is vested, by the express terms of the act, with jurisdiction, at the instance of any creditor, to entertain a suit to set aside such transfers, to take hold of the property of the debtor so attempted to be conveyed, and administer it as a trust fund for the benefit of all of the creditors. The act, in express terms, declares: "Such mortgage or assignment," etc., "made in contemplation of insolvency with a design to prefer one creditor over another, shall inure to the benefit of all of the creditors alike." Is there not, therefore, an element of trust in a suit brought under this statute, such as a court of equity alone can enforce? By the act of the debtor, in assigning or mortgaging his property in violation of the provisions of this statute, does he not thereby, by his own act, convert his property into a trust estate for the benefit of all of his creditors alike? Or, rather, it may be said that, when the insolvent debtor thus fraudulently conveys his property, the statute then converts that property into a trust estate,—a trust in which each creditor has an interest; and any creditor, within the time limited by the statute, may proceed in a court of equity to have the trust declared, and the property taken charge of by the court, and administered to all of the creditors.

But it is contended that the defendant is entitled, under the statute, to have a court of law pass upon the question as to whether the debt is due from him to the complainant, and therefore a court of equity has no jurisdiction. The objection to this contention is that it is not the existence or nonexistence of the debt claimed to be due to any particular creditor which gives the court of equity jurisdiction, but it is the act of the debtor in making the fraudulent conveyance, and giving the preference, which gives the equity jurisdiction. If the debtor is insolvent or in contemplation of insolvency, and makes the conveyance giving the fraudulent preference, the trust is then created in behalf of all of the creditors, and any one or all of them may proceed to have the trust declared, and the property proportionately administered. The insolvency of the debtor, and the conveyance

and fraudulent preference, are the essential things to be investigated which give the equity jurisdiction. Though the court might determine that a particular claimant or set of claimants were not, in fact, creditors, yet, the court having once acquired jurisdiction of the trust estate, the failure of any creditor or creditors to establish his or their debt could not oust the jurisdiction, and the court would not abandon it, but would proceed to administer and distribute the fund to such as show themselves valid creditors, and entitled to the distribution. It may be said that the creditor has a remedy at law by attachment, based upon the fraudulent conveyance. This remedy may be available, but it is neither adequate nor complete. Suppose the attaching creditor be successful in sustaining the attachment and setting aside the conveyance, what, then, becomes of the property? He cannot apply it to the satisfaction of his attachment, because each creditor has an interest in the property as a trust estate, and is entitled to his pro rata share. A court of equity is the only tribunal capable of effectually handling and administering such property. A court of law can have no concern with the administration of the estate of an insolvent under such a statute as this, as its complicated machinery is not adapted to the ends sought to be accomplished, of declaring and enforcing the trust on behalf of the creditors, and administering and distributing the property thereunder.

It is urged with great earnestness that the act deprives the party of his constitutional right of trial by jury, and is therefore void. This argument proceeds upon the theory that the ascertainment of the debt due to the creditor is the only thing to be determined. The trust feature of the case, which is always a subject of equity jurisdiction, is ignored. The right of trial by jury as an absolute right never extends to a case of equity jurisdiction. In the case of *Barton v. Barbour*, 104 U. S. 133, it is said: "But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded, or clearly shown, that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity." It may, in this connection, be suggested that, as the allegations of the bill are admitted by the demurrer, there is no necessity for a jury to ascertain the liability of the defendant or the amount of his indebtedness to the complainant; and, further, if a judgment creditor, by virtue of his lien, acquires the right to proceed in equity, to enforce it against his debtor, and thus bestows the jurisdiction to administer the estate without the intervention of a jury, it would seem that the debtor is not damaged if a similar result should ensue from his recognition of the complainant's demand.

It is claimed by the appellees that the case

of *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, and the case of *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, are controlling upon us in the determination of the question now before us. These cases both arose under a statute of Mississippi which provides as follows: "The said courts shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering, delaying or defrauding creditors, and may subject the property to the satisfaction of the demands of such creditors, as if the complainant had a judgment and execution thereon returned, 'No property found.'" Code Miss. 1880, § 1843. An examination of the statute shows that it bears little or no resemblance to the statute under consideration. By this act the legislature of Mississippi attempted by statute to vest a court with the power to declare a conveyance fraudulent, and decree a lien upon the property and give a preference to a particular creditor, to the exclusion of all other creditors. It thus attempted by statute to vest a court with power to do what it said the debtor could not do; that is, take the property of the insolvent debtor from one creditor, and give it to another. There is no element of trust in this statute. There is no provision that, in case of a fraudulent preference by an insolvent debtor, a court of equity, at the instance of a creditor, might take charge of all of the assets of the debtor, declare the conveyance fraudulent, and administer the property for the benefit of all of the creditors. In the case of *Talley v. Curtain*, supra, the circuit court of appeals had under consideration a case of the same character as the one at bar, and it was contended in that case that the case of *Scott v. Neely* was decisive of the question. The circuit court of appeals, in discussing the case of *Scott v. Neely*, say: "*Scott v. Neely* held that the Mississippi statute could not create or confer such a jurisdiction on a court of equity of the United States, and that a court of equity of the United States could not entertain such a suit, because, upon a demand like this, the adverse party had the right, under the constitution, to his trial by jury. There was no trust. The claim of complainants was strictly on a money demand, the larger portion not liquidated, consisting of an account of advances, interest, credits, and charges. No part of the debt was admitted. It had to be established and proved after opposition and litigation. The contract itself must have been proved. There was nothing to show why the remedy at law was not plain, adequate, and complete. The complainants had first to prove their case, then to set aside the deed; and they claimed that they could enter judgment, and secure the first lien. The complainants had no lien on or interest in the property. The main issue in the case was whether the courts of the United States could and would enforce the

state statute. It seemed to be admitted on all sides that, without such a statute, the court had no jurisdiction. * * * But this denial cannot defeat the trusts, if any exist, nor affect creditors who have come in under this creditors' bill, nor defeat the jurisdiction, which does not depend upon the attitude of the complainants. The aid of the court has been sought to construe a trust. Having jurisdiction to do this,—its peculiar province,—it can go on, and give such relief as it may think proper upon the whole case." On page 181, 4 C. C. A., and page 48, 54 Fed., the court, continuing, also says: "If, then, the case comes within the normal jurisdiction of a court of equity of the United States, either because it deals with trusts and equitable assets, or because complainants have no plain, adequate, and complete remedy at law, we escape the provision of the constitution relied on. This provision, correctly interpreted, cannot be made to embrace the established exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but it should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law." See, also, *Shields v. Thomas*, 18 How. 262. The case of *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, was also a case involving the same principle as the one which we are now discussing. The bill was sustained in the circuit court of the United States in the opinion rendered by Chief Justice Waite. An appeal was taken to the supreme court of the United States, and neither the circuit court nor the supreme court made any question as to the equity jurisdiction of the court. By a reference to the case of *Talley v. Curtain* it will be seen that that court reviewed the case of *Scott v. Neely*, and held that the principle as there announced, under the statute of Mississippi, could not be made to apply to a statute involving a general assignment for the benefit of all creditors. A fraudulent conveyance made by a failing debtor, in violation of the statute, operates as a general assignment of the property for the benefit of all creditors, and the same rule will apply. I do not regard, therefore, the cases of *Cates v. Allen* and *Scott v. Neely* as authorities for construing our statutes. See, also, the case of *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 45 Fed. 16, which is a case under a Missouri statute similar to ours.

If the position contended for by the appellees is to be adopted,—that a creditor must resort to the law side of the court, and obtain his judgment and execution, before he can attack the fraudulent conveyance of his debtor,—then the statute would fail of its object, as the suit must be brought to set aside the conveyance within six months; and, if the defendant contest the claim, this time would always lapse before the creditor could get his judgment and execution, and the door would be

closed against his right to attack the fraudulent conveyance. The language of the supreme court of Kentucky in construing this statute in the case of *Griffith v. Cox*, 79 Ky. 564, is, we think, applicable here: "Courts of equity are expressly given jurisdiction and control of such transfers upon the filing of a petition by any person interested within six months after the mortgage or transfer. Any person or persons interested, no matter whether their interest be manifested by judgments or otherwise, may unite in the petition. As the petition must be filed within six months after the mortgage or transfer shall have been lodged for record, or the delivery of the property or effects transferred, to require a judgment and return of 'No property found' before the petition shall be filed would render the statute almost useless, and defeat many creditors, by the delays which could be resorted to by debtors to prevent such judgments and returns before the expiration of six months." The object of the statute under consideration is to prevent an insolvent debtor from making a fraudulent conveyance and transfer of his property, and from giving a fraudulent preference to one creditor, to the exclusion of others. It is to secure an equal and fair distribution of all of his assets to all of the creditors alike. The case as made by the bill seeks to secure this end, and contains an element of trust in favor of the complainants and all other creditors, and shows the remedy at law to be wholly inadequate and incomplete. It therefore furnishes the strongest ground for exclusive equity jurisdiction in the first instance, without resort to the judgment and execution at law. The case is not one, therefore, where the party has a right to demand a jury trial. The cause is reversed and remanded, with directions to the court below to overrule the demurrer, and allow the cause to proceed.

SMITH, C. J., and LAUGHLIN and BANTZ, JJ., concur.

(9 N. Mex. 46)

PEARCE v. STRICKLER.

(Supreme Court of New Mexico. Aug. 5, 1897.)

APPEAL—TIME FOR TAKING — FINAL JUDGMENT — MOTION FOR NEW TRIAL.

1. The year from final judgment limited for appeal or writ of error does not begin to run till determination of motion for new trial, though judgment was entered on same day verdict was returned, under rule requiring it, where the party failed to give notice of intention to file motion for new trial.

2. Under rule 29, par. 2, providing that motion for new trial shall be argued or submitted and determined at the term at which the case is tried, unless the court expressly continue it, and that no continuance shall be for more than 30 days after expiration of the term, an order having expressly continued it 30 days for argument, submission, and disposition of the court, failure of the court to pass on it in that time does not divest jurisdiction over it, but the court will be considered to have deferred its action on it for good cause, within its power to further continue it.

Error to district court, Bernalillo county; before Justice N. C. Collier.

Action between F. L. Pearce and W. S. Strickler. There was judgment against Pearce, and he brings error. Strickler moves to dismiss writ of error. Denied.

H. L. Warren, for plaintiff in error. W. B. Childers, for defendant in error.

BANTZ, J. The question now to be determined arises on a motion to dismiss the writ of error on the ground that it was not brought till more than one year after the final judgment was rendered in the court below. The judgment was entered February 6, 1896. The writ of error was sued out on March 10, 1897, and was lodged in the office of the clerk of the district court on March 20, 1897. The judgment had been entered on the same day the verdict was returned, under a rule of court which required that to be done when the party failed to give notice of intention to file motion for new trial. Rule 29, par. 1. The motion was, however, filed (February 8th) during the term, and within five days after verdict, as provided by rule. Rule 29, par. 2. On February 15, 1896, the motion was continued by an order as follows: "It is ordered by the court that the time for arguing and submitting" said motion "and the disposition of the same be, and the same hereby is, extended and continued for thirty days." This continuance carried the cause from a special into the regular March term. The motion was overruled March 27, 1896. The period of limitation runs from the day of final judgment to the time when the writ of error was lodged in the court below. *Polleys v. Improvement Co.*, 113 U. S. 81, 5 Sup. Ct. 369. It therefore becomes necessary to determine when the judgment became final in the court below; and of course, if this occurred when the judgment was entered (February 6, 1896), the writ of error was barred. At common law the judgment was not entered until the conclusion of the cause, and therefore not until the motion for a new trial had been determined. Under our practice the rule is otherwise, and the judgment may be immediately entered upon the verdict, and the motion for a new trial may be made and passed upon afterwards. When the motion is filed in proper time, the proceeding is in fieri until the motion is denied; and until then the judgment must be considered as in paper, or as suspended as a roll, in the common-law sense, by the motion. *Spanagel v. Dellinger*, 34 Cal. 482; *State v. Kansas City Court of Appeals* (Mo. Sup.) 16 S. W. 415; *Higginbotham v. Campbell* (Ga.) 11 S. E. 1027; *Wheeler v. Barr* (Ind. App.) 33 N. E. 975. The third paragraph of rule 29 provides that every such motion shall be argued or submitted and determined during the term at which the case is tried, unless the court, for good cause, expressly continue it. A failure by the court to

pass on or continue such motion during the same term at which the case has been tried shall be considered as a denial of the same, and no continuance of such motion shall be for a longer period than 30 days after the expiration of the term. Such is the substance of the rule, and under it it will not be necessary to say in this case whether the pendency of a motion for a new trial will suspend a judgment beyond the term, where the motion has not been passed upon or specially continued; nor will it be necessary to say whether an order continuing such motion for a longer period than 30 days would be a nullity or merely an error. In this case the motion was filed in proper time, and could have been filed without leave first had, and was expressly continued for 30 days, so that the jurisdiction of the court to amend or set aside the judgment was preserved notwithstanding the lapse of the special term. *Sage v. Railroad Co.*, 93 U. S. 418. But it is contended by the defendant in error that when the period of 30 days expired (March 16, 1896) the judgment became final by operation of the rule last mentioned. The order expressly provides that the motion is continued for argument, submission, and disposition by the court. It would seem, therefore, to be clear that the court did entertain the motion, and we do not think that the mere failure of the court to pass upon it within the 30 days operated to divest jurisdiction over it, but rather that the court deferred its action upon it for good cause, within its undoubted power to thus further continue the motion. A construction which would deprive the court of jurisdiction of a motion while the court was entertaining it would be highly penal, and is unwarranted by the language of this rule. In *Smelting Co. v. Billings*, 150 U. S. 36, 14 Sup. Ct. 6, a decree was entered dismissing a bill in equity, and a motion was then made for a rehearing, which was not passed upon until some six or seven months afterwards. It was contended that limitation ran from the date of the decree, and not from the date of overruling the motion, but the supreme court of the United States say: "The rule is that, if a motion or petition for a rehearing is made or presented in season, and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for purposes of the writ of error or appeal. *Brockett v. Brockett*, 2 How. 288; *Railway Co. v. Murphy*, 111 U. S. 488, 4 Sup. Ct. 497; *Memphis v. Brown*, 94 U. S. 715." The judgment in this case did not become final until the motion for a new trial was determined, and the year for suing out the writ of error did not begin to run until then. The motion to dismiss will therefore be overruled.

SMITH, C. J., and COLLIER, HAMILTON, and LAUGHLIN, JJ., concur.

BAUMGARTNER v. VOLLMER.

(Supreme Court of Idaho. May 28, 1897.)

CHATTEL MORTGAGE—DISCHARGE OF LIEN.

When a creditor seeks to subject the property of his debtor to the payment of his claim, upon which property there exists a chattel mortgage, and the creditor, to avail himself of the remedy provided by section 3389, Rev. St., pays to the mortgagee the amount of such mortgage, such payment by the creditor discharges the mortgage and the lien thereunder, and the creditor cannot thereafter enforce the mortgage lien.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by William Baumgartner against John P. Vollmer. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

S. S. Denning, for appellant. E. O'Neill, for respondent.

HUSTON, J. On the 20th of October, 1894, the plaintiff executed and delivered to the Bank of Genesee and to the Genesee Mercantile Company a joint chattel mortgage to secure the sum of \$474.38 on certain personal property; and on the 10th of November, 1894, plaintiff gave to Frank Bros. Company, a private corporation, a chattel mortgage to secure the sum of \$260.50. The property described in and incumbered by the foregoing mortgages included all of the personal property of plaintiff exempt from execution under the laws of the state of Idaho. On the 7th day of November, 1894, the defendant commenced an action in the district court for Latah county against plaintiff for the recovery of the sum of \$677, besides interest and costs, and did issue an attachment, and caused the same to be levied upon all of the property of plaintiff described in said two mortgages aforesaid. In compliance with the provisions of section 3389, Rev. St. Idaho, the defendant, at the time of attaching said property, tendered to the mortgagees in said mortgages the amount due thereon, which sum was accepted by said mortgagees. On the 8th day of December, 1894, the defendant obtained a judgment in said action against the plaintiff for the sum of \$677, interest and costs, upon which judgment execution was issued and levied upon said property heretofore described, and the same was noticed for sale, which sale was by direction of the attorney of defendant postponed until the 10th day of January, 1895. That on the 27th day of December, 1894, the defendant, by Fred W. Piper, his attorney, did deliver to the sheriff of said county copies of said two chattel mortgages, together with the affidavit of said attorney, and directed said sheriff to take possession of the property described in said mortgages, and to sell the same. On the 31st of December, 1894, the plaintiff, by his attorneys, Denning & Wisswell, served written notice and demand upon the sheriff for the delivery of the property so seized by him under said affi-

davit and notice, upon said chattel mortgages, alleging in said demand and notice the insufficiency of the affidavit, and that the notes to secure which said mortgages were given had been fully paid. On the 4th day of January, 1895, the said sheriff proceeded to sell, and did sell, all of the property described in said mortgages, under and by virtue of the power of sale contained therein. It does not appear that any other or further proceedings were had under said execution, or that any sale was had or made thereunder, or any return made thereof. Plaintiff brings this action to recover from the defendant the value of the property so as aforesaid seized and sold under said chattel mortgages. To the complaint of the plaintiff the defendant interposed a general demurrer, which was sustained by the court, and, the plaintiff declining to further plead, judgment was entered for the defendant, from which judgment this appeal is taken.

Many questions are raised in the briefs of counsel which, in our view of this case, have little bearing in its decision. The only question involved, as we view it, is one of construction of the statute. Section 3389, Rev. St. Idaho, provides that "all mortgaged personal property may be attached at the suit of any creditor of the mortgagor; such creditor, however, must pay or tender to the mortgagee, the amount due him on such mortgage before the officer making such attachment is entitled to the actual possession of such property. When the property thus attached and redeemed by the creditor is sold by the officer under due legal proceedings, he must: First, pay to such creditor the amount advanced by him to pay the mortgage, with lawful interest thereon; second, pay all costs appertaining to the judgment, execution and sale; third, pay the judgment creditor the amount of his judgment, and the surplus, if any, to the judgment debtor; if the creditor of the mortgagor prefer he may cause to be attached the equity of redemption of the mortgagor; such attachment is made by serving upon the mortgagor and mortgagee a copy of the writ of attachment, together with a notice signed by the officer that the interest of the mortgagor in such property is attached, when the sale of such equity is made on execution obtained by such attaching creditor, the proceeds must be applied to the payment of the costs and the satisfaction of the judgment, and the remainder, if any, paid to the judgment debtor. The purchaser at such sale is entitled to the possession of the property, subject, however, to the rights of the mortgagee."

It will be seen that under the provisions of this section of the Revised Statutes there are two distinct and separate methods open to the creditor of the mortgagor for the enforcement of his claim. He may elect either, as the exigencies of his case may dictate; but, having elected to pursue one remedy, he cannot, at his own option and in disregard

of the defendant's rights in the premises, cease to pursue such remedy, and adopt the other. After having pursued the first remedy provided in section 3389 up to the point of having advertised the sale under the execution, having amassed nearly all the costs essential to the completion of his remedy so adopted, to say that the creditor may arbitrarily abandon such proceedings, and resort to a foreclosure of the mortgages paid by the creditor as a prerequisite to his right to levy his attachment, simply because he could thereby increase the burdens of the defendant or lessen his own, would, in our view, be the very antithesis of "administering the law in justice." In *Cochrane v. Rich*, 142 Mass. 15, 6 N. E. 781, the court says: "The right to make an attachment of mortgaged personal property is derived from Pub. St. c. 161, § 74 et seq. [a statute substantially the same as that of Idaho]. At common law a mortgagor's interest in such property could not be reached by attachment. The statute points out the method in which such attachment can be made. It can be rendered effectual by the payment of the amount secured by the mortgage upon demand made. The statute treats the payment so made as a redemption of the property, and provides that the proceeds of the sale shall be first applied to repay the attaching creditor the amount paid by him to redeem the property. The purpose of the statute appears to be to redeem the goods and discharge the mortgage so that the attachment may be effectual, inasmuch as the liens respectively created by mortgage and attachment on the same property are essentially different, and cannot co-exist. If the mortgage should be assigned to the attaching creditor, he could not hold the mortgage and preserve his attachment. It would be necessary that one of the securities should yield. Either the lien upon the property secured by the mortgage would be void, or the lien by attachment would be void. The assignment could therefore not aid the creditor in securing his debt legitimately. But the statute has made no provision for such an assignment of the mortgage, and contemplates, not the survival of the mortgage, but its discharge." This rule seems to be based upon correct legal principles, and to have the support of pretty much all of the courts where similar statutes exist. 2 Cobbey, Chat. Mortg. § 718, and cases cited in notes. The payment of the mortgages by the defendant simply gave him the right to enforce his claim under the writ of attachment. The mortgages were, by the payment of the same by defendant, discharged, and it was not within the power of the defendant to revive them, or re-establish a lien thereunder. While it may be, and probably is, the general rule that the assignment or transfer of a debt carries with it the security, such rule has no application to the case under consideration. As said by Mr. Pomeroy (section 1211, §

Eq. Jur.), cited in brief of respondent: "Under some circumstances, the payment of the amount due on a mortgage, when made by certain classes of persons, is held in equity to operate as an assignment of the mortgage." Counsel here overlooked the exceptions which Prof. Pomeroy so clearly recognizes. Had the defendant desired to enforce his claim by attachment, and at the same time preserve all rights under the mortgages, a method so to do is provided by said section 3389, to wit, by attaching the equity of redemption. He elected, however, to adopt the other method provided by said section, and, having so elected, he must stay with it. He cannot "swap horses while crossing a stream." The complaint stated a good cause of action. The demurrer should have been overruled. The judgment of the district court is reversed, and the cause remanded, with instructions to overrule the demurrer of defendant to plaintiff's complaint, and for further proceedings consistent with this opinion. Costs to appellant.

SULLIVAN, C. J., and QUARLES, J., concur.

On Rehearing.

(July 7, 1897.)

SULLIVAN, C. J. We have most carefully considered the petition for a rehearing in this case, and do not find any cause or reason for granting a rehearing. The facts clearly show that the appellant attached the personal property in question, and, in order to obtain possession thereof, paid the mortgage debt that existed against said property. He did not purchase the promissory note secured by said mortgage, but paid it under the provisions of section 3389, Rev. St., and thus satisfied said mortgage lien. He could not thereafter foreclose said mortgage. The debt was paid; the mortgage lien satisfied. When he had thus paid the mortgage debt, the provisions of said section required the proper officer, after the sale of such property, to "first pay to such creditor the amount advanced by him to pay the mortgage," etc. The petitioner having elected the proceeding that he would pursue, and pursued it to the extent of paying the mortgage debt, he cannot revive the mortgage lien and foreclose the mortgage. Rehearing denied.

HUSTON and QUARLES, JJ., concur.

EISEN v. MULTNOMAH COUNTY.

(Supreme Court of Oregon. Aug. 2, 1897.)

CRIMINAL ACTION — ACQUITTAL — DEFENDANT'S RIGHT TO COSTS.

1. Code Civ. Proc. § 565, providing that in all actions or suits prosecuted or defended in the name and for the use of the state, the state shall be liable for and may recover costs in like manner as in the case of natural persons, does not

apply to a criminal prosecution by the state to punish a violation of some public law.

2. Hill's Ann. Laws, § 2361, providing that costs in criminal actions shall be paid by the proper county to the person rendering the services, and be taxed against defendant in case of conviction, does not give defendant on acquittal a claim against the county, on which judgment can be rendered in his favor, but such costs as were incurred in enabling him to make his defense are to be paid by the county to the person rendering the service.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Judge.

Action by William T. Eisen against Multnomah county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. H. Hall and R. W. Wilbur, for appellant. T. S. Potter, Dep. Dist. Atty., for respondent.

BEAN, J. On September 13, 1896, the defendant was tried for the crime of manslaughter, and acquitted, in the circuit court of Multnomah county, and subsequently filed a statement of certain costs and disbursements which he claims to have incurred in the trial of such action, and moved the court for judgment against the county therefor. This motion was denied, whereupon his claim was presented to the county court for allowance and payment, which being refused, this action was brought to recover the amount thereof. A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action was sustained by the court below, and the plaintiff appeals.

The only question for decision is whether a judgment can be awarded against the county for costs and disbursements in favor of a defendant who has been tried and acquitted on a criminal charge. At common law costs, as such, were unknown, and it is therefore settled doctrine that a court has no power to award them in favor of a defendant in a criminal action unless the statute has expressly conferred it. 4 Am. & Eng. Enc. Law, 323; 1 Bish. Cr. Proc. § 1315; Phillips v. Gaines, 131 U. S. Append. clxix. This rule is not questioned by the plaintiff, but he claims that section 565 of the Code of Civil Procedure, which provides that "In all actions or suits prosecuted or defended in the name and for the use of the state, or any county or other public corporation therein, the state or public corporation shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons," makes the county liable for costs in a criminal action upon the acquittal of a defendant. But this section is a part of the Civil Code, and evidently refers to costs in actions or suits brought by or against the state or a county to enforce some civil or corporate right, and not to a criminal prosecution instituted by the state in its sovereign capacity to punish a violation of some public law. As said by Mr. Chief Justice Ryan in *Noyes v. State*, 46 Wis. 252, 1 N. W. 2: "There is a broad distinction between the status of a state instituting a prosecution in its sovereign capacity to assert its sovereign

rights, to enforce its public laws, or to protect its citizens, and the status of a state suing to enforce mere rights of property, as a private person might do in like case." It is to the latter class of cases the statute has reference. The only provision of law upon the subject of costs in criminal actions is section 2361, Hill's Ann. Laws, which provides that they shall be paid to the person rendering the services by the proper county, and taxed against the defendant in case of a conviction. By this and other provisions of the statute the several counties of the state are by law required to pay the necessary expenses of every criminal trial, but such payments are to be made to the person rendering the services, and not to the defendant. He has, or can have, no claim against the county upon which a judgment can be rendered in his favor, but such necessary costs and disbursements as may be incurred in his behalf and for the purpose of enabling him to make his defense are to be paid by the county to the person rendering the service, the same as other charges against the county. The judgment of the court below is therefore affirmed.

A. G. SPALDING & BROS. v. BROWN et al.
(Supreme Court of Oregon. Aug. 2, 1897.)

CONFLICTING TESTIMONY—FINDING OF FACT—
REVIEW.

Where there is an irreconcilable conflict in the testimony, the trial court's findings of fact will not be disturbed.

Appeals from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by A. G. Spalding & Bros., a corporation, against Sherman D. Brown, John F. King, and Ella D. King. From the decree as rendered, plaintiff and defendants King prosecute separate appeals. Affirmed.

A. C. Emmons and L. R. Webster, for appellants. J. M. Gearin, for respondents.

PER CURIAM. This is a suit by A. G. Spalding & Bros., a corporation, against Sherman D. Brown, John F. King, and Ella D., his wife, to set aside two bills of sale and a chattel mortgage of certain personal property, and to enjoin King and wife from maintaining an action to recover the possession of the same or damages for its detention. It appears that Brown, being engaged in selling bicycles at his place of business on Washington street, Portland, and having quite a stock on hand on March 7, 1896, executed to King a bill of sale of 25 Ariel wheels, and on the 1st of the next month he gave the same person another bill of sale of 14 Spaldings, 1 Redenda, 1 Ariel, and 7 Crown bicycles; that the wheels described in the first bill of sale were taken by King to his dwelling, but, upon obtaining the second evidence of transfer, the bicycles therein mentioned, together with the previous lot, were removed to a store at No. 130 Sixth street, the lease of which

had been taken in his name, and on April 2d he gave his wife a promissory note for the sum of \$3,000, payable in one year, at 10 per cent. interest, and at the same time, to secure the payment thereof, he executed to her a chattel mortgage of said property; that on April 14th plaintiff commenced an action against Brown in the circuit court of Multnomah county, to recover the sum of \$6,406.84, and, having sued out a writ of attachment, caused the said bicycles to be attached as the property of Brown; that King, claiming to own the same, and his wife to have a lien thereon, threatened to commence actions to recover possession thereof and damages for withholding the same, whereupon plaintiff instituted this suit, and alleges that the store on Sixth street was leased by Brown, who placed therein these bicycles under the charge of King, who was in his employ, in whom he placed implicit confidence, and to whom, without any consideration therefor, he executed said bills of sale for the purpose of overcoming, as much as possible, the competition of his business rivals; that King, after having taken possession of said store and goods, as the agent of Brown, without the latter's knowledge or consent, and with the intent of defrauding him and his creditors, executed said chattel mortgage to Ella D. King, who, without any consideration therefor, accepted the same with knowledge of the purpose with which it was executed. The answer of King and wife, after denying the material allegations of the complaint, averred that King purchased these bicycles from Brown, paying for the first lot the sum of \$1,700, and for the second \$1,600, as evidenced by the respective bills of sale executed to him therefor. The reply having put in issue the allegations of new matter contained in the answer, a trial was had and the evidence taken, from which the court found, in addition to the facts hereinbefore stated, that about January 22, 1896, King loaned Brown the sum of \$1,000, in consideration of which it was agreed that he should have a lien therefor upon said wheels, and that at the time they were attached he had a lien thereon to the extent of the sum loaned, less the sum of \$200, which had been paid thereon, and rendered a decree in accordance with these findings, except that King was required to pay, out of the amount so awarded, the sum of \$160.70 on account of certain fees and expenses incurred in the suit, from which decree plaintiff and King and wife prosecute separate appeals.

The question presented for consideration by this appeal is one of fact, and, inasmuch as there exists in the record an irreconcilable conflict in the testimony submitted at the trial, it is impossible for this court to determine the weight of it with any greater degree of certainty than did the trial judge, who saw and heard the witnesses; noted their manner, tone, and bearing while on the stand; and, having reached the conclusion that King loan-

ed to Brown the sum of \$1,000 in the manner and under the circumstances indicated, we are not prepared to say, after a careful examination of the record, that this finding is not supported by the evidence; and hence it follows that the decree must be affirmed, and it is so ordered.

Ex parte GIAMBONINI. (Cr. 321.)
(Supreme Court of California. July 16, 1897.)
CONSTITUTIONAL LAW—MUNICIPAL CLASSIFICATION
—POLICE COURTS—JURISDICTION—JUSTICES
OF THE PEACE—DUAL OFFICES.

1. St. 1891, p. 433, providing for the establishment of police courts in cities having 15,000 and under 18,000 inhabitants, does not conform to St. 1883, p. 24, classifying municipal corporations by population, as the constitution commands (article 11, § 6), nor amend that act, and hence is unconstitutional.

2. A person was convicted in a police court attempted to be created under an unconstitutional law. All the processes issued from said court. The pretended trial was held at a session thereof, and judgment was entered by its so-called judge on its records. *Held*, that the proceedings were void, because the tribunal, being unconstitutional, had no jurisdiction whatever.

3. The fact that the purported police judge was also a justice of the peace, and, as such, would have had jurisdiction of the offense and the offender, did not validate the judgment, since it was essential to its validity that the court which rendered it should have had jurisdiction.

Beatty, C. J., dissenting.

In bank. Petition of L. Giambonini for a writ of habeas corpus. Petitioner enlarged.

HENSHAW, J. Petitioner was convicted in the police court of the city of Stockton of the crime of selling intoxicating liquors to a minor under the age of 18 years. He was sentenced to pay a fine of \$100, and, in default of payment, to be imprisoned for 100 days in the city jail. C. P. Rendon, who acted as judge of the police court, was at all times a justice of the peace of the city of Stockton. Petitioner contends that the judgment against him is void, because the police court of the city of Stockton has no legal existence. Against this, it is insisted that Rendon, as justice of the peace, had jurisdiction of the offense and of the person of the offender, and the proceedings will be regarded as having taken place in the justice court before a justice of the peace, and the designation of the court as a police court, and of the justice as police judge, will be held nonessential errors. The law for the creation of the police court of the city of Stockton is found in the Statutes of 1891, at page 433. It is an act entitled "An act to provide for police courts in cities having fifteen thousand and under eighteen thousand inhabitants." This law does not conform to the provisions of the act of 1883, classifying municipal corporations by population, as the constitution commands (St.

1883, p. 24); nor yet is it an act amendatory of the earlier statute. It expresses just such another legislative effort as that considered in *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500. It is an attempt to force special and arbitrary legislation upon a city or cities, without regard to their general classification, for purposes of legislation set forth in the classification act of 1883. This, for the reasons declared in *Darcy v. City of San Jose*, the legislature may not do. It follows, therefore, that the law attempting to create the police court of the city of Stockton is unconstitutional.

It results, then, that, while this petitioner was tried and convicted under the forms of law, the proceedings were coram non iudice and void, for they were taken in a pretended court having no legal existence. It is not the case of a de facto officer filling a legally existing office. The police court here had no legal existence. And, while it is true that in some states such an office is recognized as valid and existing until, under direct proceedings, the act creating it has been declared unconstitutional, such a doctrine, as pointed out in *Buck v. City of Eureka*, 109 Cal. 504, 42 Pac. 243, is opposed to the great weight of reason and authority, and is in direct opposition to the oft-expressed views of this court. *People v. Toal*, 85 Cal. 333, 24 Pac. 603. Nor do we think the conclusion thus necessitated can be in any way modified by the consideration that the acting judge of the police court would have had jurisdiction as justice of the peace. In truth, he acted, and only purported to act, as a judicial officer, occupying the bench of an unconstitutional and therefore nonexistent court. All the processes issued from the police court. The pretended trial was held at a session of that court. The judgment was entered by the so-called judge of the police court upon the records of that court. One may not be deprived of liberty or property under our constitution by an observance merely of the forms of law. The substantive facts of a legal tribunal and of legal process to bring a party before that tribunal must exist; otherwise, the judgment, if sought to be enforced, works an unlawful invasion of his constitutional rights. Of the essentials to jurisdiction, the first is a court having legal cognizance of the question in controversy. A court is a place where justice is legally administered. This first essential of a legal court being lacking, the defendant has had no trial under the laws of the land.

For the same reason, it cannot be said that the judgment may be upheld because the judicial officer had jurisdiction of the offense and offender as justice of the peace. A de jure judge of a legally constituted court can only exercise his jurisdiction in the manner prescribed by law. As is said by the supreme court of the United States in *Windsor v. McVeigh*, 98 U. S. 282: "Though the court

may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgment. It must act judicially in all things, and cannot then transcend the power conferred by law." The justice of the peace could only have tried defendant in his justice court, and no validity could attach to his judgments rendered in any other forum. He might as well have tried him by drumhead court-martial as to have rendered judgment in an illegal police court. It is essential to the validity of a judgment that the court which renders it shall have jurisdiction. *Anthony v. Kasey*, 83 Va. 339, 5 S. E. 176. The court which rendered this judgment, being an unconstitutional tribunal, had no jurisdiction whatever. The case of *Ex parte Reilly*, 85 Cal. 632, 24 Pac. 807, has not been overlooked. The views here expressed may be found at variance with those of the earlier case, but we think the sounder construction of the law is that here given. It follows that the petitioner should be enlarged, and it is ordered accordingly.

We concur: HARRISON, J.; TEMPLE, J.; McFARLAND, J.

BEATTY, C. J. I dissent. I consider the decision in *Ex parte Reilly*, 85 Cal. 632, 24 Pac. 807, a correct statement of the law.

117 Cal. 528

DE LA GUERRA v. CITY OF SANTA BARBARA. (L. A. 148.)

(Supreme Court of California. July 9, 1897.)

MEXICAN GRANTS—POWERS OF PREFECT—APPEAL—WEIGHT OF EVIDENCE—HARMLESS ERROR.

1. A recorded document disclosed a petition for a grant of a lot belonging to a town, addressed to its alcalde (mayor), who referred the same to the secretary of the ayuntamiento (council), who reported the lot vacant, after which a grant, reciting that it was made pursuant to the secretary's report, was made by the prefect of the district embracing the town. All existing records of the ayuntamiento made no reference to this lot, but it was proved that a book of grants had been lost, and that the ayuntamiento had made grants of which there was no existing record, under the direction of the prefect, who, as such, could not convey a lot belonging to a town. *Held*, that the finding of the lower court that the prefect grant was in no way the act of the ayuntamiento was conclusive.

2. Under the laws of Mexico, a prefect in California could not exercise the authority of a pueblo in granting its lands, and hence the title thereto conveyed by him would be adverse to that of the pueblo.

3. An attorney in fact of a grantee in a grant executed by a prefect, who, as such, could convey no title, presented a petition to the town owning the lot attempted to be conveyed by the prefect deed, stating that the lot had been granted to said grantee, and, as he (the attorney in fact) did not have the deeds in his possession, he asked that the "corresponding titles" be extended to him. The town granted the petition, and issued a deed, which was lost, and there was no satisfactory evidence of its terms. *Held*

insufficient to prove that the town had thereby supplied a grant which was claimed to have been previously made by the town and that the record of it was lost, as said deed of the city will be presumed to convey a corresponding title only, and so merely to evidence said perfect grant.

4. A finding that no juridical possession was given under a Mexican grant is not error prejudicial to one not claiming that there was any evidence of such possession, where the grant is held invalid.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Ejectment by Josefa M. De La Guerra against the city of Santa Barbara. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

B. F. Thomas, for appellant. Thomas McNulta and J. F. Richards, for respondent.

HARRISON, J. Ejectment for a lot of land in the city of Santa Barbara. Judgment was rendered in favor of the defendant, and the plaintiff has appealed. The land in question is a portion of the pueblo lands of Santa Barbara, which were patented by the United States to the mayor and common council of the city of Santa Barbara, May 31, 1872. The plaintiff's right of recovery depends upon the validity of a grant claimed to have been made to her predecessor November 10, 1849. The court finds in reference to this grant:

"(3) That on the 15th day of January, A. D. 1868, a document in the Spanish language was recorded in the office of the county recorder of Santa Barbara, state of California, at the request of Miguel De La Guerra, of which the following is a translation in English:

"Joaquin Carrillo to Miguel De La Guerra. Mr. Alcalde of This Jurisdiction: I, Miguel De La Guerra, a resident of this town, as it may seem best, I appear before you and say: That desiring to possess a lot in this town, and being informed that the land lying in front of the house of Don Jose De La Guerra, and adjoining that of Francisco Leyva and Jose Maria Miranda on one side, and on another fronting that of Dona Isabel Yorba and Don Octaviano Gutierrez, ask it be granted to me fifty varas square, leaving that which is necessary for the streets that pass through said land. All of which I pray it be attended to by justice, paying the customary fees. Santa Barbara, August 26, 1849. Miguel De La Guerra.

"Court of Santa Barbara, Aug. 26, 1849. Let the present matter pass to the secretary (secretario) of the council (ayuntamiento) for a report as to whether the said lot be or be not vacant land. Octaviano Gutierrez, Secretary of the Illustrious Council.

"Ayuntamiento, August 26, 1849. In accordance with the foregoing decree of the court the secretary hereby reports that the tract of land which is petitioned for is vacant. Although something was said in the council (ayuntamiento) in regard to dedicating it for plaza, nothing was resolved thereupon, and

there appears nothing in the minutes of this body declaring the same a plaza, and therefore it is vacant land. This is all that this secretary (secretario) can report concerning the information prayed for. Anto. Ma. De La Guerra, Br. Srlo.

"Prefecture Santa Barbara, November 10, 1849. Pursuant to the foregoing report, stating that the land solicited has never been declared plaza, and the same being actually vacant land, let title be issued to the interested party in accordance therewith, stating the number of varas contained in said land, and recording these presents in the court of this place. The prefect of this place has so decreed, ordered, and signed. J. Carrillo."

"That the original of this document was, prior to the commencement of this action, lost or destroyed; when and under what circumstances it does not appear.

"(4) That at the time in the said document displayed, November 10, 1849, Joaquin Carrillo was acting as prefect of the district embracing the said pueblo of Santa Barbara. That said Joaquin Carrillo was, on the 6th day of September, 1849, appointed prefect of said district by Governor Riley, military governor of California, his office to date from August 1, 1849. That on the 16th day of September, 1849, he entered into the performance of the duties incidental to said office."

The court also found that "said perfect grant was not made by, and was not the act of, nor was it ratified or adopted as the act of, the said ayuntamiento of the pueblo of Santa Barbara." The appellant contends that this latter finding is not sustained by the evidence, and that it appeared from the evidence before the court that it was the grant of the ayuntamiento, and not of the prefect.

Upon the face of the grant it purports to have been made by the prefect, and, in the absence of any other evidence, would have been so held by the court. Although the petition of De La Guerra was addressed to the alcalde, and the secretary of the ayuntamiento, under instructions therefor, reported that the land was vacant, the ayuntamiento took no further action upon the petition, but Carrillo, who was afterwards appointed prefect, assumed authority in the matter, and, as prefect, made the grant. The concluding sentence, "The prefect of this place has so decreed, ordered, and signed," was the ordinary form used by prefects in making grants. The court, however, found, in accordance with evidence therefor, that there are in the office of the county recorder of the county of Santa Barbara two certain books of record of the proceedings of the ayuntamiento of the pueblo of Santa Barbara, entitled, respectively, "Actas o Acuerdos del Ayuntamiento" (containing the minutes of the proceedings of the ayuntamiento) and "Libro de Solares y Terrenos de Labranza" (containing the grants of lots and lands of the pueblo); that these constitute the only existing records of the acts and proceedings of the ayuntamiento; that

the said book of "Actas o Acuerdos del Ayuntamiento" contains the minutes of the ayuntamiento for a period commencing on March 13, 1849, and ending the end of March, 1850, and no reference is made in this book to the pretended grant evidenced by such document signed by J. Carrillo, or to any proceedings had in reference to the same, or to the premises the subject of the same, and said prefect grant, or any reference thereto, does not appear in the said book of "Solares y Terrenos." In the absence of any further evidence upon this subject, the entire want of any record of the grant would of itself have authorized a finding by the court that the land had never been granted by the ayuntamiento. The plaintiff, however, offered evidence for the purpose of showing that these records were not complete or conclusive, and in order that the court might find that this grant was made by the ayuntamiento; but the evidence introduced had no greater effect than to create a conflict of the evidence upon the issue. There was testimony that there had been another book of grants, which was lost, but there was no testimony that it contained any record of this grant; and it was also shown that the ayuntamiento had made grants of land of which there was no record in the book of Acuerdos, and also that it had made grants under the direction of the prefect. These were, however, only facts from which the inference might be made that the grant in question was an act of the ayuntamiento, but did not require the court to make such inference. It must be assumed, in support of the ultimate finding of the court, that the inference of fact which it made from this evidence was contrary to the contention of the plaintiff, and upon this appeal such inference is conclusive.

It is not very clear whether, under the laws of Mexico, a prefect in California had authority, under any circumstances, to grant lands within the limits of a pueblo; nor is it necessary to determine the question in the present case. The jurisdiction of the prefect extended over a district which may have included a pueblo, but he was not an officer of the pueblo, nor a member of the ayuntamiento, and the authority which he exercised was chiefly of a police and ministerial nature. If, however, the prefect did, under any circumstances, have authority to grant lands within a pueblo, such grant was not an exercise of the authority of the pueblo, but was made under a power independent of that of the pueblo. The title thus conveyed to his grantee was not the title of the pueblo, but was a title adverse to that of the pueblo. *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580. Being a grant independent of the pueblo, the confirmation of the pueblo's claim did not inure to the benefit of the grantee, but he was required to present his claim therefor to the land commission for confirmation in the same manner as a claimant under a grant by the governor of lands situated within the pueblo. *Leese v. Clark*, 18 Cal. 535; *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067; *Botiller*

v. Dominguez, 130 U. S. 238, 9 Sup. Ct. 525.

In June, 1851, Antonio Maria De La Guerra presented a petition to the common council of Santa Barbara, on behalf of the foregoing grantee, setting forth that there had been granted to him in 1850 "the land which lies in front of the house of Don Jose De La Guerra, and, not having the deeds in my possession (as his attorney in fact), I appear by these presents asking that the corresponding titles be extended to me." The records of the city council show that the petition was granted, but no further action appears to have been taken until August, 1852, when the petition was renewed, and the action of the former council affirmed, and on December 16, 1852, a deed evidencing the prefect grant was issued by the officers of the city for the property described therein. This deed was lost or destroyed, and was never recorded in the records of the city or of the county of Santa Barbara, and the court finds that the only evidence of its delivery is what is presumed from a memorandum on the back of the petition in the handwriting of the secretary of the common council: "Title for a lot of fifty varas in front of the house of Jose De La Guerra y Noriega, issued December 16, 1852." The petition was in the Spanish language, and the phrase therein, "titulos correspondientes," which in the translation is rendered "corresponding titles," was shown to signify the paper necessary to complete the grant in conformity with the statement in the petition, and the court finds that "said deed was issued as the 'corresponding title' prayed for in the petition, and did not constitute or evidence any new or different grant, conveyance, or title." The deed was lost, and, in the absence of any satisfactory evidence of its terms, we cannot say that the above finding is not sustained by the evidence. At the time of its issuance there was an ordinance in force in the city of Santa Barbara making certain proceedings requisite to any sale of the city lands, and the court finds that none of these requirements were observed in reference to the action upon the petition for the "corresponding title." The deed, therefore, cannot be considered as the source of any new title, for the reason that at that time the common council of Santa Barbara had no authority to make a donation of any of its lands, or to dispose of them except by sale in accordance with the terms of this ordinance. In fact, the appellant does not contend that the deed was issued for land sold by the city, but claims that it was merely issued to supply a lost grant. In view of the conclusion that the grant of the prefect was insufficient as a basis of recovery, the finding of the court that no juridical possession was given under the grant is of no moment. The appellant does not claim that there was any evidence that such possession was given, and, while affirmative evidence of that character might have been available in support of the validity of the original grant, a negative finding upon the subject, in the absence of such evi-

jence, cannot be invoked as prejudicial error. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(117 Cal. 604)

PEOPLE ex rel. WARFIELD v. SUTTER
ST. RY. CO. (S. F. 276.)¹

(Supreme Court of California. July 22, 1897.)

ATTORNEYS GENERAL—POWERS—STREET RAILROADS—FRANCHISE—USURPATION—NONUSER—FINE—FORFEITURE—WAIVER—ESTOPPEL—TIME FOR COMPLETING ROAD—PLEADING—JOINDER OF CAUSES—QUO WARRANTO—PARTIES—STATUTES—REPEAL.

1. An information filed by the attorney general for the forfeiture of a franchise cannot be dismissed by him without order of court.

2. An application made by authority of the retiring attorney general to dismiss an action commenced by him is ineffectual, where it is not presented until after the expiration of his term, and his successor elects to continue the prosecution.

3. A complaint showing that defendant has a franchise to maintain its railway in a certain street, and claiming a forfeiture thereof because defendant has never operated such railway for the convenience of the public, though pretending to do so, is not ambiguous, in that it asserts a usurpation and unlawful exercise of such franchise, while it also alleges that defendant has never operated such railway.

4. Two or more causes of action are not united in a complaint by averments that defendant unlawfully exercises and wrongfully claims the right to exercise a street-railway franchise, and that it claims the right to lay tracks and make switches.

5. The principle that no action lies for usurpation of a franchise that defendant is not using does not apply, where a street-railway franchise was obtained on condition that the line should be completed within a certain time, and thereafter be operated, and the company built only a part of the road within the prescribed time, and maintained the track so laid, and operated the line by running one car thereon once a day, not for the accommodation of the public, but merely to hold the franchise.

6. A provision in a street-railway franchise, in conflict with Civ. Code, § 502, fixing the time within which such railways must be built and operated, is invalid.

7. Jurisdiction of an action to declare the forfeiture of a franchise is not affected by the fact that superior courts have jurisdiction to issue writs of quo warranto for the same purpose.

8. A proceeding to declare the forfeiture of a franchise, which the attorney general has power to institute, is not converted into a private action by reason of the fact that he has unnecessarily added that it is by relation of a private person.

9. Where a street-railway franchise has become forfeited by failure to perform the conditions on which it was granted, the city granting such franchise cannot waive such forfeiture, or be estopped to claim it, as the power to institute an action to declare forfeitures is vested in the attorney general.

10. Civ. Code, § 502, fixing the time within which a street railway for which a franchise may have been granted must be completed, and declaring a forfeiture if not completed within such period, was amended, in 1895, by an act repeating the language of the former law as to the time within which the work must be done, and as to forfeiture, and authorizing the board granting such franchise to fix such time, and to extend the same, and also providing that such "act shall not affect any franchise or right of way granted before its passage." *Held*, that such provisions as to the time within which the work must be done,

and as to forfeiture, were not thereby repealed and re-enacted, so as to defeat a right of forfeiture arising before the amendment.

11. Where it appeared that defendant merely pretended to operate its street railway, by running one car over the tracks every day, merely to hold the franchise, and without intent to accommodate the public, nonuser was sufficiently shown.

12. Where a street-railway franchise had been granted for 10 years, and the track had been laid on a street in a thickly-settled portion of the city for more than six years, and such franchise was held solely for other purposes than the accommodation of the public, a fine of \$5,000 was not unreasonable.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Proceeding by the people, on the relation of R. H. Warfield, against the Sutter Street-Railway Company, to declare the forfeiture of its franchise. From a judgment and order as prayed, and imposing a fine of \$5,000, defendant appeals. Affirmed.

Naphthally, Freidenrich & Ackerman, for appellant. W. F. Fitzgerald, Atty. Gen., for respondent.

TEMPLE, J. This is an information filed by the attorney general, on the relation of R. H. Warfield, to have it declared that the defendant usurps and unlawfully exercises the franchise of maintaining tracks and switches upon and along Bush street and Central avenue, in San Francisco, and that by such judgment defendant be excluded from the privilege of maintaining and operating any street railway, or any part thereof, upon and along any of the parts of said streets and avenues described in a certain ordinance, and that all the rights and franchises acquired by said ordinance be adjudged and declared forfeited, and for a fine not exceeding \$5,000. The complaint sets out a certain ordinance of the city and county of San Francisco granting to certain named parties the right to construct, maintain, and operate for the term of 44 years a single or double track street railroad along and upon the following streets in the city and county of San Francisco, to wit: Commencing at the intersection of Market and Bush streets; thence along said Bush street, to Central avenue; thence along Central avenue, to Sacramento street; thence along Sacramento street, to First avenue; thence along First avenue, to D. street; and thence along D street, to the ocean beach. It is averred that no part of said right of way or franchise has been abandoned. It is alleged that defendant has acquired said franchise by assignment. It is stated that the work of constructing said street railway was not commenced within one year after the franchise was granted, but that in 1888 the construction was begun, and that a street railway was constructed along Bush street to Central avenue, and along Central avenue to California street, but no railway has been constructed upon any other street mentioned in said ordinance. It is further charged; That no acts have been done

¹ Rehearing denied.

towards operating a street railway over any portion of the right of way, except that a single car is run once each day along said tracks which have been constructed. Such car has not been run to accommodate the public, or to carry passengers, but to hold the franchise, and to prevent the granting of such franchise to others. That Bush street runs through a densely-populated part of the city. The defendant has never attempted to operate the road, as or for the purpose of accommodating the public, or any part of it. A demurrer was interposed, which was overruled, and the defendant answered. The facts are found as alleged in the complaint. On the 28th day of January, 1895, defendant moved the court to dismiss the action, on the ground that on the 5th day of January, 1895, the attorney general of the state of California had, by an order made on that day, ordered the action to be dismissed. The "order" was produced, and purported to be signed by W. H. H. Hart, as attorney general. On the 5th day of January, W. H. H. Hart was attorney general, but on the 28th day of January W. F. Fitzgerald held that office. Fitzgerald entered upon the duties of his office Monday, the 7th day of January, at 12 o'clock m. It appeared that on the 5th of January, 1895, General Hart concluded to dismiss the action, and made a minute of such determination. In the afternoon of January 7th, and after the expiration of his term, he mailed to the special attorneys for relator, and to the attorneys for defendant, notice of such determination. The letter concluded as follows: "It is therefore ordered that the above-entitled action be, and the same is hereby, dismissed." The attorney general, was, however, only an attorney of a party, and could not thus dismiss a pending case. He must apply to the court for such action, and, when the application was made, Hart had ceased to represent the plaintiff. He had ceased to have any authority over the matter when he signed and sent the letter which purports to be an order of dismissal. There could not be at the same time two attorneys general, and it is of no moment if the attorney general gave Hart permission to continue to act as such. The attorney general has filed a brief in this court for the respondent, and has continued to prosecute the action.

1. The complaint is not ambiguous in that it asserts that defendant usurps and unlawfully holds and exercises a franchise to maintain in and upon Bush street a street railway, while it also alleges that defendant has never operated a street railway on Bush street. The whole pleading makes it plain that defendant has a franchise to the effect indicated, of which a forfeiture is claimed, because it has never operated a street railway for the convenience of the public, but for more than six years has maintained a pretended and simulated service only.

2. Two or more causes of action are not united in the complaint. To allege that de-

fendant unlawfully exercises and wrongfully claims the right to exercise a franchise, and that it claims the right to lay tracks and make switches, is not to unite two causes of action.

3. It is claimed that the complaint states no cause of action, because it avers that, upon the tracks which defendant has constructed, it has not at any time operated a street railway; and it is contended that an action for usurpation will not lie unless the defendant is using the franchise. As authority for this proposition, *People v. Thompson*, 16 Wend. 655, is cited. In that case it was alleged that defendants usurped the right to be a corporation. In such a case, of course, the public has no interest in the matter if defendants only claim to be a corporation, but do not attempt to act as such. In this case a franchise was granted to defendant's assignors to lay down and operate on certain public streets a street railway. One condition of the grant was that the grantees should commence the work within one year, and complete the same within three years. If the road is not built and operated in accordance with the grant, a forfeiture is expressly declared, and the public is interested in having the franchise out of the way, that the right may be granted to another. But the complaint proceeds to aver that the defendant now usurps and unlawfully holds and exercises the franchises of maintaining in and upon Bush street, between Kearny and Webster streets, the tracks and switches of a street railway, and pretends to operate the same by running over the track one car every day, but not with the intent of accommodating the public. It is shown that defendant has abandoned no portion of its line. The supervisors had no power to extend the time within which the track must be completed. That is fixed by the statute (section 502, Civ. Code), and a different period cannot be fixed in the grant of the franchise. The provision in the franchise that the time shall not commence to run, if valid, might have the effect to extend the franchise for more than 50 years, contrary to section 497, Civ. Code. No valid franchise can be granted by the supervisors which conflicts with the general statutes. If the streets were not graded in time, the defendant should have abandoned the ungraded streets.

4. I see nothing in the fact that, by the constitution of 1879, superior courts have jurisdiction to issue writs of quo warranto, which affects the question. This special grant of jurisdiction is not exclusive. This is in reality an action to obtain a judgment declaring a franchise forfeited. It admits the existence of the franchise but for the dereliction by reason of which it is claimed the rights conferred have been forfeited. This may be done by a proceeding strictly in form of a quo warranto, but there is no reason why the proceeding may not be by a regular action. In fact, there is now so little difference that it is hardly worthy of discussion. The proceeding is by information by the attorney general. When the proceeding is in the interest of private per-

sons, in whole or in part, it is said to be by relation; and, under the provisions of the Code, the relator may be required to give security for costs. The information, however,—that is, the complaint,—is signed and filed by the attorney general as attorney, and doubtless, as attorney, he has control of the action. I know of no such distinction as that made by counsel, and attributed to the late attorney general. If the proceeding is one in which a private person can have no interest, the proceeding is not properly by relation. But the attorney general had the power to institute the proceeding, and in either form it is by him. If, unnecessarily, he has added that it is by relation of a named person, that does no harm. It does not convert the proceeding into a private action.

5. I am unable to discover any act on the part of the city by which a forfeiture was waived, if it were conceded that a forfeiture could be waived by the city. No right is acquired by maintaining an obstruction in the street. Statutes of limitation do not run in favor of such a trespasser. If the law be, as is claimed by some, that such a franchise is not lost until it has been declared forfeited in a judicial proceeding, the city could but acquiesce. It has no power to institute an action to secure a forfeiture. That power is vested in the attorney general. As it could not enforce a forfeiture, it could not waive it. The city cannot be estopped in respect to a matter over which it has no power. There is no statute which requires the municipal authorities to request the institution of such a suit, or which gives any force to such a request should it be made.

6. In 1895, section 502, Civ. Code, was amended by authorizing the board granting the franchise to fix the time for beginning and for completing the work, also empowering the board to extend the time for completion of the work. The forfeiture clause is the same as before, and the amendatory act concludes: "Provided, further, that this act shall not affect any franchise or right of way granted before its passage." This action was commenced before the amendment, but was tried after the new law became in force. The board of supervisors have not granted any extension of time, but the contention is that the old law was by the amendment repealed, and, as there was no saving clause, the right to insist upon a forfeiture is lost. By the repeal of an act prescribing a penalty, the right of action to recover a penalty already incurred is gone. But the old section was not repealed by the amendment. In *Railroad Co. v. Shackelford*, 63 Cal. 261, this court quoted with approval the following language from *Ely v. Holton*, 15 N. Y. 598: "The portions of the amended section which are copied without change are not to be considered as repealed and again re-enacted, but to have been the law all along." The new section repeats the language of the former law as to the time within which the work must be done, and as to the forfeiture.

These therefore have not been repealed, and do not begin with the amendment. To the section as it has been all along is added a provision giving certain powers to the board. The effect, then, of the provision above quoted, is that the new provisions do not affect existing franchises; that, as to them, the board cannot extend the time for completion. But the clause declaring the forfeiture has not been repealed.

7. I think the fact of nonuser was shown beyond question. The board of supervisors has the power to grant such franchises in the interest of the public, and to facilitate travel. The pretense of running was clearly a sham. It was not intended thereby to accommodate the public, and it could have no effect in that direction.

8. I see no reason to doubt the power of the court to impose a fine. The amount seems very large, but I cannot say that it was unreasonable. The franchise had been granted for ten years. For more than six years the track had been laid on Bush street. This was in a thickly-settled portion of the city. The circumstances show conclusively that the franchise was held, not to convenience the public, and to facilitate travel, but to prevent facilities for travel, and thus force patronage upon the Sutter street line. The judgment and order are affirmed.

We concur: HENSHAW, J.; HARRISON, J.

BEATTY, C. J., being disqualified, did not participate in the foregoing.

GAROUTTE, J. I concur in the affirmance of the judgment, and also in the views declared by Justice TEMPLE in nearly all respects. There is nothing in the record indicating an estoppel against the city, or showing a waiver of forfeiture upon its part. For these reasons, I leave the matter open as to the legal status of the city in relation to waiver and estoppel as pertaining to franchises of this character.

McFARLAND, J. I dissent. In my opinion the merits of the controversy here involved could be determined only in an action brought by the city and county of San Francisco against the appellant, to remove its tracks and switches from Bush street. The attorney general, who authorized this present proceeding, was satisfied that it should not have been instituted, and endeavored to dismiss it; but although he drafted an order of dismissal on January 5, 1896, he did not sign it, owing to delay in copying, until an hour or two after 12 o'clock m. on January 7th, at which latter time his successor had taken possession of the office, in accordance with a prevailing custom; and I presume that for this reason it must be held that the order of dismissal was technically ineffective.

Section 803 of the Code of Civil Procedure.

and succeeding sections, upon which the present proceeding was based, provide for what is in its nature a criminal prosecution. They provide for a maximum fine of \$5,000, which, is about the severest punishment allowed by our criminal law short of imprisonment, and in the present case the extreme penalty was imposed. Evidently, therefore, these provisions should not be applied to any case not clearly within them.

It is strenuously contended by appellant's counsel that, since the present constitution provides for the writ of quo warranto, under that writ alone, brought by the attorney general in the name of the people, and not on the relation of a private person, can there be such an inquiry as the one sought to be inaugurated in the case at bar; but it is not necessary to pass on that question, because, in my opinion, the judgment in the present proceeding cannot, for other reasons, be affirmed.

The chapter of the Code which contains the sections in question is entitled "Actions for the Usurpation of an Office or Franchise," and nearly all its sections refer expressly to an "office." Still, section 803 does mention "any franchise"; but surely these provisions, including the extreme penalty which they put in the power of a judge to impose, should be held to be confined to an office or to something that beyond doubt is, in a legal sense, a "franchise." Section 803 provides that the proceeding may be instituted against any person who "usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within the state." Now, the only material fact found in the case at bar is that appellant unlawfully exercised what is called the "franchise" "of maintaining in and upon Bush street, in said city, between Kearny and Webster streets, the tracks and switches of a street railway," and has claimed the right to complete it to and over certain other streets, and to maintain a railway track thereon. But that was not a "franchise"; it was a mere right of way. There has always been a well-defined distinction between "ways" and "franchises," and they are put into distinct categories of property by Blackstone and Kent and all other standard writers on the subject. *Waterworks v. Barber*, 99 Cal. 36, 33 Pac. 735. A way may be granted by a private person. A franchise can be granted only by the government, and it is a sovereign prerogative existing in the hands of a subject. A way belongs to the same species of property, whether granted by government or by a private person. The ownership of a way granted by public authority is no more a franchise than is the ownership in fee of land conveyed from the government to an individual by a patent. The Codes themselves clearly make the distinction, for in section 502 of the Civil Code, in the title "Street Railroad Corporations," it is provided that a failure to do certain things "works a forfeiture of the right of

way, as well as of the franchise." This distinction runs through all civil rights and proceedings, and, of course, the fullest force must be given to it when it is invoked in a procedure which is substantially criminal, in which the judge of a court may base his finding upon what he considers a preponderance of evidence, or upon conflicting evidence, in which case the finding could not be disturbed on appeal, where nine jurors could render a verdict, and where the judge, without regard to the rules of procedure and evidence which obtain in criminal cases, could inflict an exceedingly severe punishment. If the appellant has any franchise which would subject it to the provisions of section 803, it is such as was granted by its incorporation, under the laws of the state,—such as to be a corporation, to exercise certain granted corporate rights, to collect fares, etc.,—of which the mere right of way is not one. The franchise which in the case at bar is sought to be brought within the provisions of section 803 is alleged to have been granted by the board of supervisors of the city and county of San Francisco, and it is doubtful if the board had any power to grant any franchise to a railroad company (see section 497 et seq. of Civil Code, and other sections there referred to, and section 4046 of the Political Code); but, at all events, the right of way which is here involved is not such franchise.

These views make it unnecessary to discuss many other contentions made by appellant,—as, for instance, that under the constitution no fine can be imposed except in a criminal prosecution in the name of the people; that the city and state have waived their rights in the premises, and are estopped by acquiescing for many years in the rights of appellant here sought to be forfeited, and inducing appellant to spend large sums of money in building its road, and by assessing and accepting taxes thereon; and that there was in fact no forfeiture of appellant's right of way. I think, however, that the court erred in ruling out evidence offered by appellant to show that some of the streets mentioned in the ordinance in question had not been graded and sewered, and that it had completed the road within three years upon the streets that had been so graded and sewered. The ordinance provided in terms that the time should not commence to run until there had been such grading and sewerage; and I think that at least with respect to that part of the Code which is in its nature a criminal procedure, and for the purpose of the proper exercise of the discretion of the court as to the amount of the penalty to be imposed, or as to whether any penalty at all should be imposed, the offered evidence was proper and admissible. It certainly was pertinent to the intent of the appellant, which is an important element of a criminal act. For the reasons above stated, I think that the judgment and order appealed from should be reversed.

STRASBURGER et al. v. BEECHER.

(Supreme Court of Montana. July 26, 1897.)

APPEAL—SPECIFICATIONS OF ERROR—SUFFICIENCY
—FORFEITURE OF MINING CLAIM—SUFFICIENCY
OF EVIDENCE—WITNESSES—COMPETENCY.

1. Where, on appeal, there is a designation of a material fact at issue, and a specification that there was a failure to prove such designated fact, it is sufficient to enable the court to examine and determine whether the finding complained of was sustained by the evidence.

2. On an issue as to the forfeiture by plaintiffs of the L. S. mining claim for failure to do representation work in 1883 and 1884, the fact that the work was done in 1883 was fully shown. Plaintiff S. testified that he did the work in 1884, and the mineral surveyor testified that he saw S. there in 1884. An experienced miner said that in 1884 he saw digging on the claim that had not been done when he was there in 1883. Several witnesses for defendant, who were on adjoining premises in 1884, testified that they did not see S. on the L. S. claim, or any mining improvements done there, in 1884; that if he had been there, and the work done, they would have known it; but one of them testified on cross-examination as to certain improvements, and it was shown that two witnesses who gave the most material testimony for defendant had previously testified differently as to the same facts. *Held*, that the evidence to support a finding of forfeiture was not of that clear character essential in such cases.

3. A miner who had in 1887 assisted in surveying the boundaries of a mining claim which was discovered in 1882, and knew the ground since 1887, was competent to testify whether he knew what purported to be, and what was indicated by marks and monuments as, the discovery of the claim, and, if so, what was the mark indicating the point of discovery of such claim.

Appeal from district court, Yellowstone county; George R. Milburn, Judge.

Action by Nathan J. Strasburger and others against Samuel A. Beecher. From a judgment in favor of defendant, and from an order denying a motion for new trial, plaintiffs appeal. Reversed.

Appeal from a judgment and order denying plaintiffs' motion for a new trial. The motion was heard upon a statement of the case, to which were attached specifications of error. The action was brought to determine the right of possession of a piece of mineral land, 530x1140 feet, situated in the New World mining district, Park county, Mont. The case has already been before this court. *Hoffman v. Beecher*, 12 Mont. 489, 31 Pac. 92. The respondent (defendant) filed his application for a patent upon the Silver Queen mining claim. Appellants (plaintiffs) claimed adversely, and contended that the mineral land sought to be patented by the defendant was altogether within the boundaries of their mining claim, known as the "Lake Superior Claim." The defendant denied that the Silver Queen, or any part of it, was within the boundaries of the Lake Superior claim; and in his answer raised the issues of the discovery by the plaintiffs, location, and forfeiture for nonperformance of the annual labor between the 1st of January, 1883, and the 1st of January, 1885. The principal errors assign-

ed by plaintiffs and appellants are alleged erroneous rulings upon the admission of testimony, and the insufficiency of the evidence to justify the findings of the court. The case was tried before the judge, sitting without a jury, and a judgment entered for the defendant.

Luce & Luce, for appellants. E. C. Day and J. A. Savage, for respondent.

HUNT, J. (after stating the facts). We will first consider the assignment of error that the evidence is insufficient to justify the findings and decision of the court. The respondent argues that this question is not before this court for review, because the appellants' specifications consist of averments and conclusions of counsel as to what the evidence shows, and that such conclusions are mere statements opposed to the findings of the court, and that, therefore, section 1173 of the Code of Civil Procedure has not been complied with. But we are of the opinion that there is a sufficient assignment or specification of the particulars in which the evidence is insufficient to justify the finding and decision of the court to the effect that the plaintiffs did not perform the requisite amount of labor upon the Lake Superior mining claim from the time of the location thereof, in the year 1882, to the time of the commencement of this suit. The plaintiffs' specification in this respect was as follows: "The evidence was insufficient to prove, and the defendant did not allege nor prove in any manner, that less than \$100 worth of labor had been performed and improvements made during each and every year upon said Lake Superior mining claim, from the time of the location thereof, in the year 1882, to the time of the commencement of this action by the plaintiffs, their grantors and predecessors in interest, or any of them; and the evidence was insufficient to prove, and the defendant did not allege nor show, any failure on the part of the plaintiffs, or any of them, or their grantors or predecessors in interest, or either of them, to comply with the conditions that one hundred dollars' worth of labor should be performed and improvements made during each year upon said Lake Superior claim; and the testimony was insufficient to prove, and the defendant did not allege nor prove, that in the year 1884 the plaintiffs or their grantors or predecessors in interest did not perform one hundred dollars' worth of labor, and make one hundred dollars' worth of improvements, on said Lake Superior quartz lode mining claim; and the evidence was insufficient to prove, and the defendant did not prove in any manner, that said Lake Superior quartz lode mining claim, or any part thereof, or any of the surface ground thereof, was open or subject to relocation or to any location on the 1st day of January, 1885, or at any other date or time since June 23, 1882; and the evidence was insufficient to prove that said Jaycox and Davis, the alleged locators of said Silver Queen

claim, or either of them, did ever locate or relocate said claim, or any part thereof, in any manner."

The case of *Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718, disapproved of specifications which declared that the evidence showed certain enumerated facts or conclusions which were contrary to what the jury found. The court held that a specification should point out the variance between the facts found by the jury and the evidence, and that there should be a specification that a fact found by the jury is not sustained by the evidence, with the particulars in which the evidence is insufficient to justify the finding. We have no hesitation in affirming what the court there said. Furthermore, much that was laid down is applicable to several specifications, other than the one quoted, in the case at bar; for in them it is declared that the evidence proved that on, etc., which declaration is followed by a résumé of the conclusions of counsel as to what was proved on the trial of the case. All such specifications are to be condemned, because, as was held in *Bank v. Roberts*, supra, this simply puts the appellate court upon an inquiry, as between the conclusions of the judge and the opinion of appellant, as to what the evidence shows. But, in the specification quoted above, the appellants do designate a particular material fact in relation to labor performed upon the Lake Superior mining claim, and do aver that the finding of the court that a requisite amount of labor had not been performed upon the said mining claim was not justified by the evidence in the case, because the defendant did not show any failure on the part of the plaintiffs to comply with the conditions required to be performed. If there is a designation of a material fact at issue, and a specification that there was a failure to prove that designated fact in any manner by the party whose duty it is to prove it, we believe it is sufficient to enable the court to examine whether the finding complained of is sustained by the evidence. Believing, therefore, that the particular specification was sufficient, we shall consider the evidence bearing upon that point in the case.

The great weight of the evidence is that one Edward Hayes made a valid discovery and location of the Lake Superior claim on June 23, 1882, and filed notice of location in the office of the county recorder of Gallatin county on August 31, 1882. Experienced miners testified that Hayes discovered mineral, galena and pyrites of copper, where he put his discovery stake, on the westerly part of the Lake Superior, near the center; that, in their opinion, the mineral rock was in place; that Hayes was working on the claim in June, 1882, in a cut 10 or 12 feet long, and extracted some two or three hundred pounds of ore about that time, which was from rock in place. It also appears that Hayes sufficiently and properly marked and located his claim, and that the notice of location was good and valid. By conveyances and de-

crees of court, dated in 1882, 1883, and 1887, the plaintiffs proved record title in themselves. We shall therefore pass at once to the question of the alleged forfeiture for non-representation in the years 1883 and 1884.

The plaintiffs introduced an original affidavit of Elias Sperling, one of the plaintiffs herein, sworn to on September 22, 1884, and filed on September 27, 1884, with the recorder of the New World mining district, to the effect that at least \$100 worth of work had been performed on the Lake Superior lode claim between August 1 and September 1, 1884, and that said expenditure was made by Elias Sperling and others in interest. Plaintiffs also read in evidence another affidavit of Elias Sperling, sworn to on September 22, 1884, to the effect that \$100 worth of work had been performed on the Lake Superior and a like amount on other claims in 1884. These affidavits were admitted without objection. Plaintiffs also read a deposition of Elias Sperling, one of the plaintiffs in this suit. Sperling testified that he had known the Lake Superior claim since 1882, and that at that time he saw improvements made on the ground by an open, deep cut, about 20 feet long, near the south end of the claim, and that he did the representation work on the claim in the years 1883, 1884, and 1885; that in 1883 he did \$125 worth of work on it on the north end of the claim, in tunneling; that in 1884 he tunneled near the south end of the claim to the value of \$225, and in 1885 also tunneled near the south end. Plaintiffs also offered in evidence the deposition of one Z. H. Daniels, who testified that he was very familiar with the Lake Superior mining claim, and had been since 1883, and that in September, 1884, he had found digging done on different places in that claim that was not done in 1883, when he saw the claim. James Sweeney, a witness for plaintiffs, testified that he did the assessment work on the Lake Superior claim in 1885 for Elias Sperling; that such work was done in an open cut, and in an old tunnel, which had been driven a foot or two the year before; that he also did the work later in the year 1885 upon that claim. The evidence also proves that the Lake Superior was fully represented after 1885, and up to the time of the trial of this suit. Charles Tappan, a civil and mining engineer and deputy mineral surveyor of Montana, testified that he was on the Lake Superior claim in July or August, 1884, with Elias Sperling; that he was familiar with the conflict between the Lake Superior and the Silver Queen lodes; and that, in making a survey of the Lake Superior claim, he received information about where the claim was, from Mr. Sperling, when he (Tappan) was on the ground, some time in 1884; and that in the summer of 1884 he saw Elias Sperling on the Lake Superior claim, although he did not know whether Sperling had any business there, or was there to see "those men he had representing him." Tappan also testified that he

found several cuts and tunnels on the claim,—some old work, others more recently made. He found one cut (No. 1), 14 feet long, caved in, and about one-half of it outside the north line of the Lake Superior. He put the value of the work done at \$720, including 22 feet of a tunnel which adverse claimants built.

On behalf of defendants, a witness named Mather swore that, a few days after his first location, Hayes, the original locator of the Lake Superior claim, moved his location north from where it was at first, and put it on another stake, about five or six hundred feet north of the first discovery, giving as a reason for doing so that he thought it was better ground in the latter place, and that the point where this second notice was put is about eighty or ninety feet north of the north line of the Lake Superior. A witness for defendants, named Rock, testified that he was on the ground in controversy in 1884, and that he did not see any mining improvements done there that year; that a man named Langsdon did some work for the Maggie B. people, and that the Maggie B. joined the Homestake lode on the north, just where the Silver Queen is. It is well to note at this point that the notice of location of the Silver Queen lode claim sets forth that it is a relocation of the Maggie B.; but it is very plain that the Silver Queen was nothing but an attempted relocation of the Lake Superior mining claim, and that the case was tried upon the theory that it was such a relocation, and that the Lake Superior had been forfeited by reason of nonrepresentation. The plat accompanying the opinion of the court in *Hoffman v. Beecher*, supra, demonstrates the truth of this statement. Aaron H. Davis, another witness for defendant, testified that he knew the ground in controversy in 1884; that he then saw very little improvement on it in October of that year; that there were some slight cuts on the ground, but that he saw nobody at work on any of these cuts in 1884. On cross-examination the witness admitted that there was quite a cut on the ground in one tunnel, and that a couple of small sets of timbers had been put in. He further said that he did not see Elias Sperling on the Lake Superior claim in 1884, and that he was on the ground twice that fall, but did not go near it again until he went to relocate it (witness being one of the locators of the Silver Queen). Peter H. Branser, another witness for defendant, testified that he knew the Lake Superior claim, and saw Hayes, the original locator of the claim, about the time that he located it, in 1882; that in July, August, and September, 1884, he was on the Lake Superior ground frequently, but did not see anybody at work there during those months; that in 1883 he knew that a tunnel on the east end of the claim, marked "Tunnel No. 5," was made by Jack Burke; that this work done by Burke was at the south end of the claim, but that in 1884, although he was camped only a short distance from the claim, he saw no one at work there; that

he knew Elias Sperling, but did not see him in 1884; and that if Sperling had been at work on that ground for any considerable length of time during August and September, 1884, witness believed he would have seen him. The testimony of this witness would be entitled to great weight were it not for the fact that his credibility was much shaken on cross-examination. It appeared thereon that in the testimony of this witness as given on the trial of this case, and certain testimony given by him in a deposition taken in Cooke City in the August preceding said trial, the witness made different answers to the question of whether or not there was actually a discovery made by the locator of the Lake Superior, and whether or not there was any mineral-bearing rock in place at the point of discovery of the Lake Superior claim. In the deposition referred to, the witness testified that there was mineral-bearing rock at the last point of discovery by Hayes in 1882; while on this trial witness stated that he did not see any ore that he would call "ore in place," and that he must have been mistaken when he testified by deposition some time before. As this question of discovery was a material issue in the case, the conflicting answers of the witness weakened his whole testimony. Hamilton Kearns, another witness for the defendant, testified that he knew the ground in controversy in 1882, and has known it since; that there was a tunnel and a cut with three sets of timbers in it, which had been made by Burke, who worked for appellants (plaintiffs) in 1883 on the Forget-Me-Not ground, which adjoined the Lake Superior on the south, and not on the Lake Superior ground; that in 1883 he joked Elias Sperling about doing work off of the Lake Superior ground, and that in 1884 he did not see Elias Sperling at work on the ground; that there never was any work done on this tunnel since the sets of timbers were put in; and that, if there had been any tunnel run on the ground of the Lake Superior claim in 1884, he would have been likely to have seen it. On cross-examination this witness admitted that he had testified in a deposition at Cooke City, some time before the trial of this case, to the effect that he did not know of his own personal knowledge of any representation on the Lake Superior claim during 1884, and that he had further testified that in 1883 Sperling had sent some men to represent the Lake Superior, but that they had gone on the Forget-Me-Not ground, and run in an open cut.

We cannot think that the defendant made out his plea of forfeiture on this evidence. "A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law." *Book v. Mining Co.*, 58 Fed. 106. The positive testimony of Sperling that he

was on the claim and did the work in 1884 is not overcome by the mere statements of witnesses, who were on adjoining premises at divers times, that they did not see him on the Lake Superior claim in 1884, and did not believe he was there. Tappan, the mineral surveyor, saw him there in 1884; and Daniels, an experienced miner, says that in September, 1884, he saw digging within the limits of the claim, that had not been done when he was there in 1883. That the representation work was done for 1883 appears not only by plaintiffs' witnesses, but by the statement of one of defendant's witnesses (Kearns), who admitted that Sperling had sent men to represent the Lake Superior in 1883, but that they had, through mistake, done work on the Forget-Me-Not claim. The deputy surveyor, however, straightens this point out by testifying that the easterly line of the Lake Superior went directly over the edge of tunnel No. 5, the cut for the entrance to the tunnel being off the claim, and within the Forget-Me-Not limits. Conceding the fact to be that the work was partly off the claim, still, if it was done to develop the Lake Superior claim, and for the benefit of the Lake Superior location, as it clearly was, it may be properly considered as annual assessment work on the Lake Superior claim. *Hall v. Kearny* (Colo. Sup.) 33 Pac. 373; *Smelting Co. v. Kemp*, 104 U. S. 636; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301; *Book v. Mining Co.*, 58 Fed. 106. The burden of showing nonrepresentation is upon the party alleging it. *Coleman v. Curtis*, 12 Mont. 301, 30 Pac. 266. The defendant therefore assumed to prove that plaintiffs or their predecessors did not do the requisite amount of work for 1883 and 1884. But we cannot sustain the finding of the court in this particular, and must remand the case for a new trial. The defendant has failed to sustain his averments of forfeiture by that clear and convincing proof essential in all cases where forfeiture is relied on.

Appellants have raised several other questions, pertaining, principally, to the admissibility of certain testimony. A witness was asked by the defendant if he knew what purported to be, and what was indicated by marks and monuments as, the discovery of the Lake Superior quartz lode mining claim, and, if so, what was the mark indicating the point of discovery of such claim. The witness to whom this question was put was a miner, and had known the ground in controversy since 1887, and said that he assisted in surveying the boundaries of the Lake Superior in that year. The object of this question was to prove that the discovery of the Lake Superior was north of the north side line of the claim. The court overruled the objection, and the witness answered by saying that he did observe a post at the discovery cut, and that it was a few feet north of the north side line of the Lake Superior, as surveyed by the surveyor. The argument

of the appellants is that the ruling was erroneous, because the witness had no knowledge of the condition of the claim prior to August, 1887, and that any answer that he might make would be hearsay. But we think the ruling of the court was correct. We see no objection to permitting a miner to testify what purported to be the discovery hole or cut of a mining claim, if he can intelligently answer such a question, by reason of his familiarity with the marks and monuments which indicate the discovery on the claim. We do not think it necessary to pass upon other objections made by the appellants. The judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

PEMBERTON, C. J., and BUCK, J., concur.

(15 Utah 250)

MUNNS et al. v. LOVELAND et al.

(Supreme Court of Utah. June 4, 1897.)

ATTACHMENT—SHERIFF—JUSTIFICATION—LIABILITY OF ATTACHING CREDITORS—JUDGMENT BY DEFAULT—BILL OF SALE—REPLEVIN—ALLEGATIONS OF FRAUD—APPEAL—ABSTRACT—COSTS.

1. Attaching creditors are not liable for the acts of a sheriff unless by interference in some way they make themselves liable. They are presumed to have intended that no action should be taken by the officer not authorized by the terms of the writ. And it is not error to grant a nonsuit, as to creditors who have been joined in a suit with the sheriff, when the record furnishes no evidence tending to show that the officer was authorized or directed by his co-defendants, or either of them, to levy upon the particular goods in question, or any goods except such as belonged to the debtor. The receiving of the proceeds of the sale in satisfaction of their claims implies no consent to any irregularities or proceedings of the officer, and they are not joint wrongdoers with the sheriff.

2. Where one of the attaching creditors files no answer to such a suit brought, and plaintiff fails to show liability as to any of such creditors, it is not error to deny judgment by default against a creditor thus failing to file an answer.

3. It is not error in a court to direct a jury to return a verdict of no cause of action, in a proceeding in replevin for the possession of goods or their value, against a sheriff who attached the same as the property of B., when the liability of the officer depends upon the validity of a sale of the goods claimed to have been made by bill of sale which has never been recorded, and where there was no change of possession, as required by section 2837, Comp. Laws Utah 1888.

4. In replevin the rule that, where a party to an action relies upon fraud, he must allege and prove it, does not always apply. Where the plaintiff alleges ownership generally, and right of possession, without disclosing the origin of title, or stating facts showing it, the defendant may traverse the allegations of the complaint, and, under the issue thus formed, may prove that the plaintiff's title was founded in fraud, and introduce any evidence which tends to show that the plaintiff had neither title in the property nor right of possession thereof.

5. Where property is found in the possession of the defendant in attachment proceedings, and the writ under which the levy was made and the property seized was issued by a court or officer having lawful authority to issue it, and is in legal form, the officer may justify the levy by producing the writ.

6. When the omissions and inaccuracies of appellant's abstract render the filing of an additional abstract necessary, the costs of such additional abstract may be taxed against appellant. (Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Arthur J. Munns and Elias Jensen against C. C. Loveland, H. E. Gibson, and C. A. Smurthwaite (partners as Gibson & Smurthwaite), L. E. Hall, Zion's Co-operative Mercantile Institution, Brigham City Woolen-Mills Company, George Q. Cannon & Sons Company, Brigham City Mercantile & Manufacturing Association, and Gilbert F. Boreman. From a judgment for defendants, plaintiffs appeal. Affirmed.

All of the respondents except C. C. Loveland, who was sheriff of Box Elder county, Utah, on or about the 1st day of May, 1893, instituted separate suits in justices' and commissioners' courts in said county against one E. A. Box, to recover various claims, and at the same time instituted attachment proceedings, in which writs were issued and placed in the hands of Loveland, as sheriff, who, it appears, under and by virtue of the writs levied upon the stock of merchandise in question, as the property of said Box, and took the goods into his possession, upon dates between the 1st and 5th of May, 1893. After Sheriff Loveland had levied upon and taken into his possession the goods, under the various writs of attachment, said Box and his wife executed a deed of assignment for the benefit of his creditors to the plaintiffs (the appellants herein), as assignees, and thereby attempted to convey the merchandise in controversy, and some real property. The assignees then demanded the possession of the goods, which was refused by the sheriff. After such refusal, on the 20th day of May, 1893, they were sold by the sheriff under writs of attachment issued in the attachment suits; and on the same day the assignees brought this action to recover the possession of the goods, or, if that could not be obtained, their value. They alleged in their complaint generally, in addition to the formal matters, that they were the owners and entitled to the possession of the goods and chattels in controversy, and that upon demand made the defendants refused to surrender the same, and still wrongfully detain and withhold them from the possession of the plaintiffs. All the defendants except George Q. Cannon & Sons Company filed answers in which they specifically denied the allegations of the complaint, and in justification set up the attachment proceedings. At the trial of the cause, upon the plaintiffs resting a nonsuit was granted as to all the defendants except C. C. Loveland, the sheriff; and at the close of the testimony of defendant Loveland the court directed the jury to find a verdict of no cause of action as to him, and entered judgment accordingly. Thereupon this appeal was prosecuted.

R. H. Jones, for appellants. Boreman & Boreman, for respondents.

BARTCH, J., after stating the case as above, delivered the opinion of the court.

The first question presented in this case is whether the court erred in granting the nonsuit as to all the defendants except C. C. Loveland at the close of the plaintiffs' testimony. The appellants contend that these defendants were joint wrongdoers with the sheriff, because, as is insisted, they directed the officer to levy on the goods, and accepted the proceeds of the sale in satisfaction of their demands against E. A. Box. This contention is not sustained by the record. The matters set up in the answer in justification simply show that the officer was authorized in the attachment suits to levy on and sell the property of E. A. Box, but show no direction to him to levy upon or sell the property of these plaintiffs, or of any other person. There is nothing in the answer which would establish the fact that they were joint wrongdoers, even if it were true that the officer was a wrongdoer. Nor did the plaintiffs, before resting their case, introduce any evidence which even tended to show that the officer was authorized or directed by his codefendants, or either of them, to levy on the particular goods in question, or on any goods, except such as belonged to E. A. Box, or that either of such defendants knew, or had reason to know, that the goods levied upon belonged to any other person than E. A. Box, or that they, or either of them, assumed to direct or control the officer in making the levy. Their receiving the proceeds of the sale in satisfaction of their claims, of itself, implied no consent to any irregularities or proceedings of the officer. The attaching creditors were not liable for the acts of the sheriff unless by interference in some way they made themselves liable, and it was incumbent upon the plaintiffs to establish such liability by a preponderance of the evidence, because the defendants are presumed to have intended that no action should be taken by the officer not authorized by the terms of the writs. Speaking of the liability of defendants, in an action for trespass, who had given an indemnity bond in attachment proceedings to an officer who served the writ, the supreme court of the United States, in *Lovejoy v. Murray*, 3 Wall. 1 (Mr. Justice Miller delivering the opinion), says, "That the attaching creditor is not answerable for the acts of the officer unless he in some manner interferes so as to make himself liable must be conceded." *Freem. Ex'ns*, § 273; *Abbott v. Kimball*, 19 Vt. 551; *Hyde v. Cooper*, 26 Vt. 552. We are of the opinion that the nonsuit, as to the attaching creditors, was properly granted. The fact that George Q. Cannon & Sons Company filed no answer is immaterial, because the plaintiffs failed to show any liability; and for the same reason the motion to enter judgment by default

as to the last-named defendant company was properly denied.

The next question which we will consider is whether the court erred in directing the jury to return a verdict of no cause of action as to defendant Loveland at the close of the testimony in the case. Counsel for the appellants insists that the merchandise levied upon under the several writs of attachment and sold was not the property of E. A. Box, the defendant in the attachment proceedings, but that it had been conveyed to his wife, Roxy Box, and by her to the plaintiffs. At the trial, to support this contention appellants introduced in evidence a bill of sale of the goods in controversy executed on the 27th day of January, 1893, and a deed of assignment of the same goods made by E. A. Box and his wife, Roxy Box, for the benefit of his creditors, bearing date May 12, 1893. The bill of sale was never recorded, nor were any of the creditors or the general public ever notified of its existence; nor does it appear from the record that the sheriff or any of the defendants had any knowledge of its existence, or of any claim of the wife to the goods which it purported to convey. Nor does the evidence establish the fact that there was any change of possession of the goods. E. A. Box, as a witness for the appellants, himself testified that before the sale to his wife he conducted the business; that he collected and paid bills; that he made deposits in the bank, and drew checks in his own name; that his wife had no occupation, prior to the time of the bill of sale, except attending to the household duties; and that after the bill was made he thought she did not do much else. He further testified: "At the time I made the bill of sale my two daughters were the employees in the store. They were the employees after that. The only change that I know that was made about the store, or in the store, after the bill of sale, was that I was not around there so frequently after that, if that would be considered a change." Trieste Box, daughter of E. A. Box, and one of the appellants' witnesses, testified that she lived at home and worked at the store just the same after the bill of sale as before; that her mother's duties were not changed after the bill of sale; she still attended to her household duties; that her father was the only one who did the buying for the store, both before the bill of sale and after; and that she surrendered the possession of the store to the sheriff, and gave him the keys, but did not remember what she said to him. Further reference to the evidence is not necessary, because it is apparent from a perusal of it that there was no delivery of the goods, or any change of possession, under the bill of sale, as required by section 2837, Comp. Laws Utah 1888, and that, therefore, the pretended sale was fraudulent and void as to creditors. The maker himself treated the bill as of no effect when he made the deed of assignment to the appellants, for in that instrument his vendee in the bill of sale joins

him simply as wife, and not as maker. Counsel for the appellants, however, insists that the question of fraud cannot be considered in this case, in reference to the transfer of the property, because fraud was not specifically alleged in the answer. This question was fully considered by this court in *Jones v. McQueen*, 45 Pac. 202,—a case very similar to this on several points; and, if counsel had been diligent in an examination of that case, much useless labor might have been averted in the briefs in this. We there said: "As a general rule, where a party to an action relies upon fraud he must plead it. In replevin, however, the law seems to be settled, in most jurisdictions, that where the plaintiff alleges ownership generally, and right of possession, without disclosing origin of title, or stating facts showing it, the defendant may traverse the allegations of the complaint, and, under the issue thus formed, may prove that the plaintiff's title was founded in fraud, and introduce any evidence which tends to show that the plaintiff had neither title in the property nor right of possession thereof. This rule is doubtless based on the fact that in replevin the plaintiff is not bound to disclose any source of title, and therefore the defendant is not bound to anticipate the source of title under which the plaintiff may claim."

The bill of sale being void as to creditors, the merchandise was subject to attachment by them as the property of E. A. Box at the time when the levy was made and the property taken into possession by the officer; and it is apparent from the evidence that, for the purpose of the attachment proceedings, at least, the goods must be considered as having been in the possession of E. A. Box, and that such possession was surrendered by his daughter to the officer, while acting as his agent, at the time of the levy. It is evident, therefore, that the defendant Loveland levied upon and sold the property of the defendant in the attachment proceedings, as authorized and directed in the several writs, and not that of these plaintiffs. The assignment made after the levy could not have the effect of divesting the sheriff of his possession under the writs, and did not affect the rights of the attaching creditors. It simply served to show that neither the husband nor the wife regarded the bill of sale as a valid transfer of the property. The sheriff, having attached and sold the property of the defendants in the attachment proceedings, and not that of a stranger to them, had the right, when sued in replevin, to justify under the writs; and having done so, as is apparent from the record, the court was justified in directing the jury to return a verdict of no cause of action. Where, as in this case, property is found in the possession of the defendants in attachment proceedings, and the writ under which the levy was made and the property seized was issued by a court or officer having lawful authority to issue it, and is in legal form, the officer may justify the levy by producing the

writ. This court so held in *Jones v. McQueen*, *supra*.

Counsel for the appellants also insists that the pleadings in the attachment suits were insufficient, and the proceedings irregular. While it must be conceded that the record, in these regards, shows a degree of carelessness which ought not to be encouraged, still we are of the opinion that the pleadings and proceedings were sufficient for the purposes of this suit.

The record in the case reveals many objections made at the trial of this cause which are so frivolous as not to merit our notice. Such objections serve to confuse, rather than aid in the trial of a cause. We perceive no reversible error. The judgment is affirmed, and, as there were such omissions and inaccuracies in appellants' abstract as rendered the filing of an additional abstract necessary, it is ordered that the costs of such additional abstract be taxed with the other costs against the appellants.

ZANE, C. J., and MINER, J., concur.

(15 Utah, 449)

JORDAN v. CITY OF MT. PLEASANT.

(Supreme Court of Utah. July 31, 1897.)

MUNICIPALITIES—OPSTRUCTING WATER COURSE—LIABILITY—SURFACE WATERS.

1. It was the duty of the city authorities of Mt. Pleasant to have used all reasonable means and precautions to prevent injurious consequences to its people and to property from floods which they should have anticipated, but in doing so they should have used all reasonable means and precautions not to cause the destruction of or injury to other property.

2. Water flowing in creeks or ditches cannot be regarded and treated as surface water.

(Syllabus by the Court.)

Appeal from district court, Seventh district; J. W. N. Whitecotton, Judge.

Action by J. Jordan against the city of Mt. Pleasant. Judgment for plaintiff. Defendant appeals. Affirmed.

Williams, Van Cott & Sutherland and A. G. Sutherland, for appellant. William K. Reed and F. Erickson, for respondent.

ZANE, C. J. It appears from the findings of the lower court that Pleasant creek is a natural stream of water having its source in the mountains, and running westerly through the city of Mt. Pleasant; that its width varies from 8 to 12 feet; that its banks are perpendicular on either side, and from 2 to 12 feet high; that it held all its waters until a flood in 1893, caused by a heavy storm, called a "cloud burst"; that in 1894 the city authorities, at a point 3 or 4 miles above Mt. Pleasant, at the mouth of the canyon from which the creek issues, constructed barriers, 4 or 5 feet high, with an opening of about 8 feet for the waters of the creek to pass through, extending back on either side to ridges begin-

ning a short distance above, and extending down the stream a distance of 2 miles, from 3 to 8 rods apart; that upon the outside of the ridges, which average in height from the bottom of the creek about 12 feet, the land is lower; that ditches were cut through these ridges, just above the barriers, to the depth of from 18 to 24 inches, through which the waters could flow before running over the barriers; that on May 29, 1896, a flood, caused by an extraordinary storm called a "cloud burst," carried into and down the creek great quantities of debris consisting of timber, rocks, and mud, choking the opening between the barriers. A portion of this water and debris flowed through the ditches in the ridges on either side of the creek, and over the lands of the plaintiff and his assignors, greatly injuring the same and the crops thereon. It appears that the flood of 1893 overflowed the banks of the creek, but not the ridges on either side, from 3 to 12 rods apart; but below those natural elevations the water spread over a considerable area of land, including residence and business property, carrying mud and other drift, and doing serious damage. To prevent or alleviate such a calamity from a like occurrence, the city authorities erected the barriers and made the ditches complained of. Overruling necessity may be relied upon to justify the destruction of or injury to private property in some emergencies, as counsel contend. In the face of pending and imminent danger of destruction and disaster from the spread of a conflagration, or from the advance of a hostile army, the ravages of an infuriated mob, or the approach of a flood, the rights to private property may be sacrificed to prevent overwhelming calamity. But we do not think the erection of the barriers and the construction of the ditches two years before the flood, as they were made, can be so justified. It would seem that the opening between the barriers could have been made wider, and below the elevations on either side the capacity of the creek could have been increased or a ditch could have been added, or, if that was impracticable, ditches might have been provided to carry the water flowing over the elevations in consequence of the barriers. The city authorities must have contemplated the overflow to some extent, if not to the full extent that actually occurred in consequence of the barriers, from the fact that they cut the later ditches through the ridges. Undoubtedly the city authorities had the right, and it was their duty, to prevent injurious consequences from floods, which they should have anticipated, by the use of all necessary and reasonable means. But it was also their duty in so doing to use all reasonable means and precautions not to cause the destruction of or injury to private property, and, if necessary, to resort to right of eminent domain.

Counsel contend that the injury to plaintiff and his assignors was caused by surface water. After the water had collected in the creek, it could not be regarded as surface wa-

ter. The judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

(15 Utah 1)

PRATT v. BOARD OF POLICE AND FIRE COM'RS.

(Supreme Court of Utah. June 14, 1897.)

BOARD OF POLICE AND FIRE COMMISSIONERS—REMOVAL OF CHIEF OF POLICE—MANDAMUS.

1. Plaintiff was appointed chief of police December 31, 1894, pursuant to section 7 of the act approved March 8, 1894 (Sess. Laws 1894, p. 33), which provides that the chief of police shall be appointed by the board of commissioners, and retain his position during good behavior, except in cases otherwise provided. The act of 1894 was repealed by the act of 1896 (Sess. Laws 1896, p. 219), and section 7 of the latter act provides that the chief of police shall retain his position "during good behavior except in cases herein otherwise provided," the same as the act of 1894. Section 10 of the act of 1896, however, provides as follows: "The board hereby created shall have the power and it shall be their duty at any time for good cause, or when the good of the service shall be subserved thereby, upon the concurrence of three members thereof, to suspend without pay or dismiss the chief or captain of police." On December 1, 1896, the defendant board dismissed plaintiff from office without preferring or filing any charges against him, and without giving him notice, or an opportunity to be heard in his defense. *Held*: First. That the chief of police holds his office during good behavior, which means for life, unless it be otherwise provided by statute, or unless he becomes guilty of such improper conduct as will justify a removal. Second. That the power of removal is vested in the board of police and fire commissioners, but cannot be exercised at its mere discretion without preferring charges, and affording an opportunity to be heard. Third. That to hold otherwise would be to convert what, under section 7 of the act of 1896, is a life tenure, into a mere tenure at will, and would be in contravention of sections 10, 11, and 17 of the same act, and would enable the board to render section 11 an absolute nullity, and to wholly disregard section 17. Fourth. That, the board having attempted to remove the officer summarily, at its mere pleasure, its action was null and void, and created no vacancy. Fifth. That the plaintiff was entitled to be recognized by the board as the lawful incumbent, and has the right to discharge the duties and receive the emoluments of the office until lawfully removed, or until in some way he ceases to be the rightful incumbent.

2. Where a person has been in the actual and lawful possession of an office, received and enjoyed the emoluments thereof, is entitled to the office de jure, and is unlawfully removed, mandamus is the appropriate remedy to restore the de jure officer to his office, and it is not necessary to resort to quo warranto, even though the office be in the possession of another.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Mandamus proceeding by Arthur Pratt against the board of police and fire commissioners. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action in mandamus to compel the respondents to reinstate the appellant to the office of chief of police of Salt Lake City, on the ground that he has been unlawfully re-

moved therefrom. It is alleged in the affidavit, in substance, that on December 31, 1894, the appellant was appointed to the position of chief of police, to hold the same during good behavior; that he at once qualified, entered upon the duties of the office, and continued to discharge the same without interruption until, on December 7, 1896, the defendant board, three members concurring, dismissed him from the office, notified him to surrender control thereof, and excluded him from the management of the department; that at no time were any charges preferred or filed against him, nor any notice of charges given him, nor any opportunity afforded to be heard in his defense; and that, after being notified of his removal, he protested against it to the board, but that the board insisted in arbitrarily dismissing and excluding him from the office, and thereafter refused to recognize him as chief of police. The defendant board filed a demurrer and answer. The demurrer was overruled. In the answer, after making various denials, the board admitted that they dismissed the relator from office, and alleged that they appointed another person in his place, who had since discharged the duties of the office. At the hearing the court refused to hear or consider any evidence under the answer, and found that the appellant was appointed chief of police, as alleged in his affidavit, but adjudged that he was not entitled to the relief sought, and that the board had the power to dismiss him without notice, charges, or hearing.

Williams, Van Cott & Sutherland, for appellant. Wm. McKay and D. B. Hempstead, for respondent.

BARTCH, J. (after stating the facts). The first material question which is presented for consideration is whether, under our laws, the board of police and fire commissioners have power to remove from office summarily, without charges, notice, and hearing, the chief of police. The respondent insists that under the Laws of 1896 he may be removed by the board either for cause, after a trial on charges, or by three concurring members thereof, whenever, in their judgment, the good of the service will be subserved thereby. The appellant was appointed pursuant to section 7 of the act approved March 8, 1894 (Sess. Laws 1894, p. 33), which, among other things, provides: "The chief of police, and chief engineer of the police and fire departments shall be appointed by the board of commissioners hereby created, and retain their positions during good behavior, except in the cases herein otherwise provided." Under this provision the appellant was entitled to hold his office during good behavior, which means for life, except in cases otherwise provided by statute, or unless he becomes guilty of such improper conduct as will justify a removal. That act was repealed by the act approved March 30, 1896 (Sess. Laws 1896, p. 219), and therefore the action of the board in the premises must be considered with refer-

ence to the later law, which was in force at the time of the amotion. The several provisions of the law of 1896 material in this case will be considered in the order in which they occur in the act. Section 1 (same as section 1 of the act of 1894) provides for the appointment of a board of police and fire commissioners, consisting of four members, only two of whom can be of the same political party. The design at the outset seems to be to remove, as nearly as may be, the management of the police and fire departments from political influences. Section 7 reads: "The chief and captain of police and chief engineer and assistant engineer of the fire departments shall be appointed by the board of commissioners hereby created, and shall retain their positions during good behavior except in cases herein otherwise provided." It will be noticed that, so far as the appointing power and tenure of office are concerned, this section is a re-enactment of the provision of the former law, above quoted. Here, as there, the tenure is during good behavior, except in cases where it is otherwise provided, and it remains to be seen, by reference to other provisions of the act, how such tenure may be affected. Section 8 makes it the duty of the board to supervise the police and fire departments in accordance with law, and to see that the officers and members faithfully discharge their duties. As may be observed, the first provision of the law respecting the power of removal is contained in section 10, which, on this subject, provides: "The board hereby created shall have the power and it shall be their duty at any time for good cause or when the good of the service will be subserved thereby, upon the concurrence of three members thereof, to suspend without pay or dismiss the chief or captain of police, the chief or assistant engineer, or any subordinate officer, member or employé of either department." It is insisted for the respondent that under the clause, "when the good of the service will be subserved thereby," the board have power summarily to remove any of the officers referred to in the provision. If this position be sound, then indeed what, under section 7, appears to be intended as a life tenure, becomes merely a tenure at will, for in such event the board, at its mere pleasure or caprice, arbitrarily, at any moment, and regardless of the public good, may remove an officer without cause, notice, or hearing, by simply stating that the good of the service would be subserved thereby. To further strengthen the position here assumed, it is contended that the portion of section 10 above quoted was intended by the legislature to take the place of section 14 of the act of 1894, and that it simply changed the number of members of the board necessary to effect a removal from four to three. Whether or not section 14 of that act, when considered with other provisions of the same act respecting the power of amotion, conferred such arbitrary power as is here claimed, it is not necessary for us to decide, but it is important to notice that the portion of that sec-

tion which provides: "In such cases the removal shall be made by a notice to the officer, signed by all the members of the board, and it shall not be necessary to state any cause for such removal,"—has not been re-enacted in the law of 1896. If, in the former law, that provision was significant in conferring such power, then the omission in the later law must be equally significant as showing an intention to withhold such power. Aside from these considerations, however, there are yet other provisions of the act of 1896 which must be considered in determining the soundness of the position of the respondent, and the interpretation which ought to be given to the part of section 10 above referred to.

Section 11 reads: "Any citizen may prefer and file with the board a complaint and charges against the chief of either department, or any officer, member or employé thereof; immediately upon the filing of such charges or of charges preferred by the chief of either department, the board shall suspend such officer or member complained of if he be not already under suspension and if in their judgment the charges warrant suspension, until the matter can be heard and investigated. The person complained of shall be entitled to ten days' notice in writing of the time and place of hearing together with a copy of the charges. Upon the hearing the accused shall be tried by a full board, if he so desire, and he shall be entitled to be heard in his own defense, but in no case shall counsel be heard either for or against him, unless a majority of the board shall request it;" and then empowers the board to adopt rules governing the procedure at a hearing, to summon witnesses, and compel the production of documentary evidence. In case of refusal by any person to obey a subpoena or to testify when summoned, the board may refer the matter of such refusal to the district court. This section provides a complete system of procedure for any case where charges are preferred against the chief of police, or any of the officers to which it relates, by a citizen. Section 14 confers authority on the board to fill by appointment any vacancy in the office of chief or captain of police, or chief or assistant engineer of the fire department, "during good behavior, subject to suspension and dismissal as herein provided." It also provides expressly that all subordinate members of the force in either department, at the time when the act takes effect, shall hold their respective positions "at the pleasure of the respective chiefs, or a majority of the board." The remaining section of the act of 1896 material to this decision is the seventeenth, the language of which is as follows: "The chief and captain of police and the chief engineer and assistant engineer of the fire department, each and all of them shall be subject to suspension from office for cause, by vote of three members of the board, at any time. Any officer so suspended shall thereupon cease to exercise the functions of his office until he shall be reinstated. In case of

suspension, the board shall at once consider and examine the charges against the officer suspended, giving him an opportunity to be heard in his own defense. After hearing the matter, the board shall determine whether the charges are sustained. If the charges shall not be sustained by the board, the officer shall be immediately reinstated. If the board shall determine that the charges are sustained, it shall at once determine whether the good of the service requires that the suspended officer shall be removed from office or shall be suspended from office without pay for a fixed period and in all cases a vote of three members of the board shall be sufficient to determine that the charges are sustained and to fix the punishment by removal from office or otherwise. The board shall communicate its decision to the officer charged, in writing, and their decision shall be final and conclusive in all cases." Under this section any of the officers referred to, including the chief of police, is subject to suspension for cause at any time by a vote of three members of the board, and, upon suspension, the officer must cease to exercise his official functions, and the board must "at once consider and examine the charges against the officer suspended, giving him an opportunity to be heard in his own defense." Thus far this section contains provisions respecting suspensions, charges, and hearings similar to those in section 11, and there appears to be no reason why the method of procedure authorized in that section should not apply with equal force to cases instituted under this. The only difference seems to be that under the former section the suspension occurs upon the filing of charges by a citizen, while under the latter it may be made by the board of its own motion, for cause. Then, after charges have been filed, and the accused has been heard, or has had an opportunity to be heard, it is made the duty of the board, under this section, to determine whether the charges are sustained. This evidently implies an examination and consideration of all the evidence adduced at the hearing, being in its nature a judicial inquiry. If the charges be not sustained, the officer must be immediately reinstated; but, if they are sustained, then the further duty devolves upon the board to determine whether the accusations are of such a character that "the good of the service requires that the suspended officer shall be removed from office, or shall be suspended from office without pay for a fixed period." In such case and upon such procedure their decision is doubtless "final and conclusive." Thus, after charges have been preferred, the officer given an opportunity to be heard in his defense, or in explanation of whatever may have been suggested as a cause of removal, the case tried and determined, and the charges sustained, the board of commissioners have power to remove the accused absolutely from office, if the good of the service requires it; and such, we think, was the intent of the legislature in its use of the clause,

"when the good of the service will be subserved thereby," in section 10. Hence, under the provision hereinbefore quoted from section 10, the board have power to dismiss an officer from service only after charges have been filed, and an opportunity given the accused to be heard.

Upon examination it will be observed that this interpretation will give effect not only to all the sections of the act of 1896, hereinbefore quoted and referred to, respecting the tenure of office, but also to all the provisions of sections 10, 11, and 17 respecting the power of removal, which is in harmony with the well-known principle of construction that in the interpretation of a statute every part thereof should be given effect, if possible. Under the interpretation thus indicated, effect can be given to all the provisions of the several sections mentioned, agreeably to the legislative intent apparent from the context of the statute. The construction of the law contended for by counsel for the respondent would clothe the board with power which would enable it to render section 11 an absolute nullity, because in every instance of the filing of charges against an officer by a citizen the board could prevent a hearing, as therein provided, by dismissing the accused from office, under section 10, on the ground that the good of the service would be subserved thereby, while in reality and in truth the good of the service and the public weal might be greatly injured thereby. So, likewise, such construction would empower the board to wholly disregard section 17. It is needless to say that the legislature intended no such results. That any man should be condemned unheard is contrary to every principle of natural justice, and courts are not inclined to countenance such arbitrary power, unless under the mandate of positive law; nor will they aid it by judicial interpretation. From an examination of the several provisions of the act respecting the chiefs of the departments, it seems clear that the intention of the legislature was to confer permanency upon those positions, secure experience, and remove the incumbents, so far as possible, from political and other improper influences in the management of the affairs of the departments, by fixing no limit to the tenure of office except good behavior. The design was, doubtless, to secure greater independence on the part of the officers, so as to procure better and more efficient service, and thereby promote the public good. We perceive no intention to invest the board of commissioners with a power so arbitrary as that contended for, which would enable it to remove summarily the heads of the police and fire departments at its mere will, and regardless of the experience and proficiency of the officer or of the rights and safety of the people. No such power can be exercised under the law. The tenure of office is fixed during good behavior, and the officer de jure is entitled to hold it during life, unless the legislature otherwise directs, or by his own acts and conduct he forfeits his right.

to it; but such forfeiture cannot be declared without accusations having been preferred, and an opportunity given to be heard in defense or explanation of the matters suggested as the cause of dismissal. It may be that in the case at bar the power of removal was exercised under an apprehension that such action was demanded in the interests of the public service, but this, if true, cannot be considered by us. The views herein are in accord with those expressed in the case of *People v. McAllister*, 10 Utah, 357, 37 Pac. 578. There, as here, the question was as to the existence of the power to remove summarily a municipal officer. For a review of the authorities and further discussion of the subject, we refer to that case. As the authorities were there examined with considerable care, we do not deem it important to review them here. Most of the cases cited by the respondent were decided under statutes different from the act herein considered, and while some courts seem to have given countenance to the views urged by counsel for the respondent, the great weight of authority is otherwise. In addition to the cases cited in *People v. McAllister*, *supra*, we here call attention to the following: *Mechem*, Pub. Off. §§ 454, 455; *High*, Extr. Rem. §§ 68, 69; *State v. Hewitt*, 3 S. D. 187, 52 N. W. 875; *Attorney General v. Jochim*, 99 Mich. 358, 58 N. W. 611; *Field v. Com.*, 32 Pa. St. 478; *Ham v. Board*, 142 Mass. 90, 7 N. E. 540; *Pehrson v. City Council* (Utah) 46 Pac. 657; *Hallgren v. Campbell*, 82 Mich. 255, 46 N. W. 381; *State v. City of St. Louis*, 90 Mo. 19, 1 S. W. 757. The respondent board having attempted to remove the appellant summarily without filing charges and giving him an opportunity to be heard, its action was null and void, and created no vacancy. The appellant was, therefore, entitled to be recognized by the board as the lawful incumbent, and had the right to discharge the duties and receive the emoluments of the office until lawfully removed, or until in some legal way he ceased to be the rightful incumbent.

It is also insisted for respondent that the appellant has mistaken his remedy, and that mandamus will not lie to restore him to office, because, since his removal, another person has had charge thereof. Mandamus is an extraordinary remedy, and the law is well settled that it will not lie to try a disputed title to an office, or to compel the admission of a claimant to an office the title to which is in dispute, and of which he has never discharged the duties or had the possession. Where a person, however, has been in the actual and lawful possession of an office, received and enjoyed the emoluments thereof, is entitled to the office de jure, and was unlawfully removed therefrom, a different rule appears to prevail. In such case mandamus is an appropriate remedy to restore the de jure officer to his office, and it is not necessary to resort to quo warranto, even though the office be in the possession of another. Spelling, in his work on Extraordinary Relief (section 1576), states the

law as follows: "Mandamus is the proper remedy to restore one to the full enjoyment of an office or position of trust and emolument of a public nature from which he has been wrongfully removed, or which is wrongfully withheld. There is an important distinction to be taken between cases where mandamus is sought to induct a claimant into an office already filled and those where one actually in office has been removed or deprived of his rights and privileges therein. In the former cases, as has been shown, the incumbency of another under such color of right as constitutes him an officer de facto rather than a mere intruder will be a complete answer to the petition; but, where one has been wrongfully deprived of an office by the illegal appointment of another, mandamus will issue to effect his restoration, even though such appointee be in possession de facto. It is essential, however, to entitle a relator who has been removed to mandamus for his restoration, that he be clearly entitled de jure to the office from which he has been removed. It is not sufficient that he show himself to be an officer de facto, but he must also show a clear legal right, and his failure to do so will warrant a refusal of the peremptory writ. *High*, Extr. Rem. § 67; *Lewis v. Whittle*, 77 Va. 415; *Eastman v. Householder*, 54 Kan. 63, 37 Pac. 989; *Ex parte Lusk*, 82 Ala. 519, 2 South. 140; *Metsker v. Neally* (Kan. Sup.) 21 Pac. 206; *State v. Hewitt*, *supra*; *Ham v. Board*, *supra*. In the case at bar it clearly appears from the record that appellant was lawfully appointed to the office of chief of police of Salt Lake City; that he was in the active possession, discharged the duties, and received and enjoyed the emoluments thereof until he was removed; and that he is entitled to the office de jure. Therefore mandamus is a proper remedy, and the court erred in refusing the relief. The cause is reversed and remanded, with directions to grant the writ.

ZANE, C. J., and MINER, J., concur.

(6 Kan.App. 921)

METZLER v. WENZEL et al.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

APPEAL—REVIEW—QUESTION OF FACT—PREPARATION OF OPINION.

1. Where the only question presented to this court for review is a question of fact, and there is sufficient evidence to support the findings of the trial court, the judgment will not be disturbed.

2. An opinion will not be prepared and filed in a cause where the court of appeals deems it unnecessary to do so.

(Syllabus by the Court.)

Error from district court, Cherokee county; J. D. McCue, Judge.

Action by C. G. Metzler against C. C. Wenzel and others. Judgment for plaintiff against defendant Wenzel, but in favor of

the other defendants, and plaintiff brings error. Affirmed.

W. R. Cowley, C. D. Ashley, and E. M. Tracewell, for plaintiff in error. W. F. Sapp and W. B. Glasse, for defendants in error.

PER CURIAM. The defendant C. C. Wenzel on the 12th day of July, 1886, entered into a written contract with the board of county commissioners of Cherokee county, Kan., to furnish all material and labor, and build, erect, complete, and finish a court house for said county, and that he was to receive for the building, when completed, the sum of \$28,633. On or about the time the original contract was entered into by Wenzel and the board of county commissioners, the defendant in error Wenzel entered into a verbal contract with C. G. Metzler, plaintiff in error, by the terms of which plaintiff in error was to furnish said Wenzel the brick to be used in the erection and construction of the court house. There is due to plaintiff in error from the defendant Wenzel on said contract the sum of \$1,190.40. The plaintiff in error, with other lien holders, filed their liens for material furnished and labor performed. This action was commenced to recover the amount due, and enforce the lien. The case was tried to the court upon an agreed statement of facts. The court found for defendant the board of county commissioners of Cherokee county, Kan., and "that there is no lien upon its property as claimed." Judgment was rendered in favor of plaintiff in error and against defendant in error C. C. Wenzel for the sum of \$1,190.40.

The principal and primary question to be passed upon by this court, as suggested by plaintiff in error, is this: When was the building completed?—a question of fact. "Under the recent act of the legislature, a full opinion and syllabus are not required in every case, and are only required to be prepared and published where the decisions will add something to the jurisprudence of the state, and are deemed to be of sufficient value for publication. Laws 1895, c. 96, § 16. The judgment of the district court will be affirmed." *Anderson v. Insurance Co.*, 55 Kan. 81, 39 Pac. 1038. There was sufficient evidence to sustain the findings of the court. The judgment of the district court will be affirmed. All the judges concurring.

(6 Kan. App. 921)

WOODSON NAT. BANK v. MOORE et al.
(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

APPEAL—REVIEW—QUESTION OF FACT.

Where a question of fact is presented to this court for review, and there is sufficient evidence to sustain the judgment of the trial court, the case will be affirmed.

(Syllabus by the Court.)

Error from district court, Woodson county; L. Stilwell, Judge.

Action by the Neosho Falls Building, Loan & Savings Association against A. P. Maginnis, the Woodson National Bank, and others. Judgment for plaintiff, and the Woodson National Bank brings error. Affirmed.

W. E. Hogueland, for plaintiff in error. J. H. Sticher, for defendants in error.

SCHOONOVER, J. The Neosho Falls Building, Loan & Savings Association commenced an action in the district court of Woodson county against A. P. Maginnis, Alice Maginnis, the Woodson National Bank, Haughawout & Goodrich, P. M. Moore, and W. C. Thrasher to foreclose a mortgage given by Maginnis and wife on certain real estate. All other defendants were made parties because they held judgment liens on the mortgaged property. The Woodson National Bank and Haughawout & Goodrich answered, and had the priority of their judgment liens established. P. M. Moore and W. C. Thrasher, defendants, also held a judgment against Maginnis. They did not answer in the action, but had an execution issued, and sold the property on their judgment. P. M. Moore purchased the property, which was sold on his and Thrasher's judgment, but the sale was afterwards set aside. The Neosho Falls Building, Loan & Savings Association obtained a judgment for \$403.50 and decree of foreclosure. An order of sale was issued on this judgment, and the land sold to P. M. Moore for \$500. Plaintiff in error contends that during the pendency of this action P. M. Moore purchased the judgment from the Neosho Falls Building, Loan & Savings Association, and paid the plaintiff \$180 to apply on the same, the balance to be paid on or before the expiration of the June term, 1892, of the district court, and, if the same was not paid by that time, P. M. Moore would forfeit the \$180 to the plaintiff; that plaintiff was to take an order foreclosing said mortgage against P. M. Moore and W. C. Thrasher. The defendant P. M. Moore contends that he held a judgment against the property foreclosed; that he fully intended and arranged to buy from plaintiff the judgment which it held, and take from it an assignment of the same; that \$180 was paid, and, when the balance of said judgment was paid, an assignment thereof was to be made to him. P. M. Moore, defendant in error, further contends that his lien was junior to plaintiff's; that he caused an execution to issue, and the real estate to be levied upon and sold to satisfy his judgment; that he expected to have this sale confirmed at the June term of the district court in 1892; that he agreed to pay the balance only in the event of said confirmation; that the \$180 was not to be forfeited, nor was it a payment on plaintiff's judgment, but paid only so far as it would operate by way of assignment on plaintiff's judgment to him; that the sale of his judgment was not confirmed; that

afterwards the Neosho Falls Building, Loan & Savings Association caused the land to be sold on its judgment; that P. M. Moore, defendant, purchased the same at sheriff's sale for the sum of \$500. He paid the sheriff \$320 in cash, and gave him the receipt for the \$180 paid the Neosho Falls Building, Loan & Savings Association, plaintiff, for the assignment of its judgment. The district court refused to confirm this sale for the reason that the sheriff's return did not show a payment of \$500 cash, the purchase price. The sheriff was permitted to amend his return showing a payment of \$500 cash as the purchase price and the amount bid by P. M. Moore at the sale. The sale was thereupon confirmed by the court. In order that the sheriff might amend his return, and the sale be confirmed, it was necessary to raise \$180 in cash. It was agreed between P. M. Moore and the Neosho Falls Building, Loan & Savings Association that P. M. Moore should advance and furnish the \$180 in addition to the \$320 in the hands of the sheriff, instead of the receipt for the \$180 held by the sheriff. Moore was to take up the receipt, and the Neosho Falls Building, Loan & Savings Association was to refund to him the \$180 for which the receipt was given, which was accordingly done. The Woodson National Bank moved for a distribution of the money, claiming that the \$180 paid by Moore should be deducted from plaintiff's judgment; that on the distribution of the \$500 received from the sale of the land the plaintiff should receive \$403.50, the amount of its judgment, less the \$180 paid by Moore. The motion was overruled by the court, and plaintiff brings the case here for review. The questions presented for review are questions of fact. We have examined the record, and find the evidence sufficient to sustain the judgment of the court. The case will be affirmed. All the judges concurring.

(6 Kan.App. 814)

ST. LOUIS & S. F. RY. CO. v. BLAKELY.
(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

APPEAL—DISMISSAL—CERTIFICATE TO CASE MADE—NEW TRIAL—HARMLESS ERROR—FIRES SET BY LOCOMOTIVE—EVIDENCE.

1. A case will not be dismissed from this court because of an immaterial clerical error in the certificate of the judge to the case made.

2. The motion for a new trial in this case was filed in time.

3. Where the court permits the introduction of incompetent testimony, and then instructs the jury that they must not consider it, and where there is an abundance of uncontradicted and competent evidence to prove the fact which such incompetent evidence tends to establish, *held*, no reversible error was committed.

4. If a railway company shows by undisputed evidence that it has taken every possible precaution to prevent the escape of fire from its engine, and the jury know of nothing left undone by said company which would have prevented the fire, the jury should find for the company on the question of negligence.

(Syllabus by the Court.)

Error from district court, Rice county; J. H. Bailey, Judge.

Action by E. F. Blakely against the St. Louis & San Francisco Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. Willis Gleed, for plaintiff in error. C. F. Foley, for defendant in error.

DENNISON, P. J. We are asked to dismiss this petition in error for the following reasons, to wit: First. The certificate of the judge contains a recital that the case is "E. F. Blakely vs. The A., T. & S. F. R. R. Co." Second. The record fails to show that the motion for a new trial was filed in time.

From an examination of the certificate of the judge and the page of the record containing it, it is clear that the use of the words "A., T. & S. F. R. R. Co.," instead of "St. Louis & San Francisco Ry. Co.," was a clerical error. Not only this, but the uncontradicted affidavit of J. W. Brinkerhoff filed herein shows conclusively that such is the case.

The record shows that the jury returned a verdict on January 14, 1891, and following the statement of it in the journal entry, properly connected by the words "thereupon" and "whereupon," it is recited: "Whereupon the defendant duly filed his motion for judgment in his favor upon the special findings of the jury in the cause, and the defendant likewise filed his motion for a new trial upon the grounds in said motion more particularly set forth." The record, in effect, says: "Whereupon the defendant duly filed his motion for a new trial." When this language occurs immediately following the record of the rendition of the verdict, we must hold that the motion was filed in time, and at the term, in fact, upon the day the verdict was rendered.

We will consider the case upon its merits. This action was brought by Blakely against the railway company to recover the damages sustained by him in the loss of about 100 tons of hay, by burning. The petition alleges that the fire was caused by the operation of the company's railroad, as the result of the negligent and unskillful management of one of its engines and a train of cars. The evidence in the case is entirely free from contradictions, and fairly tends to prove the state of facts shown by the answers of the jury to the special questions. The questions and answers are as follows: "(1) Was not the engine from which the plaintiff claims the fire which burned his hay escaped, one of the most-improved invention and construction, so far as the appliances preventing the escape of fire were concerned? A. According to evidence, yes. * * * (3) Had not the engine which it is claimed set the fire which burned the plaintiff's hay been taken from the shops after having been thoroughly repaired, with a new smokestack and the latest appliances for the prevention of the escape of fire added to said engine, within two months from the time it

is claimed that the fire was set out? A. According to evidence, yes. (4) Was not the engineer who was operating said engine at the time it is claimed the fire was set out by said engine an experienced, competent, skillful, and careful engineer? A. According to the evidence, he was experienced. * * * (6) If you answer that the fire came from the engine, state how the engineer so mismanaged his engine as to set out the fire. A. No evidence showing how. (7) In what does the negligence of the railroad company in permitting the fire to escape from its engine consist? A. No evidence showing. * * * (9) Before the hay in question had been burned, had not the growing grass on the right of way of the railroad company adjacent to the plaintiff's land, on which his hay was, been burned off by the railroad company? A. Yes. (9½) Before the hay was burned, had not the sectionmen in the employ of the defendant railroad extended the fire guard beyond the right of way, and upon the plaintiff's land, a distance of seventy-five or eighty feet, making a fire guard of 125 or 130 feet between the track and the hay which was burned? A. Yes. (10) What, if any, possible precaution could the railroad company take that was not taken to prevent the fire which it is claimed burned the plaintiff's hay? A. Not known. (11) Was not an unusually strong wind blowing at the time it is claimed the fire was set out? A. Yes. (12) At what rate of speed was the engine going when it is claimed fire escaped from it, and set fire to the plaintiff's hay? A. Ten or thirteen miles per hour. (13) Was not the engine being operated in the usual and ordinary manner, and by a competent engineer, at the time it is claimed fire escaped from the engine? A. Evidence that he was experienced, but none as to competency. (14) Was there any other way, under the testimony, in which the fire could escape from the train than from the smokestack? A. No. * * * (16) Were not the spark-arresting appliances of the engine which it is claimed set out the fire examined a day or two after the fire was, and found to be in perfect condition? A. Yes. * * * (18) Is there any incompetence or carelessness shown on the part of the engineer or any other employé of the train the engine of which it is claimed set out the fire? A. Engineer experienced, but no evidence of competency. * * * (20) Has any defect been shown to exist in the engine which it is claimed set out the fire, so far as its spark-arresting appliances were concerned, or in any other respect? A. No. * * * (22) Has any negligence been shown on the part of the engineer or other employé of the train, the engine of which it is claimed set out the fire that burned plaintiff's hay? A. No proof from any other employé except engineer. * * * (24) How far from the track was the stack which first caught fire? A. Two hundred and ten feet. (25) Had not the railroad company shown that its engine was perfect, and had the most approved appliances for the prevention of the escape of fire, and that no

employé of said train was guilty of negligence in operating said train? A. No proof from any other employé except engineer." The jury found for the plaintiff below in the sum of \$241.73, and judgment was rendered thereon. The defendant company brings the case here for review.

The first alleged error argued by plaintiff in error is that the court permitted the introduction of evidence showing that other fires had been set out in the operation of the defendant's railroad. We think the court erred in permitting this evidence to cover so large a range of time and of engines as it did. The court afterwards instructed the jury that they must not consider this evidence. This cured the error. Not only this, but there was an abundance of uncontradicted and competent evidence showing that the fire was started by the engine of the company. The substantial rights of the plaintiff in error were not prejudiced by the error complained of.

The plaintiff in error contends that the court erred in overruling its motion for judgment upon the special findings. The proof was abundant and uncontradicted that engine No. 37, being operated by the company, set out the fire, and the plaintiff established his damages. This made a prima facie case against the company, and their negligence is presumed. It was then the duty of the company to show that the fire was an accidental fire, set without negligence on their part. The question therefore is, do the special findings show such a state of facts as defeats a recovery by the plaintiff below? They show that the engine was complete and perfect in every respect so far as the appliances for preventing the escape of fire were concerned; that the engineer was an experienced man; that the company had burned its right of way, and some 75 or 80 feet besides, in an endeavor to protect the hay; that an unusually strong wind was blowing at the time it was claimed the fire was set out; that the train was running from 10 to 13 miles per hour; and that there was no way in which the fire could escape other than from the smokestack. The answer to question 6 decides that there was no evidence to show that the engineer mismanaged his engine, so as to set out the fire. The answer to question 7 decides that there was no evidence showing in what the negligence of the railway company consisted in permitting the fire to escape from its engine. The answer to question 10 decides that they do not know of any possible precaution that was not taken which could have been taken by the company to prevent the fire. There was no evidence introduced as to whether the engineer was competent, careful, and skillful; nor was there any evidence showing that the fireman or other employé was not guilty of negligence. There was, however, uncontradicted evidence introduced showing that the engine was drawing a train consisting of 10 or 12 empty cars, running on schedule time;

that the furnace fire was in good shape, and had the regular fire in the furnace; and that the train was running the same as it was run on other days; and that the engine was not using one-sixteenth of its steam while passing the place where the fire escaped.

The negligence of the company being presumed, it was incumbent upon it to show that it was without fault. In an attempt to do so, it has shown that its engine was of the latest approved pattern to prevent the escape of fire, and in good condition; that it was pulling a light train, and using but a small amount of steam, and running at a reasonable rate of speed; that the furnace fire was in good shape, and was the usual fire kept in the furnace; that it was impossible for the fire to escape except from the smokestack; and that it had burned a fire guard, 125 or 130 feet wide, between the track and the hay. All of this evidence is undisputed, and no attempt is made to contradict or question it, and there was no showing of negligence on the part of the company. Nothing can be relied upon but the statutory presumption of negligence, because the fire escaped from the company's engine. What other showing should have been made? What else should they have done or left undone to have rebutted this presumption? It would seem that, if the jury could think of no other precaution that the company could take to have prevented the escape of the fire, the presumption of negligence had been pretty effectually overcome, in their minds at least. It was established that many precautions had been taken by the company. The jury say, in answer to the tenth special question, that it is "not known" what other possible precaution it could take. If the railroad company has shown that it had taken every possible precaution to prevent the escape of fire from its engine, and the jury know of nothing left undone by it or its employes which would have prevented the fire, the jury should have found the question of negligence in its favor, and the company was entitled to a verdict. The court erred in not rendering judgment for the railway company upon the special findings of the jury. The judgment of the district court is reversed, and the cause remanded, with instructions to render judgment for the railway company upon the special findings. All the judges concurring.

NORTHUP v. HOYT, County Treasurer.

(Supreme Court of Oregon. Aug. 2, 1897.)

STATE TAX—COUNTY APPORTIONMENT—PAYMENT—PRIORITY—APPLICATION OF FUNDS.

1. Hill's Ann. Laws, § 2465, as amended (Laws 1893, p. 59), requires a county treasurer, when he has \$1,500 or more belonging to the county fund, to give notice that he has moneys applicable to outstanding warrants. Section 2813 requires him to pay over to the state by a certain time the entire state tax apportioned to and

charged against his county from the first moneys collected and paid in. Const. art. 9, § 3, declares that every law imposing a tax shall state its object, to which only it shall be applied. *Held*, that the state tax is to be paid from the first moneys received that are constitutionally applicable to such payment, and not from funds derived from a tax which the county is authorized to levy and collect for a special purpose; and hence the treasurer must give notice, under section 2465, when he has moneys belonging to the road fund or other special funds, though the state tax is yet unpaid.

2. The obligation of the county to pay its portion of the state tax is a liability against the county in its corporate capacity, payable out of the funds received for general county purposes.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Proceeding by H. H. Northup against Ralph W. Hoyt, treasurer of Multnomah county. From a judgment in favor of plaintiff, defendant appeals. Modified.

J. W. Whalley, for appellant. E. W. Bingham and H. H. Northup, for respondent.

BEAN, J. By section 2465 of Hill's Annotated Laws, as amended in 1893 (Laws 1893, p. 59), the treasurer of each county is required to give notice, by publication in some newspaper printed or circulated in his county, that there are funds in his hands to redeem outstanding warrants indorsed, "Not paid for want of funds," whenever he has as much as \$1,500 belonging to the county fund. On the 11th day of June, 1897, the treasurer of Multnomah county had on hand \$74,514.86 to the credit of the general county fund, and \$6,776.71 belonging to the road fund of his county, levied and collected under the provisions of section 4085, and, refusing to give such notice, this proceeding was commenced to compel him to do so. As a defense thereto he avers that there was at the time a balance of \$157,661.67 due and owing from his county on the state taxes apportioned to it for the year 1896, which, under section 2813, he is required to pay in full before applying any of the moneys on hand to the payment and redemption of county warrants, and the sole question presented to the court for its decision is the proper construction of that section. It reads as follows: "On or before the first Monday of February in each year the several county treasurers in this state shall pay over to the state treasurer, in gold and silver coin, the amount of state taxes charged to their respective counties, which tax shall be paid out of the first of such moneys collected and paid in to the county treasurer: provided, however, that so far as the time of payment to the state treasurer is concerned, the same shall not apply to the county treasurers of the counties of Wasco, Umatilla, Baker, Union, Grant, Jackson, Coos, Curry and Josephine, but the treasurers of said counties shall be required to pay over to the state treasurer on or before the first Monday of April in each year." The contention for the plaintiff is that this section contemplates that the payment by the county treasurer on account of

state taxes charged to his county shall be made from the moneys collected on the levy for state purposes only, and that any other construction thereof would be violative of section 3, art. 9, of the constitution, which declares that "every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." Section 2813 comprises the whole of the act of October 21, 1864, and is amendatory of section 46 of the territorial act of 1854 (Laws 1855, p. 441), which required the county treasurer of each county in the territory to pay over to the territorial treasurer, in gold and silver coin, the amount charged to his county "out of the first moneys collected" and paid into the county treasurer. Aside from the use of the word "state" for "territory," the act of 1864 only changed the latter section by inserting the phrase "of such" before the word "moneys," so as to make it read, "out of the first of such moneys collected," and in extending the time for the payment of state taxes by certain counties. It is conceded that, as the law stood prior to the act of 1864, its language is broad enough to require the treasurer to pay the state taxes out of the first moneys collected and paid into the county treasury, without regard to the purpose for which they were collected. But the contention is that, by using the words "of such" between the words "first" and "moneys" in the amendatory act, the legislature intended that such payment should be made from the moneys collected for state purposes only, but this seems to be a strained construction of the statute. What office, if any, the words "of such" were designed to perform is not by any means evident, unless, as is very probable, it was to render more certain the necessity of paying the state taxes in gold and silver coin, and to settle the contention then prevailing as to the right to pay such taxes in treasury notes. See *Whiteaker v. Haley*, 2 Or. 128. But, however this may be, the section referred to requires the county treasurer of each county to pay over to the state treasurer by a certain time the entire state tax apportioned to and charged against his county, and it would be absurd to say that the legislature expected such payment to be made only from the money collected on account of what is commonly denominated the "state tax," when, in the very nature of things, it could not all be collected and paid into the treasury by the date named. Certainly, if an entire change in the policy of providing state revenue had been intended by the amendatory act of 1864, it would have been clearly expressed, and not left to mere inference and conjecture. The evident purpose of the amendatory act was to extend the time for the payment by certain counties of the state taxes charged against them, and not to change the fund out of which such payment should be made. But we are unable to concur in the contention of the defendant that the payment of the state taxes charged against his county is to be made from the

first moneys collected for taxes and paid into the county treasury, regardless of the purpose or object for which they were collected. The constitution declares that every law imposing a tax shall state the object of the same, to which only it shall be applied (section 3, art. 9); and under this constitutional provision moneys received by taxation for one purpose cannot be lawfully diverted by the legislature to any other purpose. *Bank v. Barber*, 24 Kan. 534; *Doty v. Ellsbree*, 11 Kan. 209. Thus moneys derived from a tax levied in pursuance of law for a specific object, as for the support of the common schools (section 2593, *Hill's Ann. Laws*), or for laying out, opening, or making and repairing county roads (section 4085, *Id.*), and the like, cannot lawfully be applied in payment of the amount due from the county to the state, any more than it could be applied to the payment of any other general obligation of the county. When the law declares the object for which a specific tax is levied, the constitution prohibits the application of the money derived therefrom to any other purpose, and, under the settled principles of construction, the moneys derived from such tax are as fully excepted from the operation of section 2813, *Hill's Ann. Laws*, as if the statute had contained an express provision to that effect. "The rule of construction universally adopted is," says the supreme court of New Hampshire, "that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution." *Opinion of the Justices of the Supreme Judicial Court*, 41 N. H. 555. See, also, *End. Interp. St. § 179*; *Clark v. Mayor*, etc., of Syracuse, 13 Barb. 40; *Com. v. Butler*, 99 Pa. St. 535. It is therefore from the first moneys received, constitutionally applicable to the payment of state taxes, from which such taxes are to be paid, and not from funds derived from a tax which the county is authorized to levy or collect for some special object. Now, the general scheme of assessing and collecting taxes in this state creates the relation of debtor and creditor between the county and state for the amount of state revenue apportioned to the county, so that it becomes a liability against the county in its corporate capacity, payable out of the funds received for general county purposes, the same as any other obligation. *State v. Baker Co.*, 24 Or. 141, 33 Pac. 530. And all taxes levied for state and county purposes, when collected, belong to the county, and the state becomes a preferred creditor to the amount of the state revenue apportioned to it. So that while, for convenience, the rate of taxation included in

the general county levy for the special purpose of raising money with which to pay the county's obligation to the state is designated as a state tax in the law and upon the county records, it is, in fact, a county tax levied for county purposes. The state does not deal with the individual taxpayer, but its revenue is apportioned to, and collected from, the various counties in their corporate capacity, in proportion to the taxable property in each, and is payable by the county, whether collected from the taxpayer or not; and therefore money raised from taxation for general county purposes is not diverted from the object for which it was laid, within the meaning of section 3, art. 9, of the constitution, by being applied in payment of the amount of state revenue apportioned to the particular county. As we understand the law, upon the showing made by this record, the county treasurer of Multnomah county should have given notice that he had on hand a certain amount of money belonging to the road fund applicable to the payment of warrants on such fund theretofore indorsed, "Not paid for want of funds," but no warrants drawn on the general fund of the county can be paid by him until after the state tax is paid in full. The judgment of the court will therefore be modified accordingly.

(32 Or. 195)

LADD v. JOHNSON et al.¹

(Supreme Court of Oregon. Aug. 2, 1897.)

DEED OR MORTGAGE — ASSIGNMENT FOR BENEFIT OF CREDITORS — PREFERENCE.

1. A declaration of trust executed by a solvent person contemporaneously with an absolute deed recited that whereas the maker was in a state of mortal illness, and desired to provide for the payment of his debts, he had conveyed his real estate to plaintiff, in trust to pay his debts, with the desire to avoid proceedings in the courts; it being declared that the deed was a conveyance in trust, with full power to sell, the balance, after payment of debts, to be returned to the maker, his heirs, executors, or assigns. *Held*, that the deed and agreement did not constitute a mortgage, but passed the absolute legal title to the land.

2. Hill's Ann. Laws, § 3173, declaring that no general assignment by an insolvent, or in contemplation of insolvency, shall be valid unless made for the benefit of all creditors, does not apply to a conveyance by a solvent debtor to prefer particular creditors, if executed in good faith.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by William M. Ladd against Cordella Johnson and others. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

This is a suit for the purpose of reforming a certain deed and instrument in writing, executed by A. H. Johnson to the plaintiff, by correcting a mistake in the description of the property intended to be included therein, and of restraining the sale of attached property in an action by the defendant White against Johnson. The complaint, after alleging the death of Johnson, on April 16, 1894, the pro-

bate of his will, the appointment of the defendant Cordella Johnson as executrix, and setting forth the names and ages of his heirs, avers, in substance, that on January 25, 1894, Johnson and wife conveyed, by warranty deed, to the plaintiff, Ladd, a large amount of real property in the city of Portland, for the purpose and upon the terms and conditions set forth in an instrument in writing executed contemporaneously therewith, and as a part of the same transaction, which is in words and figures substantially as follows: "Whereas, A. H. Johnson, of Portland, Oregon, is indebted to various creditors in the sum of \$240,000.00, more or less, of which indebtedness the sum of \$180,000.00, more or less, is due to Ladd & Tilton, bankers, of Portland, Oregon; and whereas, the said A. H. Johnson is in a state of mortal illness, and desires, as far as possible, to make provision for the payment of said indebtedness out of his assets, and to that end has especially requested William M. Ladd, of the firm of Ladd & Tilton, to act as his trustee in said behalf, and has, by deed executed the 25th day of January, 1894, and bearing said date, conveyed to said William M. Ladd the following described real estate situate in the county of Multnomah, state of Oregon, to wit: [Then follows a description of the real estate referred to and described in the deed of conveyance from Johnson and wife to Ladd;] and whereas, to the end aforesaid, the said A. H. Johnson has also, by a certain instrument, executed on said 25th day of January, 1894, and bearing said date, conveyed to said William M. Ladd two hundred and seventy shares of the capital stock in the Union Meat Company, a corporation of the state of Oregon: Now, therefore, this declaration of trust witnesseth: That the said William M. Ladd is fully empowered in all things to manage, incur, sell, and dispose of said property, or any portion thereof, according to his best and sole judgment, as fully and freely as if he were the owner thereof, upon the trust only that he shall apply the net proceeds of said sales and incumbrances to the reduction of the lawful indebtedness against said A. H. Johnson, and with power to sell and convey to any creditor, including said Ladd & Tilton, such portions of said property as he may see fit to convey, in liquidation of such creditor's debt, including the debt to Ladd & Tilton, or any portion thereof, as he may see fit. The conveyances have been made, and this declaration of trust is made and delivered to said William M. Ladd, in full confidence in his ability and integrity, and with the express desire to avoid proceedings, by foreclosure or otherwise, in the courts; and it is expressly intended, not as a mortgage, but as a conveyance in trust, with full power to sell and incur, and with as full power to sell and incur to the firm of Ladd & Tilton, of which said trustee is a member, as to any other person whatever. And it is expressly understood that any person who may pur-

¹ Rehearing pending.

chase the aforesaid property, or any part thereof, from said William M. Ladd, having knowledge or notice of this trust, shall not be required to see to the application of the proceeds of such sales; and it is further expressly understood that the acceptance of this trust by the said William M. Ladd shall in no respect prejudice the firm of Ladd & Tilton in respect to any claims, of any nature whatever, or any rights and remedies at law or in equity by reason thereof. The overplus or residue of said property or the proceeds thereof, after all the just debts of said A. H. Johnson shall have been paid, shall be reconveyed or returned to said A. H. Johnson, his heirs, executors, or assigns, the customary or usual compensation to be allowed said trustee for his services performed herein. In witness whereof, the said A. H. Johnson and Cordella Johnson, his wife, have hereunto set their hands and seals, this 25th day of January, 1894,"—signed by Johnson and wife and Ladd and properly witnessed and acknowledged. The complaint further alleges that Johnson was solvent at the time of the execution of the deed and agreement, although largely indebted to Ladd & Tilton and other persons, which indebtedness is still unpaid, and that said deed covered only a portion of his property. Then follow appropriate allegations of the mistake in the description of a portion of the property intended to be conveyed, and of the attachment thereof prior to Johnson's death, in an action brought against him by the defendant White. A demurrer to the complaint having been sustained, and the bill dismissed, the plaintiff appeals.

Geo. H. Williams and S. B. Linthicum, for appellant. Wirt Minor and R. Williams, for respondents.

BEAN, J. (after stating the facts). In support of the ruling of the court below, it is claimed, in the first place, that the deed and agreement set out in the complaint created a mortgage to secure Johnson's indebtedness to Ladd & Tilton and his other creditors, enforceable only in equity, and that the legal title to the property covered thereby remained in Johnson, subject to attachment. But we cannot agree with this contention. It is clear from the declaration of trust accompanying the conveyance that the transaction was intended by the parties as an unconditional conveyance to the plaintiff for the purpose of raising a fund to pay the grantor's debts then existing, between which and a mortgage or deed of trust in the nature of a mortgage there is a well-recognized distinction. In the one case the grantor parts absolutely with his title, and it vests in the grantee for the purposes of the trust. In the other the conveyance is conditional and subject to be defeated by performance on the part of the grantor. A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of

money, or for the performance of some collateral act, and becomes void upon such payment or performance (*Wing v. Cooper*, 37 Vt. 179; *Mitchell v. Burnham*, 44 Me. 299; *Harrington v. City of Port Huron*, 86 Mich. 46, 48 N. W. 641; *Newman v. Samuels*, 17 Iowa, 528); while a deed of trust of the character under consideration here is an absolute and indefeasible conveyance of the whole of the grantor's title, for the purpose expressed. The former, whatever the form of the instrument, or whatever name may be given it by the parties, creates a mere lien, while the latter conveys title. It is manifest from this distinction that the conveyance in controversy in this suit is not a mortgage or deed of trust in the nature of a mortgage, but an absolute conveyance of the legal title of the property in controversy to the plaintiff. It was not made as security for Johnson's debts, or for the performance of any other act by him. The intention of the parties, apparent upon the face of the instruments, was to vest the title absolutely in the grantee for the purposes of the trust. It was never contemplated that anything more than the surplus remaining after the payment of Johnson's debts should be returned to him. The deed is in the usual form, and, standing alone, certainly operates to convey title; and there is nothing in the declaration of trust to show the contrary. There is no statement that it was intended as a security for Johnson's debts, nor is there anything from which such an intention can be inferred. There is no contingency upon the happening of which the instrument shall be void or inoperative. There is no right of redemption remaining in Johnson. Indeed, it has none of the incidents and characteristics of a mortgage or instrument given as security. On the other hand, it is expressly declared that the deed was not intended as a mortgage, but as a conveyance in trust, with full power to convey and incur; and while this expression, standing alone, might not be sufficient to give character to the transaction, yet it is entitled to great weight in determining what it really was. Moreover, it appears that, at the time of the conveyance and agreement, Johnson was in a state of mortal illness, of which he shortly thereafter died; that he desired to make provision for the payment of his debts, so as to avoid the delay and expense incident to administrative proceedings, and, to that end, chose to convey a portion of his property to the plaintiff to be converted into money for that purpose; and we know of no rule of law which will prohibit the carrying out of his intention so clearly and definitely expressed in the instruments evidencing the transaction. It is claimed that the case of *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957, is antagonistic to this view; but it will be observed that it appeared in that case, either from the instruments themselves or from the averments of the complaint, that

the transactions were expressly intended and designed as mortgages, to secure the payment of money, and had attached to them all the incidents of redemption and right of foreclosure; and the only question before the court, or considered by it, was whether a power of sale contained in a mortgage was valid in this state. The court did not undertake to hold that the owner of property could not convey it absolutely to a trustee for the purpose of raising a fund with which to pay his debts, or that such a trust could not be enforced without the aid of a court of equity. The distinction between such an instrument and a mortgage or deed of trust designed as security for a debt is everywhere recognized, and is pointed out with clearness in the following authorities: 2 Pom. Eq. Jur. § 995; Kinney v. Heatley, 13 Or. 45, 7 Pac. 359; Wagg v. Walker, 5 Sup. Ct. 697; Hoffman v. Mackall, 5 Ohio St. 124; Woodruff v. Robb, 9 Ohio, 212; Turner v. Watkins, 31 Ark. 429; Bouter v. Miller, 15 Fla. 625; Title Guarantee & Trust Co. v. Northern Counties Investment Trust, 73 Fed. 931; Catlett v. Starr, 9 Tex. 485, 7 S. W. 844; Newman v. Samuels, 17 Iowa, 528; McDonald v. Graham (Kan.) 2 Pac. 507.

It is further claimed that the transaction between Johnson and the plaintiff is, in legal effect, a voluntary assignment for the benefit of creditors, and void, under section 1173, Hill's Ann. Laws, because it is partial, and creates a preference in favor of certain creditors. The section referred to provides that "no general assignment of property by an insolvent, or in contemplation of insolvency, shall be valid unless it be made for the benefit of all the creditors in proportion to the amount of their respective claims." The operation of this section is limited to general assignments, and was designed to cut up by the roots the common-law doctrine that a debtor could lawfully make an assignment with preferences in favor of certain creditors. But it does not prohibit him from preferring one creditor to another, or from making a partial assignment for the benefit of creditors, unless it is done in contemplation of and as part of a general assignment. And the conveyance or assignment in question here does not come within its provisions, because it was neither a general assignment, nor made by an insolvent or in contemplation of insolvency. The complaint avers, and the demurrer in effect admits, that Johnson was wholly solvent at the time, and that the deed and agreement were intended to transfer and cover only a portion of his property. Hence it cannot be said that such a transaction comes within the provisions of the section quoted. Its provisions are confined to general assignments for the benefit of creditors, made by an insolvent debtor or in contemplation of insolvency, and does not affect the common-law right of a debtor to prefer one creditor to another, if done in good faith. Inman, Poul-

sen & Co. v. Sprague (Or.) 47 Pac. 826; Sabin v. Wilkins (Or.) 48 Pac. 427; Loomis v. Stewart (Iowa) 39 N. W. 660; Campbell v. Iron Co. (Colo.) 10 Pac. 251.

It follows that the decree of the court below must be reversed, and a decree rendered here reforming the deed and agreement set out in the complaint, as prayed for, and declaring the plaintiff to be the legal owner of the property therein described, with the right and power to dispose of the same according to the terms of his trust.

(31 Or. 379)

SHATTUCK v. KINCAID. Secretary of State.¹
(Supreme Court of Oregon. Aug. 9, 1897.)

STATE OFFICERS—SALARIES—APPROPRIATION FOR PAYMENT—SECRETARY OF STATE—AUDITING OF CLAIMS—DUTIES—MANDAMUS.

1. Hill's Ann. Laws, § 2297, providing that each of the judges of the circuit courts shall receive a stated annual salary, payable quarterly; and section 2230, providing that the salaries of the officers of the state "shall be paid quarterly out of the treasury of this state upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices,"—did not effectuate a continuing appropriation for the payment of the salaries.

2. Hill's Ann. Laws, § 2208, makes it the duty of the secretary of state to "examine and determine the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law, and to indorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant on the treasury for the same"; and to "report to the legislature at the commencement of each regular session a complete list of all accounts so audited." Held that, where a claim against the state is presented to the secretary, he must act upon it, whether or not there has been an appropriation of funds with which to meet it; and, if allowed, he must indorse on it the amount so allowed, and one of the original funds subsisting under provisions of law from which it is to be paid, and draw his warrant on the treasury for the same.

3. By the phrase, "where provisions for the payment thereof shall have been made by law," is meant such obligations as the state may have incurred under warrant of law previously enacted.

4. Where the salary of a public officer is regulated by law, and made payable at fixed times, mandamus will issue to compel the secretary of state to audit a claim for such services, and draw a warrant for its payment.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Mandamus by E. D. Shattuck to compel Harrison R. Kincaid, secretary of state, to audit a claim, and draw his warrant for it. From a judgment in favor of defendant, plaintiff appeals. Reversed.

R. E. Moody, for appellant. N. B. Knight, for respondent.

WOLVERTON, J. This is a proceeding by mandamus to require the secretary of state to audit a claim, and draw his warrant for the salary of a circuit judge for the quarter ending March 31, 1897. The secretary resists the proceeding upon the ground that the legislature having failed to make appro-

¹ Rehearing pending.

priations for the current expenses of the state, he is without authority either to audit or draw his warrant for such claim. The case comes here upon demurrer to the alternative writ, which was sustained by the lower court.

By section 2207, Hill's Ann. Laws Or., it is provided that "each of the judges of the circuit courts in this state (shall) receive an annual salary of three thousand dollars, payable quarterly, and no other allowance for their services, either directly or indirectly," and by section 2230 that "the salaries of the governor, secretary of state, and other officers of the state, shall be paid quarterly, out of the treasury of this state, upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices." These sections clearly establish the plaintiff's right to the quarter's salary claimed, and upon this point there is no contention.

Section 4, art. 9, of the state constitution provides that "no money shall be drawn from the treasury but in pursuance of appropriations made by law," and section 2, art. 6, constitutes the secretary of state the auditor of public accounts. Section 2230, supra, was section 4 of an act approved June 2, 1850, and by the same act it was provided, among other things, as follows:

"Sec. 11. The secretary of state shall superintend the fiscal concerns of the state, and manage the same in the manner prescribed by law;

"To keep fair, clear, distinct and separate accounts of all the funds and revenues of the state, and also of all expenditures, disbursements and investments thereof, showing the particulars of every expenditure, disbursement and investment. * * * To examine and determine the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law, and to endorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant on the treasury for the same; and he shall report to the legislature at the commencement of each regular session a complete list of all accounts so audited, together with a general statement of the fiscal concerns of the state; provided, that no account shall be so audited, except the same be duly verified by the oath, affidavit or affirmation of the claimant or his agent and all accounts shall be kept on file in his office.

"To enter in a book to be kept for that purpose, an abstract of all warrants drawn on the treasury, showing the date, number, name of the claimant, the amount claimed, the amount allowed thereon and from which fund to be paid. * * *

"Sec. 12. Whenever any account shall be presented to the secretary of state for settlement, he may require the person presenting the same, or any other person or persons to be sworn before him touching such ac-

count, and when so sworn, to answer orally or in writing as to any facts relating to the justness of the account. If any person interested shall be dissatisfied with the decision of the secretary, on any claim, account or credit, it shall be the duty of the secretary, at the request of such person, to refer the same, with his reasons for his decision, to the legislative assembly, and all persons having claims against this state shall exhibit the same with the evidence in support thereof to the secretary to be audited, settled, and allowed within two years, and not afterwards. And in all suits brought in behalf of the state, no debt or claim shall be allowed against the state as a set-off but such as have been exhibited to the secretary, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the secretary, on account of absence from the state, sickness or unavoidable accident."

Other sections of the same act provide that: "The state treasurer shall keep his office at the seat of government, shall receive and have charge of all moneys paid into the state treasury, and shall pay out the same as directed by law."

"It shall be the duty of the treasurer: * * *

Second—To pay on demand out of the state treasury all sums authorized by law to be so paid, if there are appropriate funds in the treasury to pay the same, and when any such sum is required to be paid out of a particular fund it shall be paid out of such fund only; and he shall pay no fund out of the treasury except in pursuance of law authorizing the payment thereof; but when any claim or account is authorized by law to be paid out of a general or contingent appropriation, the same shall be paid by the treasurer upon the warrant of the secretary of state. Third—To pay all warrants on the treasurer in the order in which they are presented, out of the appropriate fund; if there are no such funds in the treasury, then he shall endorse on such warrants 'Not paid for want of funds' together with the date, and all warrants so endorsed shall draw legal interest from and after such endorsement."

There is some confusion in numbering the sections of the original act, but the sections referred to are designated in Hill's Ann. Laws Or. as sections 2208, 2209, 2217, and 2219.

The plaintiff contends—First, that the law fixing the amount of his salary, and providing for the manner of its payment, constitutes an appropriation of funds out of the treasury with which to meet the installments as they become due; and, second, that the secretary is required to audit his claim therefor, and draw a warrant for the amount found due, even though it be determined that there has been no appropriation made to meet it. The principle involved in the declaration of the fundamental law that "no money shall be drawn

from the treasury but in pursuance of appropriations made by law," had its origin with the British parliament. It had, prior to the time of Charles II., occasionally and at long intervals exercised the right of appropriating supplies to particular purposes as the needs of the government demanded, but during the reign of that monarch it employed the authority generally, although perhaps not in every instance. It was not, however, until after the revolution of 1688 that the right and authority became firmly established. The principle, as then and since understood, is "that supplies granted by parliament are only to be expended for particular objects specified by itself." *Tasw.-Langm. Hist. Eng.* 620, 621. The abuse which the establishment of the principle was designed to correct was the exercise of official discretion in paying out and disbursing the public funds, and its purpose was to endow the legislative body with the sole authority, and impose upon it the specific duty, of deciding how and when such funds shall be applied to the discharge of the expenses, debts, or other engagements or liabilities of the government; and such is the limitation imposed by our present constitutional provision. *Ristine v. State*, 20 Ind. 328; *State v. Burdick* (Wyo.) 33 Pac. 125; 2 Op. Attys. Gen. U. S. 670. An "appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be," says Perkins, J., in *Ristine v. State*, supra, "an authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state." Webster defines "appropriation" as "the act of setting apart or assigning to a particular use or person in exclusion of all others; application to a special use or purpose, as of * * * money to carry out some public object." No particular expression or set form of words is requisite or necessary to the accomplishment of the purpose, and the appropriation may be prospective as well as in present; that is "it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues." *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. 111; *Proll v. Dunn*, 80 Cal. 220, 22 Pac. 143. And in every instance it becomes a question of legislative intent to be gathered under the settled rules of interpretation from the language employed, the context, the necessity for the enactment, and purpose to be accomplished considered in the light of contemporaneous circumstances. Field, J., in *McCauley v. Brooks*, 16 Cal. 28, says: "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury." It is maintained by some authorities that constitutional provisions fixing the salaries of state officers

proprio vigore makes an appropriation out of the treasury for the payment of the same as they become due, and this upon the ground that such salaries have become fixed and unchangeable by any power vested in the legislature, and that to withhold the funds necessary to their payment would be subversive of the will of the people as expressed by the organic law. It is said, arguendo, that if the legislature is without power to reduce the salaries of such officers, it cannot be affirmed that it may take away the whole by withholding the funds requisite to their payment. In support of this view *Thomas v. Owens*, 4 Md. 189, decided in 1853, is perhaps the leading case. It has been followed in *State v. Hickman* (Mont.) 23 Pac. 740, and *State v. Weston*, 4 Neb. 216, and criticised in *Myers v. English*, 9 Cal. 341. The Nebraska case, however, presents a dissimilar feature, in that the constitution provides that "the authorities shall draw warrants on the state quarterly" for the salaries fixed thereby, "which shall be paid out of any funds not otherwise appropriated." Other cases apply the principle to legislation under constitutions which provide that salaries of state officers shall neither be increased nor diminished during the terms for which they shall have been appointed or elected. It is maintained by these that the law fixing such salaries becomes immutable in so far as it may affect incumbents, and that the legislature is powerless to cut off by indirection that which it could not do by direct enactment, and hence that a statute merely fixing the amount to be received and the times of payment is, in effect, an appropriation of funds which become applicable to the discharge of their stated compensation as it becomes due. And we may say the very decided tendency of recent adjudications is in support of this advancement upon the doctrine. *State v. Burdick* (Wyo.) 33 Pac. 125; *People v. Goodykoontz* (Colo. Sup.) 45 Pac. 414. As directly opposed to this view, see *Myers v. English*, supra. Yet other authorities maintain that the result of such legislation is to effectuate an appropriation, regardless of the fundamental law limiting the power of the legislature to change the amount of official salaries to times other than during incumbency, and that no annual or special appropriation is otherwise necessary to authorize the disbursement of public funds by the officers in charge in payment of such demands as they arise. See *Reynolds v. Taylor*, 43 Ala. 420, and *Carr v. State*, 127 Ind. 204, 26 N. E. 778. It is difficult to understand, however, upon what principle an enactment of the nature indicated can have the effect claimed for it. The plain letter of the statute falls very far short of an express direction to that end, and the apparent object to be attained is fully accomplished when the salary and times of its payment are definitely fixed. No other or further intentment is predicated of statutes of like nature where individuals only are concerned, and a different rule ought not to prevail because the state is concerned. But

we believe the weight of authority is opposed to this latter advance upon the doctrine, and that the better rule requires something more by which to indicate a legislative intentment to effectuate an appropriation. In *Nichols v. Comptroller*, 4 Stew. & P. 154, the case upon which *Reynolds v. Taylor*, supra, seems to have been based, it was determined that an act fixing a salary "payable quarter yearly out of any money in the treasury not otherwise appropriated" made an appropriation for the purpose of meeting the quarterly payments. In *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. 111, the act under consideration provided that "each member [of a commission] shall receive a salary of two thousand four hundred dollars payable monthly. * * * to be paid out of any money in the treasury not otherwise appropriated," and it was held that this operated as an appropriation. The statutory provisions, as indicated by these cases, are similar to the Nebraska constitutional provision above referred to. And in *Cutting v. Taylor* (S. D.) 51 N. W. 949, which comes nearer the case at bar, the language employed was: "The auditor * * * shall issue and deliver to the claimant in each city, town, etc., his warrant upon the territorial treasurer for an amount equal to two per cent. of the premiums received upon the policies issued upon any property in any such city, town, etc., and such warrant shall be paid by the territorial treasurer upon presentation thereof." See, also, *State v. Kenney*, 10 Mont. 485, 25 Pac. 1022. From statutes of the nature indicated by these authorities the inference is natural and legitimate that it was the legislative intent not only that the amount and times of payment of the salaries should be rendered definite and certain, but that, when falling due, funds in the treasury applicable to their payment should be at all times in readiness for their prompt discharge, and hence the appropriation as a necessary result to meet the purposes of the legislation. It is one thing to fix the amount and times of payment of an officer's salary, and quite another to provide funds, and make them available at specified times, so that the state will not at any time default in its payments, and it does not occur to us that a fixed salary with stated times for the payment of proportional installments thereof can, with any greater propriety, carry with it an appropriation of funds with which to meet the payments than where the state has become otherwise obligated under authority of law, and no appropriation has been made anticipating payment. Whatever may be the correct rule, where the salary is fixed by the constitution, or where it is by that instrument rendered unchangeable during incumbency, followed by legislation simply fixing the amount and times of payment thereof, it is quite certain that, if regard be paid to the known and well-settled rules of statutory construction, the legislature has not, by the enactment of such a statute, without else, manifested an intention of setting aside funds in the treasury

for its payment. Something more is needed, some setting aside of a particular fund, or designation of a fund, out of which it shall be paid, or direction to the officer in charge requiring him to make payment at particular times, or that it be paid out of the treasury. And this gets us back to the original proposition, that an appropriation is the setting aside or designation by express direction or by implication of particular funds for the discharge of definite and specified obligations or liabilities, which, however, may be in contemplation, such as will arise in the future, and the appropriation may be continuing in its nature, but the legislative intent to have funds always ready and applicable to their prompt discharge at stated times works out the appropriation, and nothing short of it can have such an effect. Under the legislative direction that the salaries of all state officers "shall be paid quarterly out of the treasury of this state, upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices," and under the authorities which seem pertinent to the inquiry, we would be inclined to hold that a continuing appropriation had been thus effectuated for the payment of such salaries quarterly were it not for a legislative construction of the act nearly contemporaneous with its enactment. There is some reason for believing that public funds were disbursed under this law without further direction before the meeting of the succeeding or first regular session of the state legislature which convened September 10, 1860, but at such session a general appropriation bill was passed setting aside funds for the payment of such salaries, specifying with much particularity the incumbent by his official title, and the amount for each. And every succeeding regular biennial legislative assembly since then, save in 1868 and 1897, has, in its general appropriation bills, made like specific appropriations for these salaries. So that the act of 1859 has received what may be termed a contemporaneous legislative construction, which has been acquiesced in and acted upon by that body for more than a third of a century, and we feel bound by the construction thus given the act, and therefore hold that it did not effectuate a continuous appropriation for the payment of the salaries of state officers. *Prime v. McCarthy* (Iowa) 61 N. W. 220.

This brings us to the second contention, touching the authority of the secretary of state to audit and draw his warrant for the claim, and the solution of this question depends entirely upon the construction of the statute which prescribes his duties. Under the constitution he is made the auditor of public accounts, and under the law he is charged with superintending the fiscal concerns of the state, and it is with reference to the functions of his office thus designated that we must consider the enactment. He is required "to examine and determine the claims of all persons against the state in cases where provisions

for the payment thereof shall have been made by law," and we are led to inquire, first, what claims are meant? The answer is, such as the law has made provisions for their payment, and by this is meant such obligations and liabilities as the state may have incurred under warrant of law previously enacted. No person can acquire a valid claim against the state except in such cases as the fundamental law has prescribed or the legislature has through its enactments permitted, and directed, either expressly or impliedly, that payment shall be made for that which constitutes the consideration for the claim. Acting in his capacity as auditor, the secretary is required, when a claim is presented, to look to the law, and determine whether the claimant has brought himself within any of its provisions allowing him compensation. In other words, before allowing the claim he must be able to put his finger upon some law which gives the claimant a standing in his tribunal upon which he can demand payment by the state. For instance, the law has made provisions for the payment to plaintiff of a stated salary for his services, and this constitutes such a claim as is contemplated by the statute. Further, he is directed to indorse upon the claim, if allowed, "from what fund the same is to be paid," and it is suggested that the fund here meant is one specially appropriated and set aside by the legislature for the payment of the designated claim, or of a designated class, of which it constitutes one. But it is not probable that a fund thus constituted was the one intended for designation by the indorsement. With much greater reason we may infer that it had reference to some one of the few funds that are provided for under general laws in pursuance of fundamental enactments. The constitution directs that "the legislative assembly shall provide for raising revenue sufficient to defray the expenses of the state for each fiscal year," and that "every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." Const. art. 9, §§ 2, 3. And it has been the usage of the legislature, by virtue of these provisions, to direct the levying of taxes for specified purposes, such as for current expenses, for common school, and for university purposes, and the like; thus creating separate and distinct funds into which the revenues flow from the tax collector or other sources of income, and out of which all the expenses of the state government must be met. Taxes levied for current expenses go into the general fund; those for common school purposes, together with interest derived from investments, into the common school fund, and the same with the university and other funds. And if a tax is directed to be levied for a special purpose it goes into the special fund thus provided for, and these are the funds of which the secretary shall take account in making his indorsements and drawing his warrants upon the treasury. All of the earlier appropriations

proceeded upon this idea, and the later ones are not in conflict with it. The first general appropriation act adopted in 1860 employed the following language, viz.: "That the following sums be and the same are hereby specifically appropriated to the several objects hereinafter mentioned for two years, * * * to be paid out of any money in the treasury not otherwise appropriated." Then follows an itemized statement of the various salaries and expenses for which it shall be disbursed, without naming or designating any separate fund, thus leaving but a single fund for the secretary to take into account in the indorsement of claims and in drawing his warrants. This practice was continued until 1872, when for the first time the legislature adopted the plan of naming separate funds in the appropriation bills, but subsequent acts have not been uniform in this respect. The language in all to effectuate the appropriation is in purport the same, "to be paid out of any money in the treasury not otherwise appropriated," or from the common school fund, university fund, or other fund, as the case may be. Then follows the naming of subdivided funds, as "executive fund," "general fund," "judicial fund," and the like. But in most, if not all, of these subdivided funds are contained items of salaries and expenses to be paid, as in the former acts. The legislature could, if it saw fit, name a fund for each separate salary or item of expense, but, howsoever the original funds may be subdivided by the appropriation bill, the appropriation is exhausted as to each separate item as the money necessary to its discharge is paid out by the treasurer; that is, the appropriated funds for any one item are not applicable to the payment of any other item in the whole list, so that after all the specific items govern the disbursements, and not the subdivided funds as designated in the act. The term "fund" is not synonymous with "appropriation," and as a matter of fact there are not many separate funds in the treasury, but there may be many appropriations, and most of the latter are payable out of the same fund,—the general fund. *Proll v. Dunn*, 80 Cal. 226, 22 Pac. 143. This understanding of the term is in harmony with the apparent sense in which it is used in the same act in a clause for the direction and control of the state treasurer. He is required "to pay on demand out of the state treasury all sums authorized by law to be so paid, if there are appropriate funds in the treasury to pay the same, and when any such sum is required to be paid out of a particular fund, it shall be paid out of such fund only; and he shall pay no fund out of the treasury except in pursuance of law authorizing the payment." The first clause enjoins upon the treasurer the duty of paying out of the treasury all sums authorized by law to be paid; that is to say, he, like the secretary of state, in auditing must see to it that the sums disbursed are upon valid claims or demands against the

state, such liabilities or obligations as the law has authorized to be incurred. All sums thus authorized by law must be paid if there are appropriate funds in the treasury; and when such sum is required to be paid out of a particular fund, then out of such fund only. Herein there is no reference to any appropriated fund set aside in the treasury for a specific purpose. The "funds" referred to are such as may be applicable in the disbursement of sums authorized by law to be paid. And the particular fund may be one of the few provided for by law under the constitution. In the latter clause, however, we find an additional limitation upon the action of the treasurer. He shall pay no fund—that is, no one of the funds provided by law, and of course no part of any one of such funds—out of the treasury except in pursuance of law authorizing the payment thereof, or, in other words, the disbursement of the fund. This contemplates an appropriation of the fund, and an inhibition upon the treasurer to disburse it in any event unless so appropriated. The clause authorizing the treasurer to indorse upon warrants "Not paid for want of funds" must be read in connection with these clauses, and, when so interpreted, it becomes at once intelligible and plain without the changing of a syllable or a sentence; otherwise, as under the contention of the counsel for respondent the words "the appropriate fund" must be made to read "appropriated funds." It is elementary that an act must be so construed, if possible, as to give effect to all its provisions, as it is presumed that the legislature intended each to answer some appropriate and specific purpose; and with the interpretation here indicated all the other provisions of the act prescribing and governing the secretary's official duties as auditor of public accounts and in the capacity of superintendent of the fiscal concerns of the state become operative at all times, otherwise the most important of them must fall utterly into disuse whenever it happens that appropriations have been exhausted, and all the time suspended as to any particular items or claims where funds are not set aside in the treasury for their discharge. We may instance some of them. By section 2208 the secretary is required to report to the legislature at the commencement of each regular session a complete list of all accounts so audited, and to enter in a book kept for that purpose an abstract of all warrants drawn on the treasury, showing the date, number, name of claimant, the amount claimed, the amount allowed thereon, and from which fund to be paid. And by section 2209 it is prescribed that all persons having claims shall present them to the secretary to be audited, settled, and allowed within two years, and not afterwards; that, if any person is dissatisfied with his decision on any claim, account, or credit, it is made his duty, at the request of such person, to refer the same to the legislative assembly; and that in all suits in behalf of the state no debt or claim

shall be allowed against the state as a set-off but such as have been exhibited, and by him allowed or disallowed. Under the theory that there can be no auditing unless there is an appropriation, all these clauses, among others, would rest in abeyance for the time being, and in some instances become absolutely nugatory, public service would be impeded, and individuals might suffer injustice. There is a natural and rational implication from the provisions here alluded to that the secretary should act upon the claims presented to him with reasonable dispatch; and, as there are no exceptions touching when he shall not act, we infer that the want of an appropriation of funds then applicable will not suspend his decision. We hold, therefore, that when a claim against the state is presented to the secretary he must act upon it, whether there has been an appropriation of funds with which to meet it or not; and, if allowed, he must indorse upon it the amount so allowed, and the fund,—one of the original funds subsisting under provisions of law, not the subdivided or appropriated fund, from which it is to be paid,—and draw his warrant on the treasury for the same. He has nothing to do with the subdivided fund. The treasurer must look to that. *State v. Hoffman*, 35 Ohio St. 435, 443. The drawing of the warrant is made a part of the act of auditing, and is the claimant's evidence or certificate of the allowance. Nor is it the drawing of money from the treasury. *Evans v. McCarthy*, 42 Kan. 426, 22 Pac. 631. The warrant is but *prima facie*, not conclusive, evidence of the validity of the allowed claim; and, unless there is authority of law for the payment of such claim, the treasurer may refuse, and, indeed, it is his duty to refuse, to pay the warrant, even if funds are appropriated. *Goldsmith v. Baker City* (just decided) 49 Pac. 973; *State v. Lindsley* (Wash.) 27 Pac. 1019. The legislature could have provided for auditing or settling claims and demands against the state without at the same time directing the warrant to be drawn, or it could have directed that no warrant should issue without an appropriation, but it has not seen fit to do so, and it seems to be the general policy of our legislation to associate the drawing of the warrant with the auditing of the claim, so that they become part and parcel of the same act. There are some exceptions to be found in the statute, but the particularity with which they are usually specified, directing, in effect, that no warrant shall issue unless there are funds set aside in the treasury with which to meet the demand, but fortifies the idea of the recognized existence of the general plan under which the absence of a prior appropriation of funds is not an objection to the issuance of the warrant. *People v. Lippincott*, 72 Ill. 578; *People v. Secretary of State*, 58 Ill. 94. It sometimes occurs, however, that special appropriations are made for a particular purpose where the act itself authorizes the incurring of the expense, and is the only warrant of law there-

for. In such cases, of course, the measure of the appropriation is the limit of authority to obligate the state, and hence the secretary could neither audit nor draw his warrant, because the claim is not one which the law would recognize as valid against the state. *Flynn v. Attorney General*, 99 Mich. 96, 57 N. W. 1092.

In coming to this conclusion we have not overlooked the case of *Brown v. Fleischer*, 4 Or. 132. This authority may be regarded as in point, as it was based mainly, if not exclusively, upon the ground that the authority of the secretary of state to audit accounts and draw warrants upon the treasurer depends upon the condition that an appropriation has been made for their payment, although the proceeding was for a writ of mandamus against the treasurer to compel him to pay warrants. But we firmly believe that the case was decided upon a mistaken interpretation of the statute, and we cannot give our approval to a construction which, in effect, suspends the operation of certain plain and distinct provisions necessary to the due and orderly administration of the public service, and which at the same time nullifies completely one of the most important constitutional functions pertaining to the office of secretary of state whenever there is not a subsisting appropriation. If such was the intention of the legislature, it would no doubt have given some indication thereof in expressing its will pertaining to the subject; and, in the absence of such an indication, we feel constrained to believe that such was not its intention. The case of *Brown v. Fleischer* will, therefore, be overruled in so far as it is in conflict with this opinion.

This leaves but one other question to be determined, and that is whether the secretary should be required to audit and draw his warrant for this particular demand. The authorities seem to be uniform that, when the nature and amount of the services rendered the state are definitely fixed and ascertained, and the compensation therefor is regulated by law such as the salaries of public officers, the duty of auditing and allowing the account or claim for such services becomes a mere ministerial act, the performance of which may be required by mandamus. And so it is with drawing the warrant for the payment of the claim or demand. *High*, Extr. Rem. §§ 101, 104, 105; *Fowler v. Peirce*, 2 Cal. 165; *Bryan v. Cattell*, 15 Iowa, 538; *Swann v. Buck*, 40 Miss. 268, 291. In accordance with these considerations, the judgment of the court below will be reversed, and the cause remanded, with directions to that court to overrule the demurrer.

BEAN, J. I concur in the view expressed in the prevailing opinion that under the statute the secretary is not authorized to audit a claim without issuing his warrant to the claimant as evidence thereof. The two acts seem to be made by the statute concurrent.

But I am not entirely satisfied with the conclusion that he can be compelled by mandamus to audit a claim and issue a warrant thereon, in the absence of an appropriation by the legislature with which to pay the warrant when issued; but, as my associates are agreed upon the question, I do not feel authorized to dissent upon the doubt I entertain.

CROASMAN v. KINCAID, Secretary of State.
(Supreme Court of Oregon. Aug. 9, 1897.)

CLAIMS AGAINST STATE—APPROPRIATIONS FOR PAYMENT—MANDAMUS.

1. Hill's Ann. Laws, § 3877, providing that all accounts for supplies for the penitentiary shall specify the items, be certified by the superintendent, and presented to the secretary of state, who shall audit the same, and issue warrants on the treasurer for their payment, etc., does not make an appropriation for the payment of the class of claims referred to.

2. Under Hill's Ann. Laws, §§ 2208, 3877, whereby the secretary of state is charged with the duty of determining claims against the state, mandamus will issue to compel such officer to pass upon an unliquidated demand for supplies furnished to the penitentiary, and to allow or disallow the same.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Mandamus by A. B. Croasman to compel Harrison R. Kincaid, secretary of state, to audit a claim. A demurrer to the writ was sustained, and plaintiff appeals. Reversed.

R. E. Moody, for appellant. N. B. Knight, for respondent.

WOLVERTON, J. This case was argued and submitted with the case of *Shattuck v. Kincaid* (just decided) 49 Pac. 758, and upon the same briefs. The claim involved is one preferred against the state by plaintiff for supplies furnished at the instance and request of the superintendent of the state penitentiary, for the use of said institution, which are alleged to be of the reasonable value of \$20. The bill constituting the claim was itemized and sworn to by the claimant, certified to as correct by the superintendent, and presented to the secretary of state, with a request that he audit and allow the same, and draw his warrant upon the treasurer for the amount, which being denied, this proceeding was instituted, to compel him to do so. A demurrer was interposed to the alternative writ of mandamus, and, being sustained, judgment was entered dismissing the proceedings, from which plaintiff appeals.

Section 3877, Hill's Ann. Laws Or., is pertinent to the inquiry here, and is as follows: "All accounts for supplies for the penitentiary or prisoners shall specify the items, and be certified to by the superintendent, and presented to the secretary of state, who shall audit the same and issue warrants on the treasurer for the payment of said claims, and no money shall be paid for any purpose on account of said penitentiary except upon said

warrants." The questions presented are (1) whether this section makes an appropriation of funds out of the treasury for the payment of the class of claims against the state contemplated thereby; and (2) whether, in case it does not effectuate an appropriation, the secretary can be required to audit the account, and draw his warrant on the treasurer for the payment of the same.

We are satisfied that under the law, as ascertained and applied in the case of Shattuck v. Kincaid, the section quoted does not constitute an appropriation of money in the treasury to the payment of the class of claims contemplated thereby, and this disposes of the first question.

Under the constitution, the secretary of state is the auditor of public accounts, and, by law, he is charged with the duty of superintending the fiscal concerns of the state; and it was no doubt because of the functions thus delegated to and pertaining to his office that the legislature referred to him claims of the class involved to be audited. We have seen (Shattuck v. Kincaid) "that when the nature and amount of services rendered the state are definitely fixed and ascertained, and the compensation therefor is regulated by law, such as the salaries of public officers, the duty of auditing or allowing the account or claim for such services becomes a mere ministerial act, the performance of which may be required by mandamus." See cases therein cited. Such is not the case, however, when the duty is one which necessarily involves the exercise of discretion and judgment, and mandamus will not lie to direct or control the decision or determination of the functionary to whom the discharge of such duty is confided; and this is so because it is the discretion and judgment of that functionary, not that of the court, which is to be exercised. But, while courts will not direct and control discretion and judgment, they will require its exercise, not with a view to any particular result, but that the officer shall proceed in the discharge of his duty, and determine matters proper for his cognizance, and declare, according to his own judgment, the result of his consideration. *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *State v. Oliver*, 116 Mo. 188, 22 S. W. 637; *Wailes v. Smith* (Md.) 25 Atl. 922; *Burton v. Furman* (N. C.) 20 S. E. 443; *State v. Doyle*, 38 Wis. 92; *People v. Board of Sup'rs*, 26 Barb. 118; *Dechert v. Com.*, 113 Pa. St. 229, 6 Atl. 229; *People v. Auditor*, 2 Colo. 97; *Spell. Extr. Relief*, § 1459. But the remedy thus invoked must not be extended beyond its legitimate purposes, so as to take the place of a suit against the state by its consent to establish demands which are uncertain or unliquidated, and which properly fall within the legislative cognizance. *Swann v. Buck*, 40 Miss. 268, 291; *Rice v. State*, 95 Ind. 33.

Construing section 3877, supra, with section 2208, Hill's Ann. Laws Or., whereby the secretary is charged with the express duty of examining and determining the claims of all per-

sons against the state, it would seem that he is required to audit and allow or disallow claims of the nature involved here, as well as those of a general character, with this difference in the manner of proof only; that the certificate of the superintendent of the penitentiary is made a necessary adjunct to the presentation of the claim or demand. The plaintiff's claim is an unliquidated demand for supplies furnished the superintendent, and the secretary is required to determine the amount and validity thereof, under the law and evidence; and this calls for the exercise of judgment such as the courts will not control, but they will, under the authorities, compel its exercise. *Wailes v. Smith*, supra. The issuance of the warrant in pursuance of section 3877 is made the direct and legitimate result of the auditing or allowance, and is to be considered as part of one and the same act, as under the general provisions, so that in the event of an allowance the warrant must issue. In the light of these considerations, the allegations of the complaint being admitted by the demurrer, it is manifestly proper that the secretary should exercise his discretion, and pass upon plaintiff's claim, and, if allowed, draw his warrant therefor. The judgment of the court below will therefore be reversed, and the cause remanded, with directions to overrule the demurrer.

IRWIN-HODSON CO. v. KINCAID, Secretary of State.

(Supreme Court of Oregon. Aug. 9, 1897.)

MANDAMUS—SECRETARY OF STATE—EXAMINATION OF CLAIMS.

Under Hill's Ann. Laws, § 2848, providing that the secretary of state shall cause to be printed blank assessment rolls and other forms; and section 2208, subd. 7, requiring him to examine the claim therefor, and to draw his warrant for it,—mandamus will issue to compel him to act, but not to direct how or to what effect he shall act; since, in passing on the quality of the work and materials, reasonableness of the charge, etc., he must exercise his discretion and judgment.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Mandamus by the Irwin-Hodson Company to compel Harrison R. Kincaid, secretary of state, to audit a claim, and draw his warrant for it. From a judgment in favor of defendant, plaintiff appeals. Reversed.

R. E. Moody, for appellant. N. B. Knight, for respondent.

WOLVERTON, J. This case involves the question whether the secretary of state ought to be required to audit and allow and draw his warrant upon the treasurer for \$221.50, the amount of a certain claim in favor of plaintiff, which is for ruling and binding 33 volumes of assessment and tax rolls, and ruling recapitulating sheets, at the instance and request of the secretary. He is authorized to incur the expense by section 2848, Hill's Ann.

Laws Or., which is as follows: "The secretary of state shall from time to time, as he may deem proper, cause to be printed blank assessment rolls and other forms for proceedings required by this chapter, and shall transmit the same, together with such instructions as he shall think useful, to the several county clerks in this state, who shall distribute the same to the assessors of their several counties." The duty to examine and determine the claim, and to draw his warrant therefor, is imposed by subdivision 7, § 2208, discussed and construed in *Shattuck v. Kincaid* (Or.) 49 Pac. 758; but the act required is one involving the exercise of discretion and judgment. He must satisfy himself touching the quality of the work and materials furnished, and determine upon the reasonableness of the charge, or whether in accord with the contract, if any. The writ of mandamus can therefore only require that he act in the premises, not direct how or to what effect he shall act, and is governed in all material concerns by the rules of law ascertained and applied in the case of *Croasman v. Kincaid* (just decided) 1d. 764, and the order will be the same here as in that case.

DAVIS v. WHIDDEN, County Auditor.
(S. F. 1019.)

(Supreme Court of California. July 28, 1897.)

STATUTES — APPROVAL AND OPERATION — CLARK ROAD LAW — COUNTY GOVERNMENT ACT.

1. When two irreconcilable legislative acts are approved upon the same day, resort may be had to the office of the secretary of state, and also to the published statutes, for information as to the order of their approval, and the one that is found to have been approved last is the prevailing law.

2. St. 1897, p. 452 (County Government Act), having been approved prior to, though enacted on the same day as, St. 1897, p. 374 (Clark Road Law), it prevails over the latter in case of conflicting provisions.

In bank.

Application of Fred A. Davis for a writ of mandate to compel Myron A. Whidden, county auditor, to issue warrants. Writ granted.

Bishop & Wheeler, for petitioner. Charles E. Snook, Dist. Atty., and L. S. Church, Dep. Dist. Atty., for defendant.

PER CURIAM (BEATTY, C. J., not participating). This is an application for a writ of mandate to compel the respondent, as county auditor of the county of Alameda, to draw his warrants in payment of certain claims for road work done by order of the board of supervisors of the county on June 1, 1897. The work was not done to prevent damage by storm waters or floods. The claims were duly presented to and allowed by the board of supervisors of the county, and duly certified according to law, and were thereupon assigned to petitioner, who thereafter demanded of the auditor that he draw his warrants on the county treasurer in payment thereof. This demand the auditor refused, and he justified his refusal

on the sole ground that the board of supervisors had no power or authority on June 1, 1897, to authorize or order the road work to be done for which the claims were allowed. To support this position he relies upon an act passed by the last legislature, entitled "An act for the establishment of a uniform system of road government and administration in the counties of the state of California." St. 1897, p. 374. The act was approved April 1, and went into effect May 31, 1897, and is commonly known as the "Clark Road Law." It is claimed that by the provisions of the said act the powers and duties that had for many years prior to June 1, 1897, been exercised by the boards of supervisors over the public roads in the several counties of this state were expressly withdrawn from the supervisors, and exclusively vested in and conferred upon the road-district corporations provided for in the act, and the officers thereof, and that for this reason the board of supervisors had no power or jurisdiction to order the work to be done as alleged in the petition. A new county government act was also passed by the last legislature, which was approved and took effect on the same days as the Clark road law. St. 1897, p. 452. By section 25, subd. 4, of this act it is provided that the boards of supervisors in their respective counties shall have jurisdiction and power "to lay out, maintain, control, construct, repair and manage public roads, turnpikes * * * and bridges within the county, unless otherwise provided by law; * * * provided, that the road commissioners or road overseers in their respective districts shall employ all labor required and direct the conduct of work of any kind upon any and all public roads." And by section 232 of the act it is provided that "all acts and parts of acts inconsistent with this act are hereby repealed." It is contended for petitioner that this last-named act was, at the time the road work in question was done, and still is, in force, and the controlling law upon the subject; that the Clark road law never has been or could be put in operation, and that it was repealed by the county government act, and, besides, was unconstitutional and void for various reasons. By section 1 of the Clark road law every road district is, in effect, declared to be a public corporation, and it is made the duty of the boards of supervisors in the several counties in which road districts do not now exist "to subdivide such counties into road districts as by law now provided"; and by sections 2, 3, 4, 5, 6, 7, and 8 authority is given the boards of supervisors to change the boundaries of old districts, to form new districts, and to consolidate two or more existing districts into one district. Section 9 provides: "An election for road trustees shall be held in each road district on the last Saturday of May of each year, at a place in each district to be designated by its board of trustees: (1) The number of road trustees for each district shall be three. * * * (2) In new road districts the road trustees shall be elected on the

last Saturday in May subsequent to the formation of the district. * * * (3) When a vacancy occurs from any of the causes specified in section 996 of the Political Code of this state the board of supervisors shall appoint a suitable person to fill such vacancy until the first day of July next succeeding such appointment." Section 16 provides: "Except when otherwise authorized by law, every road district shall be under the control of a board of road trustees consisting of three members who shall be residents of the district." Section 18 provides: "Vacancies in the office of road trustees are caused as follows: (1) By the happening of any of the events specified in section 996 of the Political Code; (2) by failure to elect as provided in section 9 of this act; (3) by the resignation of a trustee. * * *" Section 19 provides: "Vacancies in the office of trustee in a new district shall be filled as are other vacancies. No person shall be appointed to fill any vacancy except upon petition signed by at least ten electors of the district; provided, that a vacancy may be filled in any case upon petition signed by a majority of the electors of the district." Section 23 provides, among other things, "that all powers and duties by this act conferred upon road districts and their officers, which are by any law enacted prior to and existing at the time of the taking effect of this act conferred upon road overseers, or road commissioners, or boards of supervisors, or other officers, shall be deemed withdrawn by this act from the officers last above named and conferred exclusively upon road districts and their officers." Other sections prescribe very fully the powers and duties of road districts and their trustees as to the laying out, construction, repair, and management of roads in the districts, and as to the levying, collection, and expenditure of moneys raised for road purposes. That there is an irreconcilable conflict between the two acts in question is apparent, since by them the same powers are vested in entirely distinct and separate bodies. The question, then, is, which act must prevail?

In view of the conclusion reached, it is unnecessary to determine how the road law could be put in operation; that is, how the vacancies in the office of trustee in all the districts in the state could be filled. The act took effect on the sixtieth day after its passage,—May 31st,—and it provided for an election of trustees on the last Saturday of May, which this year was May 20th. There could, therefore, be no election this year, and the offices of trustee were left vacant. How could those vacancies be filled? Counsel radically disagree as to whether, under the peculiar provisions of the act, they could be filled by the boards of supervisors, or must be filled, if at all, by the governor of the state. So it is unnecessary to consider the several objections raised to the road law upon the ground that it is unconstitutional. "It is an old and well-settled rule that when two laws upon the same subject, passed at different times, are

Inconsistent with each other, the one last passed must prevail." *People v. Dobbins*, 73 Cal. 237, 14 Pac. 800. A law is not finally passed until it is approved by the governor, and transmitted by him to the secretary of state. And, when public justice requires it, the exact time at which an act was approved may be ascertained. In *People v. Clark*, 1 Cal. 406, the facts were that Clark was elected county judge at an election regularly appointed and held. On that day the legislature passed an act repealing the one by virtue of which the election was held, and conferring upon the governor the power of appointment. The repealing act was approved the same day, but at what hour of the day did not appear. Some days thereafter the relator was, by the governor, appointed county judge. The court sustained the validity of the election, and said: "The time of the approval of the executive is a fact which can be ascertained and proved, and in all cases where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when did the event—the passage of the act—occur? should be had." In *Louisville v. Savings Bank*, 104 U. S. 469, the case of *People v. Clark*, supra, was cited approvingly, and the court, by Mr. Justice Harlan, said: "In view of the authorities, it cannot be doubted that the court may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. * * * In determining when a statute took effect no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was, in fact, given." As we have seen, the two acts in question were approved on the same day, April 1, 1897. How, then, shall we ascertain the chronological order in which they were approved? Since the publication of the first volume of our statutes it has been the uniform custom to print and publish all laws approved on different days in the order of their approval, and it is only a fair presumption that all laws approved on the same day are printed and published in the same chronological order. And under the provisions of section 528 of the Political Code this order of printing and publication would seem to be required. It appears from the statutes of 1897 that the Clark road law commences on page 374, and is headed "Chapter CCXLIV," while the county government act commences on page 452, and is headed "Chapter CCLXXXVII." From this order we infer that the last-named act was last approved. To remove the possibility of doubt upon the matter, it may be added that courts take judicial notice of the following facts: of whatever is established by law, and of the public and pri-

vate official acts of the legislative, executive, and judicial departments of the state. In all such cases the court may resort for its aid to appropriate books and documents of reference. Code Civ. Proc. § 1875, subds. 2, 3. Resorting for aid to the office of the secretary of state, we learn that the county government act was in fact last approved by the governor, and was filed in the office of the secretary of state some hours after the filing of the Clark road law. Under these circumstances the county government act must be held to be the later act, and must prevail. Let a peremptory writ of mandate be issued as prayed for.

(15 Utah 440)

SALT LAKE LITHOGRAPHING CO. v.

IBEX MINE & SMELTING CO. et al.

(Supreme Court of Utah. July 28, 1897.)

MATERIAL MAN'S LIEN—EXTENT—WAIVER BY ATTACHMENT.

1. A lien for lumber used in several structures on the same tract, under one contract, may exist on the whole, when they constitute one plant.

2. Though lumber be delivered and used in the construction of a granulator two months after the operation of the smelter commenced, it may be included in the lien for the lumber to build the smelter, if the granulator enables it to be more economically operated, and was contemplated as a part of the plant.

3. The Nevada Company did not waive its lien for lumber by the levy of an attachment, afterwards dismissed, on the same property, to secure the same demand.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Action by the Salt Lake Lithographing Company against the Ibex Mine & Smelting Company and others. From the judgment, W. S. McCornick appeals. Affirmed.

Frank Pierce, for appellant. Frank B. Stephens, for respondent.

ZANE, C. J. This is an appeal by the defendant McCornick from so much of the decree entered by the trial court as adjudged that the lien set up in the cross complaint of the Sierra Nevada Lumber Company was superior to the lien of the mortgage described in his complaint. The plaintiff, the Salt Lake Lithographing Company, filed its complaint against the defendants, in which it asked the court to appoint a receiver with authority to take possession of the property of the defendant the Ibex Mine & Smelting Company, and convert it into money, and pay its debts according to their priority. The lumber company filed an answer and a cross complaint in the cause, in which it alleged that it entered into a verbal contract with the Ibex Company on the 14th day of September, 1894, to furnish lumber and other building material, to be paid for as delivered, to be used in constructing a smelter, scales, assay office, flumes, ore bins, boarding house, and other appurtenances upon the land of the company,—describing it as one tract. It was also alleged that the smelter, scales, assay

office, ore bins, boarding house, and other structures and appurtenances were to constitute, and did, when completed, constitute, one plant for smelting purposes; that in pursuance of the contract the lumber company furnished lumber and other material to the amount of \$6,728, used in the construction of the smelter and other parts of the plant on the piece of ground described; that the first material was delivered on September 14, 1894, and the last on March 27, 1895; that notice of the lien was recorded May 25, 1895; that, after deducting all just credits, there still remained due \$2,638, for which a first lien was alleged and claimed. The defendant McCornick also filed an answer and cross complaint, in which he set up a mortgage executed to him by the Ibex Company on March 6, 1895, to secure a note of the mortgagor for \$60,000 of the same date, recorded on the 11th day of April of the same year. The lumber company denied that appellant had a lien superior to its own, and appellant denied that the lumber company had any lien; and, if the court should find it had, he claimed his to be superior to it. It is conceded that the Ibex Company owned a mine for which the lumber company also delivered lumber, and the appellant claims that the accounts for material furnished for the respective plants were not kept separate, and that it cannot be ascertained how much should have been charged for materials furnished to each. While all the lumber and other material furnished to the Ibex Mine & Smelting Company to be used at the mine and at the smelter are contained in the same account, the items to be used at the mine and those to be used at the smelter are separate, and the charges for material to be used at each plant can be easily ascertained, and the court below found and allowed only for that used in the construction of the smelter and other structures claimed to belong to that plant. The appellant also urges that the materials for which the lumber company claims its lien were used in several buildings, to wit, the smelter, the blower house, the sampling mill, the ore bins, the boarding house, the superintendent's house, the blacksmith shop, the pug mill, the assay office, and the granulating flume; and that the charges for materials used in each structure should have been kept separately, and that they did not constitute a whole, and that a lien could not be decreed on the entire premises for all. In effect, the appellant insists that a separate lien should have been decreed upon each structure, and the land occupied by it.

If each structure, and the land upon which it stands, could be used for separate purposes, and would be as valuable when so used as when used together as a smelting plant, there would be great force in the claim. But in view of the facts that the lumber was delivered under one contract, and the structures were all erected on the same piece of ground, and they were all to be used together in prosecuting the business of smelting,—the same purpose, the same enterprise,—we are of the opin-

ion that a lien existed on the entire premises for the lumber used in each structure, and that one lien could be decreed thereon for the security of the entire bill, the aggregate. *Phil. Mech. Liens* (3d Ed.) § 229; *Wall v. Robinson*, 115 Mass. 429; *Gilbert v. Fowler*, 116 Mass. 375.

The appellant claims that the smelter was completed on January 29, 1895, and that the notice of the lien was not filed for record until May 25, 1895, and that the lumber company did not acquire a lien, because it did not file its notice within 60 days after completing the contract. The last item for material was delivered on March 27, 1895, and was used in the construction of a granulating flume. The removal of the slag from the smelter was necessary, and it appears from the evidence that it could be most conveniently and economically done in the use of the flume. We are of the opinion that the court below did not err in allowing the item for lumber used in its construction, and that the lumber company had the notice recorded within the 60 days given by the statute after the completion of its contract.

It is also urged that the lumber company waived its right to the lien claimed by obtaining and levying an attachment upon the property of the Ibox Company for the same demand before filing its cross complaint. It appears that the attachment lien was not perfected, and that it was dismissed. We are disposed to hold that the lien of the lumber company claimed in its cross complaint was not waived by the institution of the attachment suit and a levy of the writ. *Brennan v. Swasey*, 16 Cal. 141; *West v. Flemming*, 18 Ill. 248; *Association v. Wagner*, 61 Cal. 349. The decree appealed from is affirmed.

BARTON and MINER, JJ., concur.

(15 Utah, 280)

HAMILTON et al. v. DOOLY.

(Supreme Court of Utah. July 26, 1897.)

NEW TRIAL — NOTICE — WAIVER OF DEFECTS — LACHES — CONVEYANCE IN TRUST — SALE — PURCHASE BY TRUSTEE — RIGHTS OF BENEFICIARIES.

1. Under section 3400, Comp. Laws Utah 1888, only the defeated or aggrieved party to an action has the right to appeal, and, when notice of motion for new trial is served within 10 days after notice of the decision of the court, it is in full compliance with section 3402, Id.

2. Where counsel, by stipulation, agreed that the statement on motion for a new trial was full, true, and correct, and that the same might be settled by the court, reserving only the objection that no statement was made within the time provided by law, and that no order of the court was obtained extending the time, an objection, raised for the first time in this court, that the notice was defective, will be regarded as waived.

3. Mere lapse of time, when the parties remain in the same relative position, and the delay has worked no serious wrong to the adverse party, so that justice can still be done, although an important ingredient in the law of laches, will not operate as a bar in equity.

4. N. mortgaged certain mining property to D., and afterwards conveyed the same, with other

property, to him by deed absolute on its face, without consideration except the parol agreement that D. was to convert the same into money, and out of the proceeds pay the debts of N., a reasonable compensation to the trustee, and turn the balance over to the devisees of N. As a part of the same transaction, N. also made his last will, therein providing for the same trust, and appointing D. as his executor. Afterwards N. died, and D., having assumed his duties as trustee, also became executor of the estate. At the time of the above transactions, negotiations for the sale of said mining property to a certain syndicate were pending. One-third interest in this property had previously been conveyed to N. by R., who received therefor \$3,000 cash, and a note from N. for \$47,000. This conveyance was made for the purposes of the sale, and a reconveyance was to be made, and the note canceled, if the sale was not made by a certain date. The third interest was never reconveyed nor the note paid. After the death of N., suits to foreclose miners' liens on the mining property were commenced against D. individually and as executor, but were dismissed as against him as executor, and were consolidated into one suit. D. answered, contesting the liens, and praying that, if the court should decree a foreclosure, his mortgage should be decreed to be a superior lien. A few of the miners' liens were held superior to the mortgage lien, and the property was sold under a decree which contained a clause permitting any of the parties to the suit to bid and become purchasers. The expenses concerning the property, including those incurred in the litigation, were paid out of funds arising through the conveyance from N. to D. At the foreclosure sale, D., through one O., as trustee or agent for him, purchased the said mining property. The negotiations for sale to the syndicate were still going on, and within 10 days after the period for redemption had expired it was sold to the syndicate by D. at a large profit. D. refused to account for the profits, claiming that he purchased the property freed from any trust. Thereafter J., a creditor of N., and R., the holder of the \$47,000 note, and who had never presented his claim to the executor for allowance, brought suit to establish a trust in their favor against D., and to compel an accounting by him. *Held*: First, that the property which was conveyed by N. to D. became a trust fund, and could not be diverted from the objects of the trust; second, that D.'s position as mortgagee gave him no such interest in the property as to alter his position as trustee, or permit him, without the consent of the cestuis que trust, to assume any attitude whereby his own interests might be opposed to their interests; third, that D. could not act as trustee up to the time of the sale, then disrobe himself of his fiduciary character, and, with the information obtained while in the trust relation, gain an advantage to himself; fourth, that the court, by dismissing the foreclosure suits against him as executor, could confer no power upon him to gain such advantage; fifth, that D. had no right to speculate with the trust fund, and therefore it was his duty to account to the cestuis que trust for the profits of the sale to the syndicate; sixth, that R., having an equitable claim or interest in the property, could bring suit against the trustee without first presenting the claim to the executor for allowance; seventh, that the provision permitting any party to bid at the sale in the decree of foreclosure did not authorize D. to purchase trust property for his own benefit.

5. When the circumstances warrant it, a trustee may, by special application to a court of equity, obtain a decree under which he will be entitled to purchase and hold trust property freed from the trust.

6. The general rule is that one who occupies the position of trustee for the benefit of others is incapable of purchasing the trust property, either at a public, private, or judicial sale, for himself. In such case the beneficiaries have the

option to affirm, or within a reasonable time set aside, the sale, and in case of affirmance to require an accounting for the profits; and no fraud on the part of the trustee so purchasing need be shown to give the cestuis que trust the benefit of the purchase.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Bill by J. F. Hamilton and John S. Rohrer against John E. Dooly. Decree for defendant, and plaintiffs appeal. Reversed.

This is a suit in equity, brought to establish a trust in favor of the plaintiffs, and to compel an accounting by the defendant, as trustee, for certain proceeds of the sale of a mine, and for other property which came into his hands as trustee and executor of an estate. It was alleged in the complaint, substantially, that on or about the 20th of June, 1884, one William A. Norton was indebted to the plaintiffs and others, and at that time was, and previous thereto had been, the owner of a large amount of property, including the Charles Dickens mine and mill site; that on or about the same date Norton conveyed, without consideration, by deed absolute on its face, all of said property to the defendant, but with the trust, as understood by the parties, that the defendant should take charge of the property, convert the same into money, and out of the proceeds pay the debts of Norton, and return any balance to him or his representatives; that the defendant received the property under the trust; that the plaintiffs are creditors of Norton; that the defendant received for personal property sold by him about \$11,000, and converted the Charles Dickens mine and other property into money, and mingled it with his own; that the amount of the money received for said property was more than sufficient to pay all of Norton's debts, but the defendant retains it, and has failed to apply the same under the trust; and that after repeated demands for payment the plaintiffs' claims remain unpaid. The answer admits the conveyance of the property by Norton, and the trust, but denies, among other things, that the plaintiffs were creditors of Norton or that any of his personal property was sold for any greater sum than \$3,254.12, or that on the 20th of June, 1884, Norton had more than a two-thirds interest in certain of the property, including the Dickens mine, described in the complaint, or that defendant has received, from the sale of trust property, an amount of money in excess of the debts of Norton, or that he has any trust money in his hands, or that he has mingled such money with his own. By way of further answer it is alleged that the defendant himself had a mortgage on two-thirds of the Charles Dickens mining property in the sum of \$20,000 and interest, and that W. S. McCornick had a mortgage on the other third; that by foreclosure proceedings instituted in Custer county, Idaho, where the Dickens mine was situate, by others than the defendant, Dooly,

the Dickens property was, on the 15th of February, 1886, charged, by the judgment of the court, with various liens, among them the mortgage lien of the defendant amounting to \$25,610.41 on two-thirds of said premises, and another such lien in favor of W. S. McCornick for \$22,368.77 on the other third thereof, and thereupon such property was ordered sold to satisfy the several incumbrances; that the defendant herein filed an answer in each of the several foreclosure proceedings which were brought against him individually and as executor of the estate of William A. Norton, deceased, but were dismissed as against him as executor, and prayed that, if the court should order a sale of the premises, the amount due on his mortgage should be first paid out of the proceeds arising out of the undivided two-thirds of the Dickens property; that the decree of sale permitted the parties to those actions, including the defendant, Dooly, to bid and become purchasers at the sale; that on the 21st of July, 1886, the Dickens property was sold pursuant to the decree of the court; that at the sale two-thirds of the property was purchased by the defendant for \$28,000, which was less than the amount of his claim, and the other third by McCornick for \$24,000, both purchases having been made through R. C. Chambers, as trustee for the defendant and McCornick; that the purchase for defendant was so made that his interests as an individual and as trustee might be severed; that thereafter, on or about the 10th of April, 1887, the defendant, holding the two-thirds interest in the Dickens property freed from the trust, sold the same, through his trustee, Chambers, and received a certain sum therefor, which was not subject to any trust; and that the defendant, as trustee, was forced to expend large sums of money in protecting the trust property, and in defending various lawsuits involving the same. It is further alleged in the answer that on June 20, 1884, Norton made and published his last will as a part of the same transaction as said deed, and appointed the defendant as his executor; that on the 15th of July, 1884, the testator died, and thereafter, upon the will being admitted to probate, the defendant qualified as such executor, and notice to creditors was published as required by the laws of Idaho; that his letters testamentary were not revoked until June 26, 1886; that the plaintiff Rohrer presented no claim for allowance, and that the plaintiff Hamilton presented his claim, which was not allowed.

The proof shows that the principal property involved in this controversy is the Charles Dickens mine and mill site, which is situate in Yankee Fork mining district, Custer county, Idaho. William A. Norton, deceased, was the locator of the mine, and after location conveyed a one-third interest therein to the plaintiff Rohrer, and one-third to Fred Phillips, who conveyed his third to J. D. Wood. Afterwards Rohrer and Wood conveyed their interests to Norton to enable him to sell the

mine. Norton, Rohrer, and Phillips were the locators of the mill site, and Rohrer also conveyed his interest therein to Norton. On the 23d of February, 1883, after obtaining the deeds from Rohrer and Wood, Norton mortgaged the two-thirds thus conveyed to him to defendant, Dooly, for \$20,000. He had previously mortgaged his other third to W. S. McCornick for \$15,000. At the time the mortgage was given to Dooly, a sale of the property was pending. Norton gave Rohrer and Phillips each \$3,000 in cash, and a note for \$47,000, so that, in case of sale, or if Norton failed to reconvey to them,—for it seems the deeds of Rohrer and Wood were executed to Norton to facilitate a sale, the property to be reconveyed in the event of failure to sell,—then they would have something to show their interests. While it is not clearly shown, yet it is apparent that Wood acted merely as agent in conveying the title of Phillips to Norton. On the 26th day of March, 1884, Norton mortgaged the whole mine to George L. Shoup for \$14,583.85. On June 20, 1884, while sick in the hospital at Salt Lake City, Norton, by deed absolute on its face, and without consideration, conveyed the Dickens mine and two-thirds of the mill site, with other property, to the defendant, Dooly. This conveyance was made in trust, by oral agreement of the parties, as admitted by the grantee, to sell the property, and out of the proceeds pay the debts of the grantor, a reasonable compensation to the trustee, and the balance to the grantor or his devisees under his will. At the same time the grantor made his last will, and appointed the grantee as his executor. On July 15, 1884, Norton died. His will was then probated, and the defendant qualified as executor, assumed his duties as such, and took possession of the property. Soon after Norton's death, and within a short time after the execution of the deed and the making of the will, the defendant received under the trust, from the banks of which he was manager, the sum of \$601.72, and then from the sale of provisions on hand at the mine \$71.85, and from sale of salt \$225, amounting to \$998.85. From a sale of ore at the mine to R. O. Chambers he received on July 15, 1886, \$3,254.12. The defendant testified that at the time of the sale of the Dickens mine, which occurred on July 21, 1886, he had expended \$1,380.23. This sale was made under a decree of court as a result of 17 different suits brought in Idaho by miners claiming liens on the property against defendant, Dooly, personally and as executor. They were all consolidated by order of court. The suit against him as executor was then dismissed. The defendant herein answered therein, contesting the liens, and praying that, if the property should be sold, he might have the benefit of his mortgage, as a prior lien upon the property. McCornick intervened, and set up his mortgage. Shoup was not a party to the litigation. In its decree in the consolidated suit the court, after giving liens of miners amount-

ing to about \$2,000 priority, allowed Dooly's mortgage lien upon two-thirds of the property and McCornick's upon one-third, and ordered the property to be sold to satisfy these various liens. The decree permitted any of the parties to bid and become purchasers. At the sale, John A. Marshall appeared as attorney for defendant, Dooly, who sent him \$2,000, and McCornick sent him \$1,000, and \$100 was furnished him for expenses. R. O. Chambers, as trustee, bid \$24,000 on one-third of the property, for McCornick, and \$28,000 on two-thirds thereof, for Dooly, which was less than the amount of Dooly's claim. The entire bid was \$52,000. The amount paid for liens was \$2,349.35, of which Dooly's share was \$1,566.23. The whole amount of miners' liens was \$19,737.80. It appears that no other cash was necessary or actually used in effecting the purchases by Chambers than the \$3,000 sent to the attorney. The time for redemption having expired on January 21, 1887, and no redemption having been made, the property was deeded to Chambers by the officer who made the sale. This closed all right of record appearing in the name of Norton or Dooly as grantee of Norton. It appears during all this time negotiations were pending for the sale of the property to an English syndicate, through parties known as "promoters," and on January 31, 1887, the defendant, through his trustee, Chambers, sold it to John A. Marshall, who was acting as agent or trustee for the syndicate. The purchase price was \$250,000, and \$50,000 of it was to go to the promoters. Sixty thousand dollars of this was paid in cash, and the balance in debenture bonds,—\$38,000. The bonds were sold for 60 per cent. of their face value. After paying the promoters, defendant, Dooly, recognized the right of McCornick to one-third, and claimed two-thirds of the net proceeds for himself. Phillips, the holder of a \$47,000 note, brought suit to recover his third, which was conveyed to Norton through Wood. It appears this suit was compromised, and that Phillips received in settlement of his claim \$8,950 in debenture bonds. No reconveyance was ever made by Norton or his representatives or grantee to Rohrer or Phillips of their interests in the property, although the evidence tends to show that their interests were to be reconveyed, and the notes canceled, if the property was not sold by June 20, 1884. The accounts of defendant, Dooly, show that the expenses of the Phillips suit, and other expenses incurred respecting the property, both before and after the foreclosure suit, were charged against the trust estate. The claim of plaintiff Hamilton, who was a physician, was for professional services rendered Norton while living, and for embalming the body after death. This cause was tried in the district court, and on August 22, 1891, that court announced its decision, which was, in effect, merely an interlocutory order in favor of the plaintiffs, ordered that the devisees of Norton be made parties to the suit, and that findings

be made and decree entered. The findings were not filed until January 10, 1894, and then, as conclusions of law, it was found, among other things, that the sale of the Dickens property made by Chambers to Marshall, as trustee, was for the benefit of the trust fund; that the proceeds of the sale were received by defendant, Dooly, as trustee, to be accounted for as such; that this action be referred to a master with directions to ascertain the amount of money in defendant's hands as trustee, and the amount so remaining in his hands, after allowing all reasonable expenses of his trust, compensation as trustee, and all prior liens on the property paid by him; and also to ascertain the creditors of Norton entitled to the residue. On November 1, 1895, a different judge being on the bench, the defendant moved to amend the conclusions of law, and to dismiss the action. The motion was granted, and the conclusions were amended so as to determine that the proceeds received by Dooly from the sale to the syndicate were not trust funds, and that the plaintiffs were guilty of laches in prosecuting the suit, and in complying with the order of court respecting new parties, and then, on December 19, 1895, final judgment was entered in favor of defendant. Afterwards, on November 17, 1896, in one of the state district courts, a motion for a new trial was overruled, and thereupon the plaintiffs appealed from the final judgment so entered.

Brown & Henderson and J. T. Morgan, for appellants. W. H. Dickson, Bennett, Harkness, Howat & Bradley, for respondent.

BARTCH, J., after making a statement of the pleadings and facts as above, delivered the opinion of the court.

It is contended for the respondent at the outset that the statement on motion for a new trial is not properly a part of the record on which the appeal was taken, because, as is insisted, notice of intention to move for a new trial was not served in time, as required by section 3402, Comp. Laws Utah 1888, and was defective. The statute requires the moving party to serve such notice within 10 days after notice of the decision of the court when the cause is tried without a jury. The question, therefore, is, when ought the notice to have been served? The first decision in the cause was announced on the 22d of August, 1891, and it was in favor of the plaintiffs. In line with that decision, which, in effect and in reality, was merely an interlocutory decree, the same judge, on January 10, 1894, filed findings of fact and conclusions of law. Why these findings were not filed sooner, does not appear, and, in the absence of any showing to the contrary, this court must assume that there was cause for the apparent delay. Nor does it appear why the order making the devisees parties to the suit was not made before May 20, 1895. Mere delay in the proceedings of the court

will not justify us in assuming that it was wrongful, and without cause, in a case of this character. During all this time, and until the 19th of December, 1895, matters were favorable to the plaintiffs, and they were not aggrieved, and had no occasion to move for a new trial, before that date. Only the defeated or aggrieved party has the right to make application for and serve notice of motion for a new trial. Section 3400, Comp. Laws Utah 1888. On the last-named date, however, the court, on motion of the defendant, filed November 1, 1895, amended the conclusions of law filed January 10, 1894, and entered a final judgment dismissing the plaintiffs' complaint. This was the first decision in the cause adverse to the plaintiffs, and was a final judgment, from which they had the right to appeal. On the 28th of December, 1895, the plaintiffs filed and served their notice of intention to move for a new trial. As will be observed, this was within 10 days after the final decision of the court, and in full compliance with the statute. The point that the notice was defective, because, as is said, it did not designate whether it was made upon affidavit, or the minutes of the court, or bill of exceptions, or a statement of the case, cannot avail the respondent, in view of the stipulation made on the 9th of June, 1896, wherein his counsel agreed that the statement was full, true, and correct, and that the same might be settled by the court, reserving the objection only "that no statement was made within the time provided by law, and that no order of the court was obtained extending the time." At no time in the court below, so far as appears from the record, was there any objection made or reserved on the ground that the notice was defective or insufficient. Nor does it appear that the court considered any such objection in denying such motion. Under these circumstances the respondent must be held to have waived the objection now made to the sufficiency of the notice, and the statement be considered as properly a part of the record. *Gray v. Nunan*, 63 Cal. 220. The matters contained in the statement may be considered on appeal from the final judgment. *White v. Pease* (decided at the present term) 49 Pac. 416.

It is further insisted on behalf of the respondent that the plaintiffs were guilty of such laches in the prosecution of their suit as to justify the court in dismissing the complaint. No doubt it is the duty of every person who institutes legal proceedings against another to prosecute his suit with reasonable diligence, and he may forfeit his rights by a failure to so prosecute it. *Bouvier* defines laches as "negligence"; *Anderson*, as "neglect, negligence, default; inexcusable delay in asserting a right." It is such negligence as results in the omission to do what one is by law required to do to save a right, and which warrants a presumption that the claimant of it has abandoned it and declines to assert it. When the assertion of a right is neglected or omitted for a period of time more or less great, and un-

der such circumstances as to cause prejudice to an adverse party, it may operate as a bar in equity. Although an important ingredient in the law of laches, the instances seem to be rare where courts have declared that mere lapse of time might effect a positive bar, even in cases of purely equitable jurisdiction; while, on the other hand, relief has frequently been granted, notwithstanding great delay, when substantial justice could yet be done between the parties. 12 Am. & Eng. Enc. Law, 540-542. This is a salutary and beneficial law, and, like the principle of limitation, was dictated by experience, and founded in wisdom. It discourages stale demands, requires promptness in the establishment of a claim, and thereby promotes the peace, repose, and welfare of society. While it warns against such lapse of time as destroys the muniments of evidence and other proof, by carrying with it the memory and lives of witnesses, still the rule which gives it effect should not be so applied as to make it an instrument of oppression. When, therefore, the parties remain in the same relative position, and the delay has worked no serious wrong to the adverse party, so that justice can still be done, the claimant should not be refused relief on the ground of laches. So, likewise, where the delay was caused by, or may properly be attributed to, the acts of the party insisting on the bar. Whether, therefore, one has slept on his claim so long as to be estopped from asserting it must depend upon the particular facts and circumstances of each case. In *Daggers v. Van Dyck*, 37 N. J. Eq. 130, Vice Chancellor Van Fleet said: "It is only when the complainant has slept over his wrongs so long that, if relief be given to him, great and serious wrong will be done to the defendant, that laches constitute a complete defense." In *Wollaston v. Tribe*, L. R. 9 Eq. 44, where, in 1888, a bill was brought to set aside a marriage settlement executed in 1858, on the ground of fraud and mistake, Lord Romilly, M. R., said: "Great stress was laid on lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort." 12 Am. & Eng. Enc. Law, 533-535, 544; *Nudd v. Powers*, 136 Mass. 273; *Nelson v. Carrington*, 4 Munf. 332; *Gibbons v. Hoag*, 95 Ill. 45; *Coles' Adm'r v. Ballard*, 78 Va. 139; *Paschall v. Hinderer*, 28 Ohio St. 568; *Wissler v. Craig's Adm'r*, 80 Va. 22; *Brown v. County of Buena Vista*, 95 U. S. 157; *Ex parte Adamson*, 8 Ch. Div. 807, 817; *Platt v. Platt*, 58 N. Y. 646. Viewing the case at bar, as disclosed by the record, in the light of these principles, were the plaintiffs guilty of such negligence in the prosecution of the action as to preclude their recovery on the ground of laches? Without stating the facts and examining the history of the case in detail, it is clear that this question must be answered in the negative. It

is true, the cause was tried, and the interlocutory decree entered, in 1891, and the findings were not filed until 1894; but what is there to show that the plaintiffs caused the delay? There is no proof of facts or circumstances which impute negligence to them in this regard, and we cannot presume negligence where no facts appear which warrant us in so doing. In fact, the presumption growing out of the principles of human nature as developed in experience is that men will use reasonable diligence to obtain their rights. Observation teaches us that persons are more likely, in their haste, to assert a groundless, and consequently false, claim, than to retard proceedings to enforce a just and lawful one. Considering the crowded condition of the docket during the proceedings of this case in the territorial district court, the record of which we may take judicial notice, it could hardly do violence to any principle of justice and fairness to presume, in the absence of proof to the contrary, that the delay was caused by the court being engaged in the trial of causes having preference in point of time, or possibly through dilatory tactics of the defendant himself. So, the delay in making the devisees of the testator parties to the action, for aught that appears from the record, may have been owing to an impossibility of learning where they lived. However these matters may be, there is nothing in the record to justify a holding that the laches of the plaintiffs constitute an absolute bar to the further prosecution of their suit. Nor is the conclusion of law declaring the plaintiffs guilty of laches, found by the court that entered the final judgment against them, supported by the proof, and yet laches always depend on the facts peculiar to the case. What may be considered neglect in one case may be regarded as reasonable diligence in another. It does not appear that the controversy is seriously embarrassed by the loss of evidence or otherwise. Nor is it shown that the defendant's rights have been prejudiced by the delay. The parties are about in the same situation as they were when the suit was commenced. Under all the circumstances of this case, we are of the opinion that the lapse of time in the prosecution of the suit constitutes no bar to relief in equity, and that the action of the court respecting laches was unwarranted.

The most important question in the case is whether the defendant, Dooly, having become the purchaser at the foreclosure sale of two-thirds of the Dickens mining property, purchased and had the right to hold it discharged of any trust. It is admitted that Norton conveyed the property to him in trust to convert the same into money, pay the debts of the grantor, a reasonable compensation to the trustee, and the balance to his devisees, and that, after Norton's death, Dooly became the executor of his estate; and it is therefore strenuously contended by counsel for the appellant that Dooly purchased the property as trustee, not for his own benefit, but for that of the

cestuis que trust, and that, as he afterwards sold it to the English syndicate at a profit, he is bound to account to the beneficiaries for the proceeds of that sale. Counsel for the respondent with equal vigor insist that, because of his interests in the property as mortgagee, the purchase by Dooly at the foreclosure sale vested in him an indefeasible title, for his own benefit, freed from the trust, and that, therefore, he is not required to account for the proceeds of the subsequent sale, either as executor or trustee. The sale of the other third of the mine to McCornick is not questioned. Nor has there been an attempt to set aside the subsequent sale to the syndicate. The plaintiffs appear to be satisfied with that sale, but demand an accounting. The real controversy is, therefore, over the profits of the last sale, and the rights of the creditors and devisees of the deceased respecting the same. When the defendant accepted the trust under the conveyance from Norton, he at once became charged with the duty of managing and disposing of the property in a careful and prudent manner for the benefit of the cestuis que trust. The property became a trust fund, and could not be diverted from the objects of the trust. His duty in relation thereto was imperative, and the fiduciary relation which thereafter existed between him and his beneficiaries made it impossible for him to lawfully gain any peculiar advantage or benefit to himself out of the trust estate. Under such a trust the trustee is absolutely prohibited from speculating with the trust funds; and, if he does, and loses, the loss is his, and, if he gains, the gain belongs to the cestuis que trust. If property be sold under the trust, the law requires that it shall bring the highest price reasonably obtainable for it, and that the trustee shall retain a position which will enable him to procure such price. This brings the trustee directly within the reason of the policy which, on account of the possible clashing of interests, forbids that he shall become a purchaser of trust funds for his own benefit. This is a prohibition which is not confined to him who, through his personal efforts, effects the sale, but it extends to all who, by operation of law or act of a party, stand in a fiduciary relation to the subject of the trust, which they cannot cast off at mere pleasure, to assume some position hostile to the interests of the cestuis que trust. A person in such a situation cannot be permitted to act up to the time of the sale, obtain all the information useful to him, and then shake off his character as trustee, and become an unconditional purchaser of the property. He can only be permitted to become such purchaser upon having ceased his relations as trustee by consent of the cestuis que trust, after full information freely given. *Ex parte James*, 8 Ves. 337, 352.

The disqualification embraces also all such persons as are employed and concerned in the affairs of another, and who, because of position, possess means of information which might be used in a manner hostile to the in-

terests which it is their duty to promote. Where a trustee, however, purchases trust property at a sale, the purchase is not absolutely void, but voidable merely, at the option of those who are beneficially interested, and he takes the property subject to the equities of the cestuis que trust, who, within a reasonable time, may call upon him to account for the proceeds or profits, or have a resale, or may avoid the sale. *Fisk v. Sarber*, 6 Watts & S. 18; *Whitchote v. Lawrence*, 3 Ves. 740. If it were otherwise, infinite mischief would, in many cases, be the sequence, because, as has been learned from experience, the frailties of human nature are such that he who has the power will usually be seized with the inclination to use his information to benefit himself, even at the expense of those whose interests he is in law and duty bound to foster. Respecting this the maxim is, "Emptor emit quam minimo potest, venditor vendit quam maximo potest." If the trustee were allowed to purchase the trust property for his own benefit, it would be to his interest to purchase at the lowest price possible, while it would be to the interest of the cestuis que trust to sell at the highest procurable price. This would create a conflict of interests in contravention of the policy of the law. To avoid such conflict, it is well established, as a general rule, that a trustee, or person acting in a fiduciary relation, shall not become an unconditional purchaser of property subject to the trust, or acquire an indefeasible interest therein, without the consent, given after full information, of those for whose benefit he has undertaken to act. This rule, in the language of the learned commentator on American law, is founded on the danger of imposition, and the presumption of the existence of fraud inaccessible to the eye of the court. Its policy is to shut the door against temptation, which, in cases where the relationship before adverted to exists, is of itself deemed to be sufficient to create the disqualification. 4 Kent, Comm. 438. And courts of equity will not be misled, in the application of the rule, by any attempt of the purchasing trustee to show that no fraud was committed, and to establish the fairness of the purchase. Whether fraud exists or not makes no difference. The object of the rule is to secure fidelity on the part of the trustee, and to guard and preserve the interests of the cestui que trust. Hence equity makes no inquiry for fraud respecting the purchase, but removes the temptation by declaring him who has assumed the fiduciary relation incapable of making a purchase which will bind the beneficiaries of the trust, and gives them the option to affirm, or within a reasonable time to set aside, the sale, and, in case of affirmance, to require an accounting for the profits. And it is immaterial whether the sale at which the purchase is made is public or private or judicial. In *Story, Eq. Jur. § 307*, the learned author observed that in these cases "there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other

marks of direct and positive fraud." But the principle on which courts of equity act in regard thereto stands, independent of any such ingredient, upon a motive of general public policy; and it is designed in some degree as a protection to the parties against the effect of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. In *Van Epps v. Van Epps*, 9 Paige, 238, a person holding a subsequent mortgage for the benefit of others attempted to purchase the land mortgaged for his own benefit at a foreclosure sale under a prior mortgage. It was held that the act of purchasing was inconsistent with his duty as a trustee, and that he could not purchase to the prejudice of the cestui que trust. In the course of his opinion, Chancellor Walworth said: "It is a rule which applies universally to all who come within its principle; which principle is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use." And again he said: "In cases of this kind the court does not suffer itself to be drawn aside from the application of the equitable rule by any attempt on the part of the purchaser to establish the fairness of the purchase." So in *Ex parte Lacey*, 6 Ves. 625, where the charges were against assignees under a commission of bankruptcy, one of whom was a banker, into whose bank the money was paid, and another was the purchaser of a part of the bankrupt's estate, sold under the commission, Lord Eldon observed: "The rule is this: A trustee who is intrusted to sell and manage for others undertakes in the same moment in which he becomes a trustee not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have intrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The cestui que trust may, by a new contract, dismiss him from that character; but even then that transaction by which they dismiss him must, according to the rules of this court, be watched with infinite and the most guarded jealousy; and for this reason: that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the cestui que trust the court can never be sure he has made when entering into the new contract by which he is discharged." And this doctrine is not inconsistent with the position assumed by Lord Alvanley in *Campbell v. Walker*, 5 Ves. 678, that "there is no rule that a trustee cannot be a purchaser; but, however fair the transaction, it must be subject to an option in the cestui que trust, if he comes within a reasonable time, to have a resale." In *McGinn v. Shaeffer*, 7 Watts, 412, Mr. Justice Sergeant, delivering the opinion of the court, said: "It is not sufficient for a par-

ty who has been clothed with a fiduciary character to intrench himself in forms of law. Equity follows his character throughout, and clothes him with it, notwithstanding his endeavors to shake it off in order that he may enjoy the advantages derived from that character, to the injury of others for whom he has acted. * * * There is but one recognized path for a trustee to walk in, and that is that all his views and conduct be directed to a faithful discharge of his duty as such; and where his acts may admit of two constructions, one rightful, the other tortious, in respect to his cestui que trust, equity will choose the former, and reject the latter."

The case of *Bennett v. Austin*, 81 N. Y. 308, was an action to have a quitclaim deed declared to be a mortgage, and for an accounting and redemption. From the facts it appears that as security for advances made to the firm of Bennett & Avery the members thereof executed to Stephen G. Austin a quitclaim deed to their interests in certain premises, upon which were two elevators. Previously, the firm and other owners of elevators had entered into an agreement with the Western Elevating Company, and nominally leased to it their elevators; they, however, to retain possession and operate them, and the profits to be divided among the owners. The firm had also assigned their share in the profits to the holders of a prior mortgage, to be applied in liquidation of the debt secured by the mortgage and other prior incumbrances. Austin, although aware of this arrangement, afterwards, by setting up his apparent title, without the consent of the firm or of the mortgagees, induced the company to cancel the former agreement, and substitute a new one with him as the owner of the elevators, and thereafter received and retained the dividends. Thereupon the mortgagees, making Austin a defendant, foreclosed, and by an arrangement with them Austin, at the sale, purchased the property for the amount of their judgment. After his death, in the action to have the quitclaim deed declared a mortgage, and to redeem, Lavinia Austin, widow and devisee of the deceased, was defendant. The court, among other things, held that the defendant in equity could not avail herself of the title obtained at the foreclosure sale to defeat the plaintiff's equity of redemption; that when Austin received the dividend in the manner specified he became *ex maleficio*, constructively, a trustee of the fund; that under the law it was his duty to apply the dividends to the purposes for which they had been appropriated; and that he had no right, in violation of that duty, to become a purchaser for his own benefit. Mr. Justice Miller, in the course of his opinion, remarked: "Austin then bid off the property, and took the title in his own name. This bid was not personal for himself, but for the benefit of the trust he represented. He could

not be a trustee before the sale, and immediately afterwards a stranger to the trust. A trustee cannot thus get rid of his obligation, discharge the trust, and reap the advantages of a sale for himself individually. It is but just to remark that it does not necessarily follow that he purchased and took the conveyance for the purpose of defrauding Bennett & Avery. As trustee, it may have been consistent with his duty to clear up the title, and get rid of junior incumbrances. He had a right to purchase in this form, but he could not buy for his own benefit." That case, it will be noticed, was, in many respects, similar to the one at bar. The principles hereinbefore mentioned and considered, as may be observed upon examination of the authorities herein referred to, have frequently been applied to this class of cases, both in England and in this country. *Ex parte Bennett*, 10 Ves. 381; *Jewett v. Miller*, 10 N. Y. 402; *Iddings v. Bruen*, 4 Sandf. 239, 281; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*, 6 Ves. 617; *Arnold v. Brown*, 24 Pick. 89; *Beeson v. Beeson*, 9 Pa. St. 279; *Randall v. Errington*, 10 Ves. 423; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Conger v. Ring*, 11 Barb. 356; *Wistar's Appeal*, 54 Pa. St. 60; *May v. Le Claire*, 11 Wall. 217; *Slade v. Van Vechten*, 11 Paige, 21; *Janes v. Throckmorton*, 57 Cal. 368; *Sanderson v. Walker*, 13 Ves. 601; *Hermstead's Appeal*, 60 Pa. St. 423. The transaction, in legal effect, is the same, and the general rule applies, whether the purchase is made by the trustee himself, for his benefit, or through the intervention of a third party, as trustee or agent for him, or whether he makes the purchase as agent for some other person, because one who is incapacitated to purchase for himself cannot buy as agent for another. *Ex parte Bennett*, *supra*; *Hawley v. Cramer*, 4 Cow. 717.

Having thus considered the principles which apply to trustees, or those holding fiduciary relations to others, it now becomes important to determine whether, under the facts and circumstances disclosed by the record, the case at bar falls within the prohibition of the general rule, or whether defendant, Dooly, had shaken off his relation as trustee, and made the purchase discharged from the trust. In the first instance he took upon himself the duties of a trustee by accepting the deed from Norton. These duties required him to sell the property to the best possible advantage, and out of the proceeds to pay Norton's creditors, including the defendant as mortgagee, and, after paying the expenses, and paying the trustee a reasonable compensation for services, turn the balance over to the devisees. After conferring this trust, Norton died, and then Dooly became executor of the estate. He immediately assumed control of the property, and was placed in a position to obtain, through his own efforts and those of em-

ployés and agents, valuable information respecting the mine, and the negotiations of sale which had been in progress. The actions to establish miners' liens were commenced in Idaho, and consolidated in the foreclosure suit, and Dooly answered, contesting the claims, and praying that, if the court should order a foreclosure, his mortgage might be declared a prior lien. Liens amounting to about \$2,000 were declared to be superior to the mortgage liens of McCornick and Dooly, the sale was ordered, and Dooly bought the property in controversy, paying, as it appears, on account of prior liens, \$1,566.23, which, excepting expenses of sale, was all the actual cash used and necessary at the time of the purchase. Dooly bid \$28,000, which was less than his claim, for two-thirds of the property,—being that in dispute,—and McCornick bid \$24,000 for the other third, the entire bid being \$52,000, to cover the superior liens. The accounts of the defendant show that all the expenses respecting the property, including those incurred in defending the various lawsuits, and of sale, as well as the prior liens, were paid out of the trust fund. Dooly himself testified that up to the time of the sale he had paid in expenses \$1,380.23, and his accounts show that from various sources he had received \$898.85, and from sale of ore at the mine \$3,254.12, all of which belonged to the trust fund. It is therefore clear that the money used in making the purchase was actually a part of that fund; and the fact that \$2,000 was sent to the place of sale for the purpose of the purchase, simply shows accuracy of information as to the amount required, and does not devert it of its character as trust money. Nor did the fact that the purchase was made by Chambers, as trustee for Dooly, devert the transaction of its fiduciary character. As we have seen, one who is incapable of purchasing for himself cannot buy through the intervention of a third person. In the meantime the negotiations for the sale of the property were going on, and finally resulted in the sale thereof by the defendant to the English syndicate, within 10 days after the period for redemption had expired, at a purchase price of \$250,000, two-thirds of which being for the property in question.

Further reference to the evidence would not be profitable, because it is evident that the defendant made the purchase in his character as trustee, for the benefit of the cestui que trust, and must be held to account for the profits made by the subsequent sale. It is true that he was a mortgagee, and was not instrumental, in the first instance, in bringing about the foreclosure sale; but this gave him no such interest in the property as to alter his position as trustee, or permit him, without the consent of the cestui que trust, to assume an attitude whereby his own interests might be opposed to the interests of those for whom

he had undertaken to act. Equity will not open the door to any such clashing of interests. A mortgagee who is also a trustee is bound to fulfill his trust with the same fidelity as if he were not a creditor. Nor could the defendant act as trustee up to the time of the sale, then disrobe himself of his fiduciary character, and, with the information obtained while in the trust relation, gain an advantage to himself. Nor could the court of Idaho confer upon him any power to so gain such advantage by dismissing the suits against him as executor. As mortgagee his rights were in no way impaired by the sale. His situation was just the same after as before. He still had the right to payment out of the property, but he had no right to speculate with the trust fund, and therefore it was his duty to account to the cestui que trust for the profits of the sale to the syndicate. Failing to do this, a cause of action accrued to the plaintiffs to enforce payment of any lawful claims to the extent of the money so held in trust by him; and the plaintiff Rohrer, having an equitable claim or interest in the property, could bring suit against the trustee without first presenting the claim to the executor for allowance. Rohrer is not seeking to recover an ordinary debt against the estate, but to enforce his rights to the trust funds which found their way into the hands of the executor, who is also trustee. He was not, therefore, a creditor within the meaning of the probate laws. *Gunter v. Janes*, 9 Cal. 643.

Counsel for the respondent also rely on the provision in the decree of foreclosure which authorizes any party to bid at the sale. A provision of this character is common in such decrees, but it was never intended for the purpose of permitting a trustee, who is a party to the suit, to bid in the trust property for his own benefit. It is usually inserted to avoid the supposed technical rule that a party to a suit cannot become a purchaser, under the decree therein, without special permission. In *Fulton v. Whitney*, 66 N. Y. 548, Mr. Justice Rapallo said: "Such a provision, in foreclosure cases, is usually inserted for the purpose of removing any doubt as to the right of the complainant who conducts the suit and the sale to become the purchaser. If the purchaser, though a party to the action, is acting in a fiduciary capacity arising outside of the relation of mortgagor and mortgagee, his liability to his cestui que trust cannot be affected by such a provision, nor by the order confirming the sale." *Bennett v. Austin*, supra; *Torrey v. Bank*, 9 Paige, 649. Doubtless a trustee may, when the circumstances of the case warrant it, make special application to a court of equity, stating why it would promote the interests of his cestui que trust to permit him to purchase and hold property of his beneficiaries freed from the trust. His statements then can be judicially investigated, and, if determined in his favor, under a decree therefor, he may purchase and procure an

indefeasible title; but this is a different thing from permitting him to purchase under the usual clause inserted in an ordinary decree of foreclosure. *Gallatian v. Cunningham*, 8 Cow. 361; *Campbell v. Walker*, 5 Ves. 678.

Counsel for the appellants insist that the defendant was guilty of actual fraud. However this may be, it is unimportant to consider this question, because it is not a necessary ground for relief. However innocent and fair the purchase, it was vicious in its consequences, and the cestui que trust were neither bound to allege nor prove, nor was the court bound to determine, that the trustee was guilty of fraud, or made a bargain advantageous to himself. For the purposes of this suit it may be assumed that the purchase was not tainted with fraud, and still the plaintiffs are not bound by it. Fraud may exist, and yet not be susceptible of proof. To guard against this hazard and the violation of duty, and to remove the trustee from temptation, equity imposes upon him the disqualification of becoming a purchaser of the trust property for himself, without the consent of his cestui que trust, and thus the rule destroys the very root of the evil. *Whelpdale v. Cookson*, 1 Ves. Sr. 9; *Case v. Carrol*, 35 N. Y. 385; *Davoue v. Fanning*, supra; *Fulton v. Whitney*, supra.

It is not deemed necessary to make a special analysis of the cases cited by counsel for the respondent, because a careful examination of them satisfies us that they cannot be regarded as controlling authority in the case at bar. In none of them do the essential and decisive facts appear to be the same as, or even similar to, those herein. We are of the opinion that as the respondent, outside of his relation as mortgagee, was a trustee of the property, he did not, under the facts and circumstances revealed by the record, acquire an unimpeachable title by his purchase, and that, therefore, he must be required to account for the profits of the subsequent sale to the syndicate. The cause is reversed and remanded, with directions to the court below to set aside the judgment of dismissal, grant a new trial, and proceed in accordance with this opinion.

MANER and HILES, JJ., concur.

(15 Utah, 308)

SALISBURY v. STEWART et al.

(Supreme Court of Utah. July 2, 1897.)

PROMISSORY NOTE—ATTORNEY'S FEE—NEGOTIABILITY.

1. The fact that the makers of a promissory note undertake to pay an attorney's fee if suit should be brought to enforce the collection of the note does not render the note nonnegotiable.
2. A note falling due in the hands of the payee ceases to be negotiable. Afterwards indorsers take it subject to the same defenses that could have been made to it in the hands of the payee. The stipulation to pay attorney's fees in case of suit binds the maker to pay them as a part of the costs of the remedy, but he cannot be requir-

ed to pay more than the fees actually charged. They are for the attorney, not for the plaintiff.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Orange J. Salisbury against J. Z. Stewart and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rhodes & Tait and Young & Moyle, for appellants. Evans & Rogers and W. C. Hall, for respondent.

ZANE, C. J. This is an action upon a promissory note for \$3,500, with interest at 10 per cent. per annum, executed by the defendants, and payable six months after its date to the order of John W. Taylor, the assignor of the plaintiff. It also contained the following stipulation: "And in the event of a suit to enforce the collection of this note, or any part thereof, we further agree to pay the additional sum of ten per cent. upon the amount found due, as attorney's fees in said suit." Before its maturity the note was indorsed by the payee to the plaintiff. The defendants alleged in their answer, and offered to prove on the trial, that their signatures were obtained without consideration, by false statements of the payee, and promises which he did not perform, that would have been a defense to the collection of the note in his hands. The defendants assign as error the ruling of the court sustaining plaintiff's objection to their offer. The error alleged presents for our consideration and decision the question, did the stipulation to pay 10 per cent. on the amount recovered, as an attorney's fee, in the event of a suit to collect it, included in the note, destroy its negotiability? While text writers generally agree that such provisions do not affect the negotiability of notes, the question has given rise to much judicial controversy and difference of opinion, and it is impossible to reconcile the numerous decisions on the point. The question is new in this court, and we will endeavor to adopt the rule which our reason commends, and which we think is supported by the better line of authority. The makers of the note promised to pay the holder \$3,500, and interest thereon at 10 per cent. per annum. This payment was subject to no contingency. It was certain in every respect, and it remained so until a breach of the contract by the defendants. In case the makers should not keep their contract, and it should become necessary to institute suit upon the note, the makers stipulated they would pay the necessary attorney's fee, and the law required them to pay the other costs. In that case the holder of the note would receive the \$3,500 and the interest,—precisely the amount the makers promised to pay him. In that event the holder would receive no more for his own use than he would have received had the makers paid according to their promise. It appears right that the parties whose default caused the expense should pay it; that it

should not be imposed upon the party who kept his contract. The party who keeps a contract should receive from the one who breaks it compensation for his loss. If the defendants had kept their contract, the holder would have received \$3,500 and the interest. They not having done so, the stipulation and the law required the makers to pay him that amount, and no more, for his own use, and to pay the costs of the court and the attorney's fee. Only the costs of the court could have been charged against the defendants without the stipulation. The stipulation, in effect, also added the fee of the attorney, if one should be employed to bring the suit, to the costs imposed by the law upon the defendants. The fee is for the attorney. If the employment of an attorney does not become necessary, or if one is not employed, the court should not allow such a fee, and the allowance should not exceed the amount charged by the attorney. The allowance is not as a penalty, as interest, or as a bonus. It is simply to pay the costs of enforcing the collection of the note by suit. And, if none is charged, none should be allowed against the makers, and no more than is to be actually paid should be allowed against the makers. That is, in legal effect, the stipulation. The court should not allow the plaintiff, by deception, fraud, and false pretenses, to obtain money as an attorney's fee, and then appropriate it to his own use. Plaintiff should not be allowed (as it is suggested they do sometimes) to call a penalty, additional interest, or a bonus, as an attorney's fee, and by such deception and fraud to induce the court to impose burdens on the makers of contracts,—to oppress them in that way or any other. This reasoning proceeds on the presumption that the stipulation to pay the attorney's fee is not negotiable. In other words, the maker interposes the same defense to the attorney's fee when the note is in the hands of an indorsee who received it before due, for a valuable consideration, that he could have interposed if it had been sued upon by the payee. If the makers of the note in question had paid according to its terms, the stipulation for an attorney's fee would have been of no effect. A note becoming due in the hands of payee ceases to be negotiable in the sense that the indorsee takes it free from defenses before indorsement. The reason for the rule that the amount to be paid to the holder must be fixed and certain is that negotiable paper becomes a substitute for money, and for that reason it must indicate precisely how much money it represents. The note in question represented \$3,500 and interest while it remained negotiable, and the stipulation further represented that, if suit should be brought, the costs of the remedy, including the attorney's fee, should be paid by its makers. The object of this stipulation was to make the note represent to the holder precisely the \$3,500 and interest. The amount of the court costs must depend upon the service

rendered by its officers, and the amount of the attorney's fee must depend upon the amount to be paid him, or if suit is brought without the employment of an attorney, as it may be, no fees can be allowed. The amount to be recovered by the holder of the note, which he may appropriate to his own use, is more certain with the stipulation than without it. Without the stipulation the holder realizes the amount of the principal and interest, less the attorney's fee, whatever that may be, when the maker fails to comply with his contract, but with the stipulation he realizes the principal and interest named in the note. The stipulation relates to the remedy, and not to the amount to be recovered and appropriated by the holder to his own use. The fact that the makers undertook to pay an attorney's fee if a suit should be brought to enforce the collection of the note did not render the note nonnegotiable. 1 Daniel, Neg. Inst. § 62a; Oppenheimer v. Bank (Tenn.) 36 S. W. 705; Bank v. Fuqua, 11 Mont. 285, 28 Pac. 291; Gaar v. Banking Co., 11 Bush, 180; Sperry v. Horr, 32 Iowa, 184; Bank v. Anglin (Wash.) 33 Pac. 1056; Benn v. Kutzschan (Or.) 32 Pac. 763. In 1 Daniel, Neg. Inst., supra, it is said: "Such instruments should, we think, be upheld as negotiable. They are not like contracts to pay money and do some other thing. They are simply for the payment of a certain sum of money at a certain time, and the additional stipulations as to attorney's fees can never go into effect if the terms of the bill or note are complied with. They are therefore incidental and ancillary to the main engagement,—intended to insure its performance, or to compensate for trouble and expense entailed by its breach. At maturity negotiable paper ceases to be negotiable, in the full commercial sense of the term, as heretofore explained, though it still passes from hand to hand by the negotiable forms of transfer; and it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency because when they cease to be current they contain a stipulation to defray the expenses of collection." In Oppenheimer v. Bank, supra, the following language is used: "Upon a careful review of the authorities, we can see no reason why a note otherwise imbued with all the attributes of negotiability is rendered nonnegotiable by a stipulation which is entirely inoperative until after the maturity of the note, and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary and the expense entailed." The judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

(15 Utah 231)

DONALDSON v. GRANT et al.

(Supreme Court of Utah. July 14, 1897.)

NOTES—MORTGAGES—NONNEGOTIABILITY—RECORD OF ASSIGNMENT—PERSONAL JUDGMENT.

1. The stipulation in a note which includes the covenants of a mortgage by which the maker agrees to pay the taxes on the property, assessments, insurance, and waste, renders the note nonnegotiable.

2. Under sections 2613, 2645, Comp. Laws Utah 1888, the assignee of a mortgage is required to have the assignment recorded in order to give notice to subsequent grantees, mortgagees, and lienholders; and the indorsement and delivery of the note, upon which the mortgage is given, to the assignee, is equivalent to an assignment and delivery of the mortgage to him also.

3. Under section 3460, Comp. Laws Utah 1888, property mortgaged must be subjected first to the payment of the debt, and the mortgagee or assignee of the note cannot recover a personal judgment unless the proceeds of the sale of the property mortgaged prove to be insufficient.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by John Baxter Donaldson against Frank A. Grant and others. Judgment for defendants. Plaintiff appeals. Affirmed.

It appears from the evidence and findings in this record that the plaintiff was a resident of London, England, at the time of the transactions mentioned in the pleadings, and that the defendants resided in Salt Lake City, Utah; that in 1891 the plaintiff and defendant Bache agreed to engage in the business of loaning money at the last-named place; that the plaintiff was to obtain the money to be loaned, and Bache was to make the loans, and they were to share equally in the profits of the business; that in the latter part of the same year and in 1892 the plaintiff transmitted to Bache at different times amounts aggregating \$10,800, and on January 25, 1892, the latter loaned of that amount \$2,000 to defendant Grant, and took his note for it, payable in five years from its date, with annual interest at 7 per cent., and a mortgage on Grant's real estate to secure it. The note contained the following provision: "If default be made in the payment of any of the interest after it becomes due, or failure to comply with any of the conditions or agreements contained in the mortgage given herewith, then said principal sum, with the accrued interest thereon, shall, at the option of the holder of the note, become due and payable, and shall be collected without further notice. This note and accompanying coupons are to draw interest at the rate of ten per cent. per annum after maturity until paid." The mortgage contained covenants for the payment of taxes, assessments, and insurance, and against waste. It appears that Grant knew at the time he received the money from Bache that it was furnished by the plaintiff. On January 27, 1892, Grant executed a deed of the land to Bache, containing a statement that the conveyance was subject to the mortgage, in consideration of which the latter deeded him other land valued at \$2,200, and agreed to sur-

render the note sued on, making the consideration \$4,200. Soon after making the loan, Bache assigned the note sued on, with the mortgage, to Donaldson, and on February 23, 1892, forwarded the same, with the assignment thereon, to the plaintiff; and in the letter accompanying them he informed the plaintiff the record title was in the writer's name, but, if plaintiff desired, he could record the assignment, and that would take it out of the writer's power to release the mortgage; that, if they were left in his name, it would be easier to release the mortgage than if the assignment was recorded. It further appears that the plaintiff received the note, mortgage, and assignment in March, 1892, and held them without recording the assignment until the 10th day of October, 1895; that on July 20, 1892, Bache, to whom the mortgage was made, entered a release of the mortgage on the records, and declared it paid and discharged, and communicated the fact to Grant; that Grant then demanded his note, and Bache stated that Donaldson had it, but he would return it, and that no demand for payment was made upon Grant for more than three years, nor had he any information that the note was not regarded as paid and discharged; that, upon the maturity of the interest coupons, plaintiff sent them to Bache for collection, and permitted them to remain in his hands unpaid for about two years, and at no time did he communicate with Grant. It further appears that on July 5, 1894, Bache, for a valuable consideration, executed to Glen Miller a trust deed of the property mortgaged, to secure the payment of his promissory note to defendant MacCord for \$1,400; that it was duly recorded on the 8th day of August, 1894, and has never been satisfied; that on July 12, 1895, Bache conveyed the same land to the defendant Mulvey in consideration of a credit of \$1,000 on \$5,000 indebtedness owed by the former to the latter, which was duly recorded on July 12, 1895; and that Mulvey in good faith credited to Bache the \$1,000. It further appears that Bache left the United States prior to the institution of this action, and has remained away, and that he was insolvent.

Frank Pierce, for appellant. M. L. Ritchie, C. W. Morris, and M. E. McEnanny, for respondents.

ZANE, C. J., after stating the facts, delivered the opinion of the court.

The plaintiff insists that the court erred in holding that the note sued on was not negotiable. The mortgage given to secure it contains covenants for the payment of taxes, assessments, and insurance, and against waste; and the maker stipulated in the note that, upon his failure to "comply with any of the conditions or agreements contained in the mortgage, the principal sum, with the accrued interest, should, at the option of the holder, become due and payable, and should be collectible, without further notice." The stipu-

lation made a failure to pay taxes, assessments, or the premium for insurance on the property, or a failure to pay damages on account of waste, a violation of the provisions of the note. By this stipulation the maker of the note became bound to pay indefinite sums of money for taxes, assessments, insurance, and waste; and in case of a failure to do so the payee was given the right to declare the note payable, and to proceed to collect it without notice. The legal effect of this note did not simply bind the maker to pay a definite and certain sum of money, and, in case of failure and suit, the costs of collecting, including attorney's fees. When the promise is to pay a certain sum of money, with an attorney's fee in case of suit brought, the sum to be paid is definite while the note remained negotiable. If suit is brought afterwards, the maker is bound to pay the costs of the suit, including the attorney's fees. This court held at the present term that a stipulation to pay 10 per cent. on the amount recovered, as attorney's fees, in case of a suit upon it, included in the note, did not render the note nonnegotiable. *Salisbury v. Stewart* (not yet officially reported) 49 Pac. 777. But by the stipulation now under consideration the maker became bound to pay indefinite amounts for taxes, assessments, insurance, and waste,—unliquidated and unascertained damages. They do not relate to the cost of collecting the note. Though the maker may keep his promise to pay the sum named in the note as principal, and the interest, he is liable in addition to pay taxes, assessments, insurance premiums, and damages for waste. The note was not negotiable.

The note and mortgage sued on were executed to Bache on January 25, 1892, and recorded soon after, and they were assigned to the plaintiff, and transmitted to him at London, where they were received by him in March, 1892; but the assignment was not recorded until October 10, 1895. When Bache executed the trust deed to Miller to secure his note given to MacCord, and when it was recorded, and when the deed to Mulvey was made and recorded, the note and mortgage and the land appeared from the records to belong to Bache; and it does not appear that Miller, MacCord, or Mulvey had any notice that Bache was not the owner, and that he had not the right to satisfy the mortgage and to convey the property. The question is, were the trust deed and conveyance subject to plaintiff's mortgage? Stating the question to be decided in more general terms, does the law require the assignee of a mortgage to have the assignment recorded, in order to give notice to subsequent grantees, mortgagees, and lienholders? The determination of the question depends upon the construction of the following sections of the Compiled Laws of Utah of 1888:

"Sec. 2613. That every conveyance of real estate within this territory hereafter made, which shall not be recorded as provided in

this act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

"Sec. 2045. The term 'conveyance' as used in this act shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, or mortgaged, or assigned, except wills and leases for a term not exceeding one year."

The first-mentioned section makes all conveyances of real estate not recorded void, as against subsequent purchasers in good faith for a valuable consideration, when the subsequent conveyance is first recorded. The last section declares that the term "conveyance," as used in the act, shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is assigned. While a mortgage under the statute of this state does not vest the title in the mortgagee, it does create a lien in favor of him,—an interest in the land to the extent of the debt secured. It vests an interest in the land according to the provisions of the mortgage. *Thompson v. Cheesman* (Utah) 48 Pac. 477. The lien and interest created by the mortgage to Bache, he assigned to the plaintiff. As the assignment was not recorded, we are not called upon to determine whether it was sufficiently expressed and proven to entitle it to be recorded. If it was not, it should have been; and we have no doubt that the indorsement and delivery of the note to the plaintiff were equivalent to an assignment and delivery of the mortgage to him also. In consequence of the failure of the plaintiff to record the assignment of his note and mortgage, his lien by virtue thereof became subject to the trust deed to Miller, and the conveyance to Mulvey vested the title in him, discharged from the plaintiff's mortgage. 1 Jones, *Mortg.* §§ 472, 814; *Bacon v. Van Schoonhoven*, 87 N. Y. 448; *Ladd v. Campbell*, 56 Vt. 529; *Insurance Co. v. Talbot* (Ind. Sup.) 14 N. E. 586.

The plaintiff having lost his right to foreclose his mortgage on the property by his neglect to have its assignment to him recorded, the further question arises, can he maintain his action against Grant, the maker of the note, and the mortgage to secure it? After executing the note and the mortgage to secure it on the land, he conveyed to Bache for \$4,200, and Bache deducted that amount from the purchase price. The land was still subject to the mortgage, but Bache assigned the note and mortgage to the plaintiff, who failed to have the assignment recorded, and lost the lien of the mortgage on the land, and now insists upon enforcing the collection of the debt so secured against Grant. If he should be permitted to do so, Grant would lose the \$2,000 through plaintiff's negligence.

Section 3460, Comp. Laws Utah 1888, declares that there can be but one action for the recovery of a debt or the enforcement of any right secured by mortgage upon real estate or personal property; that the court may direct a sale of the incumbered property, or so much as may be necessary, and apply the proceeds to the payment of costs and the amount due the plaintiff, and, if it appears from the return of the officer making the sale that the proceeds are insufficient, a judgment may be docketed for the balance against the defendant personally liable for the debt; and that it shall become a lien on the judgment debtor, as in other cases, and that an execution may issue thereon. This section requires the property mortgaged to be subjected first to the payment of the debt, and the mortgagee or any assignee of the note cannot recover a personal judgment unless the proceeds of the sale of the property mortgaged prove to be insufficient. In that case a deficiency judgment may be entered as provided by the section. The supreme court of California have so held in construing a law of that state like ours. *Bank v. Casaccia*, 103 Cal. 641, 37 Pac. 648; *Society v. Thornton*, 42 Pac. 417; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086. In *Bank v. Casaccia*, supra, the court said: "The obvious purpose of the statute is to compel one who has taken a specific lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action." In *Society v. Thornton*, supra, the court said: "It may be that if the mortgagor's title to the land has become extinguished subsequent to the making of the mortgage, by title paramount, or if the mortgaged property has been destroyed or has ceased to exist, the mortgagee need not go through the idle form of bringing an action for foreclosure before he can have a judgment on the note. But, when the mortgagee by his own act or neglect deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action on the note. He is not permitted, without the consent of the mortgagor, to release the mortgage for the purpose of bringing an action upon the note. He is not authorized to waive the security and bring an action on the indebtedness, and whether he releases the security by some affirmative act or by his neglect is immaterial."

In consequence of his failure to record the assignment of the mortgage to him, the plaintiff lost his right to obtain a judgment on the note against the defendant Grant. The judgment appealed from is affirmed.

BARTCH and MINER, JJ., concur.

(6 Kan.App. 231)

**MODERN WOODMEN OF AMERICA v.
VAN WALD.**

(Court of Appeals of Kansas, Northern Department,
C. D. July 20, 1897.)

**LIFE INSURANCE — APPLICATION — WARRANTIES—
HEALTH OF APPLICANT— EVIDENCE—PROOFS
OF DEATH—CROSS-EXAMINATION.**

1. In an action upon a certificate of membership in a fraternal order, to recover benefits payable thereunder to the wife upon her husband's decease, where the defense is that the answers of the deceased to the questions contained in the application for membership were false, and that the applicant had at the time of the making of the same a disease called "tuberculosis of the lungs," or consumption, of which disease he died within six months after making such application, and the plaintiff wife testifies in her own behalf that her husband took sick with his last illness some time in April, and died in June, it is proper, on cross-examination, for the defendant to inquire of her when immediately prior to April was he ill before this last illness, which she alleges began in April.

2. In such case it is competent for the defendant to show that the deceased was, within 60 days after his application, using medicine or treatment for such disease.

3. Where proofs of death are required by such order to be made to it before any right to recover for such benefits shall accrue to the claimant, proofs of death furnished by the plaintiff are competent evidence in behalf of the defendant, and it is error for the court to reject them.

4. Where the applicant in such case expressly, in the body of the application as well as in the certificate, warrants the literal and exact truthfulness of all his answers contained in such application, and the application is made a part of the contract, and it is expressly declared therein that the application is the basis of the contract, and the certificate is issued upon the express condition of the literal and exact truthfulness of the answers therein contained, such questions and answers become material, and a condition in the certificate that it shall be void in case of the untruthfulness of any of these answers; and neither the court nor the jury are at liberty to inquire into the materiality of the questions and answers, and unless they are true the beneficiary cannot recover.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by Lillian Van Wald against the Modern Woodmen of America. From a judgment for plaintiff, defendant brings error. Reversed.

J. G. Johnson, for plaintiff in error. J. A. Broughten, for defendant in error.

MAHAN, P. J. Action upon a membership certificate to recover \$2,000 for the death of the plaintiff's husband. The defense made by the plaintiff in error was that the answers to the interrogatories contained in the application of the deceased for insurance were untrue; that by the terms of the contract the application was made a part of the policy, and the deceased warranted each answer to interrogatories in the application to be literally and exactly true. The certificate of membership was issued to the deceased and he became a member of the society the 3d day of January, 1894. In

the latter part of February, 1894, he was taken seriously ill, and in April, 1894, as early as the 9th or 10th of April, was confined to his bed with what the physicians testified to be tuberculosis of the lungs. He died on the 18th of June, 1894, of this disease. Among the interrogatories in the application which he was required to answer were the following: "Answer yes or no to each of the following questions: Have you ever had difficult, excessive, or scanty urinations, or any disease of the genital or urinary organs? No. Have you had any disease of the lungs? No. Bronchitis? No. Have you ever had any serious illness, local disease, or personal injury? No. If so, explain fully. * * * Have you consulted a physician in the last seven years? No." The defendant company insisted that the answer to each one of these interrogatories was untrue; that at the time the certificate was issued, and at the time the application therefor was made, the deceased had tuberculosis of the lungs; that within the time named in the application he had la grippe, and been treated therefor; and the mumps, and had been treated therefor; and that in the preceding year of 1893 he had not only consulted his father, as a physician, who usually attended him, but had consulted Dr. Dean, of Kansas City. In the examination in chief of the plaintiff, she was asked by her counsel when her husband took sick with his last illness, and she answered, "In April." There was evidence that he was seriously ill in February, strength much impaired, considerably emaciated, and that he continued to decline in health very rapidly until he was confined to his bed, in April. Upon cross-examination, counsel for plaintiff in error again asked the plaintiff, "When it was you say that he was taken down with his last illness?" and she repeated her answer: "Some time in April. I couldn't say just when." Counsel for plaintiff in error then asked her, "When was he ill before that?" to which question the plaintiff's counsel objected for the reason that it was not proper cross-examination, was incompetent, irrelevant, and immaterial, and now contend that defendant's counsel were seeking to interject into the case, by way of cross-examination, a part of their defense. This was not necessarily so. It was based on her examination in chief as to when her husband became ill, and it was a proper investigation by counsel for defendant, as throwing light upon the fact as to when he did become ill. The claim of the plaintiff was that he only became ill in April. The claim of the defendant was that he was ill before that, and had been ill from the time the application was made until his decease, and it was competent for the defendant to cross-examine her upon this branch of the case, having been interrogated by her own counsel as to when he became ill with his last sickness, to show that she was mistaken in that; that he had been ill

at all times since the making of the application for insurance. The question upon cross-examination was a proper one, and should have been allowed. This is the first assignment of error.

The second assignment of error is in relation to the testimony of Dr. Wilson, one of the physicians who attended him in his last illness. This witness testified that he visited the deceased some time in February,—the latter part of the month of February, 1894,—and that he found him exceedingly ill; that he made no careful examination of him; that he was not called, but made a voluntary visit to the deceased; that in the latter part of his sickness he was called in as consulting physician, and examined him again more critically; that upon his first examination he did not discover any evidence of tuberculosis of the lungs, but found that he was using at that time a treatment called "Amick's Cure for Consumption." Defendant's counsel then asked him what this Amick's Cure was used for, to which counsel for plaintiff objected, and the objection was sustained as incompetent, irrelevant, and immaterial. If the deceased in the latter part of February, within 60 days after his application for a membership, was using a remedy for consumption, it was relevant and material for the defense to show that fact.

The fourth assignment of error is based upon the same subject-matter. The defense called Dr. Van Wald, the father of the deceased, and, in the course of his examination, counsel for defendant asked him if he had procured for his son the Amick Cure for Consumption. The plaintiff objected to this question unless it was confined to a date prior to the application for a membership. This objection was sustained by the court. Counsel for defendant then asked if he had procured this remedy for the use of his son between the date of the issuing of the certificate and the last of February, 1894,—within 60 days next after the issuing of the certificate of membership,—to which counsel for plaintiff objected, as the time was fixed after the contract of admission of membership, and the objection was sustained by the court. It was a proper matter to show to the jury, under the contention of the defendant company, that the answers were not true at the time they were made. It afforded some evidence. The weight of it was for the jury to determine.

The third assignment of error is based upon the refusal of the court to permit the defendant to read in evidence to the jury the proofs of death furnished by the plaintiff under the conditions of the certificate, and as an act necessary to be done by her in order to sustain her action. These proofs of death were competent evidence, and the defendant company had a right to use them in the case as evidence, and it was error to reject them. *Insurance Co. v. Rodol*, 95 U. S. 232; *Insurance Co. v. Higginbotham*, Id. 380; *Edgerly*

v. Insurance Co., 48 Iowa, 587; *Insurance Co. v. Newton*, 22 Wall. 32.

The fifth assignment of error is that the court erred in overruling defendant's demurrer to the plaintiff's evidence. It is not necessary to consider this assignment.

In the court's instruction to the jury is the following: "Sixth. The tenth question in said application is as follows: 'Have you ever had any serious illness, local disease, or personal injury?' to which the answer is, 'No.' In considering this question the adjective 'serious' is to be taken as referring to the words 'local disease' and 'personal injury,' as well as the word 'illness,' which immediately follows it. And, if you believe from the evidence that the answers made by said applicant to said question were untrue (that is, if you believe that he ever had any serious illness, any serious local disease, or any serious injury), then plaintiff cannot recover in this action; and this would be true even if such illness, disease, or injury had nothing to do in causing the death of said applicant." Upon this point in the case the defendant asked the court to instruct as follows: "(13) If you believe from the evidence that Alfred G. Van Wald had an ailment or local disease known as the 'mumps' about two years prior to the 13th day of December, 1893, then the plaintiff cannot recover, and your verdict must be for the defendant." "(14) You are instructed that if you believe from the evidence that the deceased, Alfred G. Van Wald, had the la grippe, and was treated therefor by his father, Dr. Van Wald, within seven years next preceding December 13, 1893, then the plaintiff cannot recover, and your verdict must be for the defendant." These instructions were refused by the court, and the one numbered 6, above quoted, was given in lieu thereof. It is conceded that the answers to these questions, the truthfulness of the answers,—the literal, exact truthfulness,—was made a warranty upon the part of the assured, upon which he was admitted to the membership; and it is well settled, as we understand the law, that it is immaterial whether the applicant knew that his answer was false. It is immaterial whether he intended to defraud the company or not. It makes no difference whether the fact was a material fact or not. Making it a warranty upon the part of the assured made it material, and the parties both elected thereby to make it material; and its falsity defeated the contract, or, in other words, by reason of the falsity of the answer there never was any contract. It was an error upon the part of the court to say to the jury that the adjective "serious," qualifying the word "illness," also applied to the other parts of the interrogatory. The parties did not so apply them in the construction of the contract, and the court had no right to interpolate it into it.

The court in the seventh instruction also said to the jury: "Seventh. Question No. 14 is as follows: 'Have you consulted a phy-

sician in the last seven years?" and the answer thereto is, 'No.' The consultation referred to in this question must be taken to mean a consultation in regard to some indisposition of an apparently grave character. An inquiry of a physician in regard to some slight ailment of a trivial or merely temporary character would not be within the meaning of this question." This is importing into the contract a condition not put there by the parties. The defendant company had a right to know truthfully whether the deceased had consulted a physician for any purpose, whether the consultation was with regard to some grave indisposition or a slight ailment. The question was, "Have you consulted a physician?" It was important for the company to know. They had a right to inquire themselves with regard to the matter, whether it was a grave indisposition, a serious illness, or a slight ailment, before entering into the contract. The answer gave them no opportunity to do so. The literal, exact truthfulness of the answer was made a warranty in the contract upon which it was based. It was so agreed in the body of the contract. Evidence was offered tending to show that on three several occasions, within a year prior to the application made, the deceased had consulted at least three different physicians, including his father. Upon this branch of the case the defendant company asked the court to instruct the jury as follows: "(3) If you believe from the evidence that in reply to the question in the application of Alfred Van Wald, 'No. 14. Have you consulted a physician in the last seven years?' he answered, 'No,' and you find that he had consulted a physician within that time, then the plaintiff cannot recover, and your verdict must be for the defendant." This was refused and excepted to. And again: "(7) If the jury believe from the evidence that at any time within seven years next prior to the 13th day of December, 1893, said Alfred G. Van Wald consulted, and was professionally treated by, his father, Dr. George Van Wald, for any ailment whatever, the plaintiff cannot recover, and your verdict must be for the defendant." This instruction was refused and excepted to. "(8) If you believe from the evidence that at any time within seven years next preceding the 13th day of December, 1893, said Alfred G. Van Wald consulted, or was examined by, Dr. Dean, of Kansas City, Mo., either at his own request, or at the request of Dr. George Van Wald, his father, in his (Alfred G. Van Wald's) presence, then the plaintiff cannot recover, and your verdict must be for

the defendant." This instruction was refused and excepted to, and the only instruction given upon this proposition in the case was the seventh instruction, which I have already quoted, and the eighth, as follows: "Eighth. Bearing in mind the explanation given in the last instruction, if you believe from the evidence that the answer made by said applicant to question 14 was untrue, then plaintiff cannot recover in this action, and your verdict should be for the defendant." That is, if the jury believed that the matter about which the deceased consulted Dr. Wilson was a grave and serious indisposition, or the matter about which he consulted Dr. Dean at Kansas City was a grave and serious indisposition, then the answer would be untrue, but that notwithstanding he had consulted these physicians, and also his father, unless the jury believed from the evidence that the deceased had some grave indisposition at the time he sought the physicians' advice, then the answer was not untrue. This was a modification of the contract not warranted upon the part of the court, and was error prejudicial to the rights of the defendant company. The court likewise erred in refusing to grant to the defendant a new trial. The judgment is reversed, with instructions to the lower court to grant a new trial. All the judges concurring.

(6 Kan.App. 640)

ELMENDARO TP. v. KANSAS BRIDGE & IRON CO.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

TOWN WARRANTS—PUBLIC IMPROVEMENTS.

A township board may join with a county, township, or private citizen whenever the available means at their disposal will permit, and the improvements to be made are practicable, and contribute towards the building of permanent roads and bridges within or on the line of their respective townships; and for this purpose a warrant issued by the township board at a regular meeting, payable when the improvements are completed, will be held valid and binding on the township when presented for payment after the improvements have been completed and accepted. (Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by the Kansas Bridge & Iron Company against Elmendaro township, Lyon county. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Harvey Frith, for plaintiff in error. T. N. Sedgwick and L. B. Kellogg, for defendant in error.

SCHOONOVER, J. In 1890, Lyon and Coffey counties, with the assistance of California township, in Coffey county, and Elmendaro township, in Lyon county, and the private subscription of individuals of Hartford, built a bridge at the crossing of the Neosho river,

at a cost of \$3,930.35, of which amount Lyon county contributed and paid \$2,000, Coffey county \$1,000, California township \$200. Elmandaro township (the plaintiff in error) contributed \$200, and issued the following warrant: "Hartford, Ks., Oct. 27th, 1890. To J. W. O'Connor, P. O. Hartford, Township Treasurer of Elmandaro Township, Lyon County, Kansas: Pay to I. A. Taylor, bridge commissioner, or bearer, the sum of two hundred dollars (\$200.00), for subscription to bridge over Neosho river, at Rambo Ford, to be paid on completion of bridge, as allowed by the township board. A. S. Shepard, Tp. Trustee. W. T. Stark, Tp. Clerk. Total, \$200.00." The Kansas Bridge & Iron Company, defendant in error, constructed the bridge, and accepted the warrant of plaintiff in error for \$200 as so much cash in payment of the contract price for building the bridge, and duly presented the same for payment, which was refused. The defendant in error commenced an action before a justice of the peace upon the warrant, and obtained judgment for its full amount. The plaintiff in error appealed to the district court, where the case was tried to the court, without a jury. Judgment was again rendered for the bridge company, and the township brings the case to this court upon petition in error. It is claimed that the township had no power to subscribe towards the building of the bridge, and that the warrant was issued without authority.

Subdivision 8, par. 7084, Gen. St. 1889, provides: "Eighth. Shall superintend all the pecuniary concerns of his township, and shall at the July session of the board of county commissioners, annually with the advice and concurrence of said board levy a tax on the property in said township, for township road and other purposes, and report the same to the county clerk, who shall enter the same on the proper tax roll in a separate column or columns, and the treasurer shall collect the same as other taxes are collected; but in a failure of such trustee and commissioners to concur, then the board of county commissioners shall levy such township road and other taxes." It is also provided in paragraph 7093, Gen. St. 1889: "The township treasurer shall receive and take charge of all moneys belonging to the township, or which are, by law, required to be paid to him, and shall pay out and account for the same upon orders drawn upon him by the township trustee, and shall discharge such other duties as may be required of him by law." It is further provided in paragraph 7133, Gen. St. 1889: "The said board shall have charge of the roads and bridges of their respective townships, and it shall be their duty to keep the same in repair, and to improve them so far as practicable. Whenever the available means at their disposal will permit, they shall construct permanent roads, beginning where most needed. The work on roads shall be done timely, and in accordance with the best known methods of road making,—by proper grading and thorough

drainage, by tile, or otherwise, as may be expedient, or by the application of gravel, rock, or other material."

In considering the various provisions of the statute our supreme court have said: "Where it is alleged in a bill of particulars that a bridge was needed in a township across a river; that it would cost about \$1,300 to purchase and erect the same, of which sum the county agreed to pay \$1,000; that there was raised by individual subscription \$200; and that then the township agreed to pay \$100 to the plaintiff, if he would contract for the erection of the bridge, and have it erected; and thereafter, relying upon such promise and agreement, the plaintiff paid for having the bridge built,—held, that the contract set forth in the bill of particulars was within the power of the township officers, and a compliance therewith by the plaintiff would entitle him to a recovery from the township of \$100." *Uhl v. Douglass Tp.*, 27 Kan. 80. Chief Justice Horton, in the opinion, says: "We do not perceive any valid reason why a township and a county may not conjointly contribute towards the building of a bridge if the authorities thereof choose so to do." It is not only the duty of the township board to keep the roads and bridges in their respective townships in repair, but they should construct permanent roads (bridges), make permanent and lasting improvements, beginning where most needed, whenever the available means at their disposal will permit. For this purpose, and in order to insure efficiency, they may employ a general superintendent to execute their orders, that the work may be done timely, and in accordance with the best-known methods of road making,—by proper grading and thorough drainage by tile, or otherwise, as may be expedient, or by the application of gravel, rock, or other material. It is clearly intended by this provision of law that permanent bridges may be constructed out of the available means in the hands of the township board, if they so desire. They may build the bridges, or they may join with enterprising citizens, a county, or a township, and contribute of the available means at their disposal towards its construction. The spirit of this law is to secure to the citizens of the township the best and most permanent roads and bridges for the least money. That the building of this bridge was advantageous and beneficial for the people of Elmandaro township; that it was practicable; that it was constructed at a place where a bridge was needed; that the township had, of the available means at its disposal, \$200 to contribute to the building of the bridge,—is not questioned. In the absence of fraud or collusion, it is clear that the township had the authority to make the subscription. A verified account for this subscription was presented to the township board at their annual meeting, audited and allowed, and the warrant sued on in this action lawfully issued. The bridge was completed, and accepted by the special bridge commissioner selected to superintend its con-

struction. The warrant was presented, and payment refused.

The attorney for plaintiff in error, in an able argument to the court, insisted that the bridge was not in Lyon county; that the proposition to build the bridge was not submitted to the people at any election; that it is an evasion of the law providing that, when the cost of a proposed bridge shall exceed \$2,000, the question of building it must be submitted to the qualified electors of the county. Both propositions have been considered, but there is not sufficient merit in either of them to require a reversal of this case. The judgment of the district court will be affirmed. All the judges concurring.

(6 Kan.App. 650)

STATE v. WHELDON.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

LIQUOR NUISANCE—EVIDENCE.

Where the testimony filed with the information fully discloses the fact that the offense of keeping a common nuisance has been committed, it is not error for the court to submit to the jury evidence showing sales of intoxicating liquor other than the ones of which the prosecuting witness had knowledge.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Ben Wheldon was convicted of violating the liquor law, and brings error. Affirmed.

I. E. Lambert and Graves & Dickson, for plaintiff in error. F. B. Dawes, Atty. Gen., and W. C. Simpson, Co. Atty., for the State.

SCHOONOVER, J. In the district court of Lyon county the defendant was charged, in four counts, with violating the prohibitory law by the unlawful sale of liquor, and in the fifth count by keeping a common nuisance. On the 7th day of October, 1895, the case was tried, and the defendant acquitted on the first four counts, and convicted on the fifth count. A motion for a new trial was overruled, and the defendant brings the case to this court.

It is claimed that testimony was improperly admitted, to the material prejudice of the defendant: that evidence was introduced on the trial showing sales of intoxicating liquor other than those of which the prosecuting witness had knowledge. The information was verified by the county attorney "on information and belief," and the following sworn statement of a witness filed therewith: "A. D. McKanna, of lawful age, being duly sworn, testified as follows: My name is A. D. McKanna. Residence, Emporia, Lyon Co., Kan. Occupation, canvassing agent. Age, twenty-eight years. I know Ben Wheldon, and have known him for about two months. His place of business is on Commercial St., in the city of Emporia, in Lyon county, known as 'Wheldon's Drug Store,' and is house No.

624 Commercial street. I was in that drug store on December 21, 1894. I went with Olof Johnson, and he and I got a bottle of beer and drank it in there. We got the beer of some party in the store. Do not remember who it was. I paid for the beer. L. G. Wilcox came in while I was in there. He got a drink of either whisky or wine, and drank it there in the back room. I was in that place again on the 24th of December, 1894, with Olof Johnson, and treated him to whisky. We drank the whisky there, back of the prescription case, and Mr. Wheldon was present and saw us drink it. I also bought a half pint of whisky of Ben Wheldon at the same time, and paid him 25 cents for it, and brought it away with me in a bottle. I was in that place again on January 1, 1895, with C. T. Logsdon. We drank whisky this time. We each had a drink, and I paid for it. We got it of one of the clerks,—a small, smooth-faced man. I had a half-pint bottle with me that time, and this same clerk put twenty cents worth in it, and I carried it away. I paid him for it. I was in that place again on January 12, 1895, with W. C. Robinson. We drank whisky back of the prescription case. I think Wheldon himself waited on us. I paid him for it. I was in that place again on January 18, 1895, with James Rumford and Morgan Rumford. I bought a half pint of whisky of the clerk with light mustache, and paid him for it, and took it away. We each afterwards drank part of it, and I have the rest yet. I saw at the end of the counter, and back of it, and right across from the prescription case, two large bottles which contained the whisky and wine. The beer was gotten in the back room. A. D. McKanna." Paragraph 2543, Gen. St. 1889, provides: "If the testimony so taken shall disclose the fact that an offense has been committed against any of the provisions of this act, the county attorney shall forthwith file such statement, together with his complaint or information against the person having committed the offense, in some court of competent jurisdiction." This evidence disclosed facts sufficient to justify the county attorney in filing an information against the defendant, charging him with the illegal sale of liquor, and also of keeping a common nuisance.

It is well settled that the defendant cannot be found guilty of any offense, except some offense of which the complaining witness had notice or knowledge at the time of verifying the information. State v. Brooks, 33 Kan. 708, 7 Pac. 591. Paragraph 2533, Gen. St. 1889, provides: "All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery. In violation of this act, are hereby declared to be common nuisances." The

testimony filed with the information clearly shows that the complaining witness had knowledge of facts at the time of verifying the information sufficient to require the county attorney to file his complaint or information in some court of competent jurisdiction, charging the plaintiff in error with keeping a common nuisance. During the trial the prosecution introduced evidence under the fifth or nuisance count, to the introduction of which the defendant objected on the ground "that it was not one of the cases mentioned in the evidence filed with the county attorney." The trial court properly admitted the testimony. The gravamen of the offense charged in the first four counts of the information in this case was the unlawful selling of intoxicating liquor, while the gravamen charged in the fifth count was the unlawful keeping of a place for the sale of intoxicating liquor. Under the first four counts it was necessary to prove unlawful sales, and to prove the sales set forth in the testimony filed with the information; but under the nuisance, or fifth, count, where the testimony filed with the information fully discloses the fact that the offense has been committed, it is not error for the court to submit to the jury evidence showing sales of intoxicating liquor other than ones of which the prosecuting witness had knowledge. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan.App. 620)

MERRILL v. MEADE et al.

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS — TRANSFER OF STOCK.

1. No liability for the debts of a corporation can be enforced against a stockholder until a judgment upon the debts has been rendered against the corporation, and an execution issued thereon, and returned nulla bona, or until the corporation has been dissolved, or has suspended business for more than one year.

2. Where a stockholder makes a regular transfer of his stock in good faith to a solvent person, prior to the time the claims of creditors attach to the stockholders, such transfer is valid, and relieves the original stockholder from liability, although the transferee may have become insolvent before the commencement of an action to charge said original stockholder.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county.

Action by H. E. Meade & Co. against Albert H. Merrill. Judgment for plaintiffs, and defendant brings error. Reversed.

J. J. Parks and W. E. Stanley, for plaintiff in error. Dale & Wall, for defendants in error.

DENNISON, P. J. This action was brought in the court of common pleas of Sedgwick county, Kan., by H. E. Meade & Co., as plaintiffs, against Albert H. Merrill, as defendant, to recover upon a judgment against the Wich-

ita Paper Company. Merrill is sued as an alleged stockholder, as the owner of 20 shares of stock of the par value of \$100 per share. On October 14, 1887, Merrill transferred 19 shares of his stock to his son, W. A. Merrill, who was then the treasurer of the company, and on March 13, 1888, gave the Wichita Paper Company credit upon a note he held against it of \$200, for liability on stock in the company. On November 14, 1888, judgment was rendered in favor of Meade & Co. against the Wichita Paper Company, and on July 15, 1890, an execution was issued thereon, which was, on July 16, 1890, returned nulla bona. Judgment was rendered against Merrill in this action, and he brings the case here for review.

The court, in the introduction of evidence and in the instructions, proceeded upon the theory that at the time an indebtedness is contracted by a corporation all who are then stockholders are liable to the creditor if the corporation should afterwards become insolvent, and that to avoid such liability by a transfer of the stock the transfer must be made in good faith to a person who was then solvent, and who is solvent also at the time of the commencement of the action against the stockholders. In the case of *Van Demark v. Barons*, 52 Kan. 779, 35 Pac. 798, Chief Justice Horton, in delivering the opinion of the majority of the court, and in the first section of the syllabus, says: "The general rule is that shares of stock of a corporation are personal property, and may be transferred like any other property, unless the transfer is restrained by the charter or articles of association, and that a bona fide transfer terminates the liability of the transfer of either to the company or to creditors." The second section of the syllabus is as follows: "The liability of a stockholder of a corporation against whom an execution may be issued under the provisions of paragraph 1192 of the General Statutes of 1889 is measured by the number of shares held by him at the time the execution against the property or effects of the corporation is found to be ineffectual." It is argued by the defendant in error that the case at bar is a direct action, brought under paragraphs 1200 and 1204 of the General Statutes of 1889, and that the whole question as to the liability of the claimed stockholders, the bona fides of the transfer, the solvency of the transferee, and fraud in the attempted transfer, may be investigated, and the governing rules of law applied; and for that reason a rule announced by the supreme court, arising upon a motion for an execution, may not be applicable. In analyzing this distinction it must be borne in mind that at common law a stockholder is not liable for the dues or debts of the corporation. We must look to the constitution and statutes of our state to ascertain under what circumstances and when a stockholder becomes liable to creditors of the corporation. Referring to our constitution, we find that "dues from corporations shall be secured by individual liability of the stock-

holders to an additional amount equal to the stock owned by each stockholder, and such other means as may be provided by law." Const. art. 12, § 2. When does this liability attach to the stockholder so as to permit a creditor to proceed against him? Paragraph 1192, Gen. St. 1889, provides that when an execution shall have been issued against the property of a corporation, and returned nulla bona, an execution may be ordered by the court against the stockholder upon a motion to be filed in open court after a reasonable notice to the persons sought to be charged. Paragraph 1204, Id., provides that if any corporation be dissolved, leaving debts unpaid, suit may be brought against any person who was a stockholder at the time of such dissolution. Paragraph 1200 provides that "a corporation is dissolved first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year. * * *". In construing these constitutional and statutory provisions in *Van Demark v. Barons*, supra, it is said: "The true meaning of the constitution and statute is manifest. Each stockholder is liable for the dues of the corporation to an additional amount equal to the stock owned by him or her; that is, owned at the time the liability attaches." It is clear that no liability for the debts of a corporation can be enforced against a stockholder until a judgment upon the debt has been rendered against the corporation, and an execution issued thereon, and returned nulla bona, or until the corporation has been dissolved, or has suspended business for more than one year.

The question to be determined in the case at bar is whether the plaintiff in error was a stockholder of the Wichita Paper Company after it had suspended business for more than one year. It is not denied that he was at one time a stockholder. If the transfer of the stock to his son, W. A. Merrill, was valid as to creditors, he was not a stockholder at that time, and is not liable in this action; if the transfer was void as to creditors, he remained a stockholder, and is liable in this action. To be valid the transfer must have been made in good faith. It has not yet been decided in Kansas whether the transferee must be solvent at the time of the transfer; neither is it necessary for us to decide this point. We do decide, however, that if, prior to the time the liability attached, the transfer is regularly made in good faith to a solvent person, who becomes insolvent before the commencement of an action against the original stockholders, such transfer is valid, and relieves the original stockholder from liability. The court instructed the jury in instructions 1, 2, 3, and 4 as

follows: "(1) If you believe from the evidence, by the greater weight of it, that at the time the original indebtedness was contracted on which the judgment of H. E. Meade and Co. vs. The Wichita Paper Company et al. is based, that the defendant, A. H. Merrill, was the owner of twenty shares of the stock in that corporation, of the face value of \$100 each, and that the Wichita Paper Company was insolvent at the commencement of this action, then you should find in favor of the plaintiff for the sum of \$1,212.47. (2) As a defense it is claimed by the defendant that he transferred nineteen shares of said stock of the Wichita Paper Company on October 14, 1887. You are instructed that if you should find that said transfer was made in good faith to a person who was then solvent, and who was solvent at the commencement of this action, then you cannot find the defendant liable upon said 19 shares. (3) You are instructed, however, that if you should find that the person to whom the transfers were alleged to have been made was then insolvent, and that the indebtedness sued on was incurred prior to such transfer, then I instruct you that such transfer of the 19 shares will not avoid liability thereon, and the defendant cannot rely thereon as a defense to the action. (4) If you should find that such transfer was made for the purpose of avoiding liability upon said shares, or if you find that at the time of such transfer to W. H. Merrill that he was then insolvent, or that he became insolvent prior to the bringing of this action, then such transfer does not avoid defendant's liability as a holder of such shares." By a comparison of the views expressed in these instructions with the views expressed in this opinion, the erroneous theory of the trial court will be manifest. The judgment of the court of common pleas is reversed, and it is ordered that the case be sent to the district court of Sedgwick county, Kan., with instructions to grant the plaintiff in error a new trial. All the judges concurring.

(6 Kan.App. 629)

**YORK-DRAPER MERCANTILE CO. v.
LUSK.**

(Court of Appeals of Kansas, Southern Department, C. D. July 21, 1897.)

BREACH OF CONTRACT—DAMAGES—SALE—FAILURE TO DELIVER.

1. Upon the breach of a contract by either party thereto, the party not in fault may recover from the defaulting party the natural, direct, and approximate damages sustained by him.

2. Where a seller of personal property prior to the time of delivery notifies the buyer that he will not deliver the property purchased, and the buyer upon the receipt of such notice purchases the same kind of property from another at its then market value, which is in advance upon the contract price, and where at the time delivery was to have been made the market value of such property is at or below the contract price, the buyer cannot recover from the seller such advance price paid.

3. If a defaulting seller should show that the buyer could have bought the same kind of prop-

erty at or below the contract price at any time between the time of the notice of rescission and the time of delivery, the buyer could recover only nominal damages.

4. A buyer is not required to purchase the same kind of property at a price in advance of the contract price, in order to lessen the damages occasioned by a defaulting seller's refusal to deliver the property sold. Nor must such buyer purchase such property, at his peril, at the time between such notice and time of delivery when the value is the lowest, so as to decrease the damages which he can recover against a defaulting seller.

(Syllabus by the Court.)

Error from district court, Harvey county.

Action by the York-Draper Mercantile Company against Benjamin Lusk. Judgment for defendant, and plaintiffs bring error. Reversed.

M. A. Thompson, for plaintiffs in error.
Clark & Green, for defendant in error.

DENNISON, P. J. This action was brought in the district court of Rice county, Kan., and taken on a change of venue to Harvey county. The plaintiffs in error were plaintiffs below, and brought the action to recover from Benjamin Lusk the damages sustained by them in the breach of a contract entered into with said Lusk to sell them a quantity of corn. The jury found for the plaintiffs in the sum of \$184.10, and judgment was rendered thereon. Being dissatisfied with the amount of the judgment, the plaintiffs bring the case here for review. The errors complained of and argued all relate to the proper measure of damages. The contract for the sale of the corn was entered into August 2, 1887. The plaintiffs' evidence establishes the following facts: First, that the contract price of the corn was 80 cents per hundredweight; second, that the amount of corn contracted was 235,006 pounds; third, that a reasonable time within which to deliver said corn was from 6 to 16 days; fourth, that the market value of corn at Dodge City (the place of delivery under the contract) during the period of time between the making of the contract and the time of delivery was from 85 cents to \$1.05 per 100 pounds; fifth, that on August 3d and 4th the defendant notified them that he would not deliver the corn.

The defendant introduced in evidence an agreement between the parties stipulating that there was an abundance of corn on hand in Rice county from August 2d to August 16th, and that during said period and every part thereof the plaintiffs could have ordered from 5,000 to 10,000 bushels of corn from the dealers in corn, and that said orders could have been filled at once at the market price at the time of such order. It was stipulated that this agreement might be offered in evidence, subject to the right of the plaintiff to object to its introduction on the ground that such evidence is immaterial, incompetent, and irrelevant, or on any other legal grounds. This raises the question as

to whether there were any mitigating circumstances in this case which take it out of the general rule. In this same case, which is reported in 45 Kan. 182, 25 Pac. 646, our supreme court says: "In an action by the buyer against the seller for breach of contract for a delivery of corn, the measure of damages is, as a general rule, the market value of the corn at the time and place of delivery, less the contract price. In such case, when the seller, after his contract of sale is made, notifies the buyer that he will not fill the contract, held that, in the absence of any evidence on the part of the defaulting seller, that the buyer, after notice that the seller would not fill the contract, and before date of delivery, could have purchased corn in the market at the place of delivery upon such terms as to have mitigated his loss, the measure of damages remains the same." In the above case the plaintiff requested the court to give the jury the general rule of damages. This the court refused to do, but instructed them that the measure of damages was the difference between the contract price and the price of the corn at Dodge City at the time the defendant notified the plaintiff that he would not deliver the corn. The court held that this instruction was erroneous, in the absence of any evidence by the defendant that the plaintiffs could have purchased the corn in the markets of the place of delivery so as to have mitigated the loss. Now, suppose that the plaintiffs could have bought the corn at the time of the notice of rescission, to be delivered in Dodge City, at a price greater than the contract price, and had bought it at such advanced price, believing that corn would continue to advance, and endeavoring in good faith to mitigate the loss. Then, again, suppose that upon the day of delivery according to the former contract the market value of corn at the place of delivery should be the same as the contract price. Could not the defendant contend that the general rule should apply, and the plaintiffs be entitled to only nominal damages? The plaintiff had in good faith attempted to mitigate the damages of the defendant by buying at the market price after notice that the defendant would not furnish the corn. He had proven himself a poor prophet, and, instead of mitigating the damages, had increased them. Who suffers? In *Furnace Co. v. Cochran*, 8 Fed. 463, it is held that the buyer cannot recover such advanced prices paid after notice of rescission, although he bought the coal in the belief that coal would go still higher, when in fact it went below the contract price before the times of delivery had arrived. We are aware that in some cases the general rule of damages does not apply. One of these is stated in *Lumber Co. v. Sutton*, 46 Kan. 192, 26 Pac. 444, as follows: "Under special circumstances, as where merchandise is purchased for a particular purpose, and to be delivered at a specified time, and where it cannot be pur-

chased in the market at the place of delivery, and these facts are known to the vendor, the general rule of damages would be inadequate to compensate the vendee for a delay or a nondelivery of the merchandise, but in such a case he would be entitled to recover the actual loss directly and naturally resulting from the defaulting vendor." Another one is stated in *Stewart v. Power*, 12 Kan. 456, as follows: "But where a vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the articles to enable him to fulfill the same, then upon a breach by the vendor the purchaser may recover as damages such portion of the profits of the resale as he is compelled to lose on account of such breach." It is intended that upon the breach of a contract by either party the party not in fault shall recover from the defaulting party the natural, direct, and proximate damages sustained by him. In analyzing the case at bar it is necessary to determine the natural, direct, and proximate damages sustained by the plaintiffs. On August 2, 1887, they purchased 285,096 pounds of corn of the defendant at 80 cents per hundred. It was to have been delivered in Dodge City in from 6 to 16 days. The market value of corn in Dodge City during this period was from 85 cents to \$1.05 per hundred. Under the general rule the jury should have fixed the time for delivery, and have subtracted the contract price from the market value of corn in Dodge City at the time so fixed, and allowed the plaintiffs the remainder, together with interest upon said remainder from the time so fixed for delivery. What, if anything, should have been done by the plaintiffs after notice from the defendant that he would not deliver the corn, to have made the damages as light as possible, for which they intended to hold the defendant? At no time could they have filled the contract at the contract price. They must have paid more than 80 cents at any time from the time of receiving the notice until the time of delivery had passed. If it was their duty to buy, when should they have done so? Were they compelled to buy when the value was 85 cents or when it had reached \$1.05? Should they have bought on the day they received the notice of rescission, whether corn was \$1.05, or whether it was 85 cents? If they bought at a price higher than the market value at the time of delivery, they could not recover such higher price. It will hardly do to say that they must have bought on the day that the market value was the least, for they cannot know until the time is past which day to make the purchase. To hold that they must buy at any time, if the market value is greater than the contract price, in order to decrease the damages to be recovered against the defaulting seller, is to establish a ruling which would lead to endless confusion. If the defendant should show

that the plaintiffs could have bought the corn at or below the contract price at any time between the notice of rescission and the time of delivery, the plaintiffs could recover only nominal damages; but we cannot give our assent to the doctrine that the plaintiffs must buy at a price above the contract price, nor that they must, at their peril, buy at the time when the value is the lowest, so as to decrease the damages which they can recover against the defendant.

Upon the trial of this case the court gave the jury the following instruction: "Where a seller, having made a contract of sale, notifies the buyer that he will not fill the contract, the seller may show, if he can, that the buyer could have purchased corn in the market of the place of delivery, or, at the place where he purchased the seller's corn, upon such terms as to have mitigated the seller's loss. If you believe that the defendant in this case has shown by the greater weight of the evidence that he did notify the buyer soon after making the contract that he would not deliver the corn, and that the buyer after such notice could have purchased corn, delivered at Dodge City, Kansas, at a less price than the market value of the corn at the time the seller could have reasonably delivered it, in that event the measure of plaintiff's damages in this case would be the market value of the corn at Dodge City, Kansas, which he could have purchased, less the contract price." This instruction and the introduction of evidence are seemingly warranted by the language of Commissioner Strang in 45 Kan., 25 Pac., supra, but we feel confident that our supreme court never intended to establish or assent to the measure of damages contended for in this case. The judgment in this case might readily be sustained under the evidence, in the absence of the erroneous evidence and instructions, but we cannot say that the jury were not influenced in the amount of their verdict by such error. The judgment of the district court is reversed, and the case remanded for a new trial. All the judges concurring.

(6 Kan.App. 835)

DODSON v. WIGHTMAN et al.

(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

ATTACHMENT—LEVY—NECESSITY OF APPRAISEMENT—INSOLVENT BANK.

1. Under section 197 of the Code of Civil Procedure an attachment levy on personal property is sufficient and valid if the officer, with the order of attachment in hand, goes to the place where the goods and chattels of the defendant are found, and there declares, by virtue of said order, that he attaches such property at the suit of the plaintiff, and thereupon takes such possession as deprives the defendant's possession and gives to the officer a claim of dominion, coupled with the power to exercise it, over the attached property.

2. It is not essential to the validity of an attachment levy so executed that an appraisal of the attached property should be immediately made.

3. Under chapter 48, Laws 1891, it was necessary for the bank commissioner to take actual personal possession of the property and assets of an insolvent bank, as a condition precedent to the institution of an action by the attorney general for the appointment of a receiver for such bank; and the property of an insolvent bank, prior to the taking of such actual possession by the commissioner, was subject to seizure by attachment or other legal process at the suit of its creditors.

4. An attachment levy should not be held wholly invalid because of the fact that the appraisalment involves certain chattels which the officer and the appraisers have not seen, and cannot see, because the same are locked in a bank safe, of which they do not have the combination.

(Syllabus by the Court.)

Error from district court, Greeley county; J. E. Andrews, Judge.

Action by William Dodson against C. E. Wightman, the Bank of Tribune, and the state of Kansas. Plaintiff moved to discharge the attachment. From a judgment dissolving the same, plaintiff brings error. Reversed.

Quinton & Quinton and W. M. Glenn, for plaintiff in error. F. B. Dawes, A. A. Godard, and L. C. Boyle, Atty. Gen., for defendants in error.

MILTON, J. The defendant C. E. Wightman had conducted a bank known as the Bank of Tribune, which was owned entirely by him, for a number of years, and, being insolvent, appeared before the bank commissioner at Topeka on September 23, 1896, and stated that he had come for the purpose of surrendering to the commissioner the possession of said bank, and that he desired that the commissioner should go immediately to Tribune, and take actual and personal possession of the bank and all of its assets. Wightman then gave to the commissioner a statement of the financial condition of the bank, showing its insolvency, and, as the commissioner testifies, delivered and surrendered possession of said bank to the latter so far as it was possible for him to do. On September 24th, and while Wightman was in Topeka conferring with the commissioner, the plaintiff in error brought an action in the district court of Greeley county to recover \$594.06, which he alleged he had on deposit in said bank. An attachment order was issued at the commencement of the action, and the sheriff purported to levy the same at 3:15 o'clock p. m. on the same day. The sheriff's return on this order shows that at the time named he executed the same by going to the place where certain personal property of the defendants was found (naming, among other articles, a burglar-proof safe and all its contents), and there declaring that he attached said property at the suit of plaintiff. The return of the sheriff as to the inventory and appraisalment of the property is regular in all respects, except that it shows an appraisalment of the safe and its contents, when, as a matter of fact, the safe had not been and could not be opened by the sheriff when the appraisalment

was made. The appraisalment did not state the nature of the contents of the safe, and both were appraised together at \$700. The appraisalment is dated September 28th, and it was filed, together with the order of attachment, on October 3d. The sheriff and appraisers obtained their information as to the contents of the safe from Wightman. The attorney for the plaintiff was aware before the attachment was levied of the fact that Wightman had gone to Topeka to turn the bank over to the commissioner, but the evidence does not show whether or not the plaintiff had such knowledge. Wightman returned to Tribune on the morning of September 25th, and the commissioner arrived there at noon the same day. The sheriff or his deputy had remained in charge of the attached property, and in control of all the property of the bank, from the time the levy was made, and the commissioner was unable to take actual possession of the same. Before starting for Topeka, Wightman left the following notice with a party in Tribune: "Tribune, Kansas, September 23rd, 1896. This bank has been placed in the hands of the bank commissioner, who will take charge, probably, Friday. I will return with him. C. E. Wightman." This notice was posted on the door of the bank soon after the sheriff took possession under the writ of attachment. The bank commissioner testified that he made a demand upon the sheriff for the possession of the property, and that, if he had not been prevented by the sheriff, he would have taken possession of all the notes, books, moneys, and all other property of said bank that was contained in the safe at that time. The property which was attached consisted of various articles of office furniture, and the safe and its contents. At the request of the bank commissioner the attorney general, on October 2, 1896, instituted an action in the district court of Greeley county, in the name of the state, on relation of the attorney general, as plaintiff, against C. E. Wightman, as the owner of the Bank of Tribune, for the purpose of procuring the appointment of a receiver of said bank, and for the winding up of its affairs under the provisions of the banking law. On October 5th the plaintiff and four other attaching creditors jointly applied to the judge of the district court, at chambers, for the appointment of a receiver to take charge of the attached property; and on the same day the state of Kansas, by the attorney general, presented to said judge a motion for the discharge of the several attachments which had been levied upon the bank property. These motions were considered together, and the evidence relating thereto was presented on the said day. The motion to discharge the attachments set forth, substantially, that no sufficient levy of any of the said writs of attachment had been made; that none of said writs had been levied on the 25th day of September, when the bank commissioner demanded pos-

session of said property; that all of the property attached was owned by the defendant Wightman in connection with the Bank of Tribune, and constituted a part of the assets of the bank, which was insolvent at the time of the pretended levy of said writs, and prior thereto; that said property was in the hands of the bank commissioner at the time of the levy of said writs; and that a suit had been commenced in the district court of Greeley county by the attorney general to have a receiver appointed to wind up the affairs of said bank. The foregoing facts were developed on said hearing, and the additional fact that the Bank of Tribune had never obtained authority from the banking department to do business, although it had been making reports regularly for two or three years. The judge discharged the attachments, and ordered the sheriff to turn over said property to C. H. Adams, whom he then and there appointed receiver in the case brought by the attorney general. Plaintiff in error excepted to the action of the judge, and by due and timely proceedings the order discharging the attachment is before us for review.

It is claimed on the part of the state that the case-made is insufficient because it fails to show that it contains all the evidence that was introduced on the hearing of the motion. While it is true that no single, specific statement to this effect is made, we think the case-made shows that all the evidence is contained therein. It is also claimed that the case-made is insufficient because it does not contain the attachment undertaking. This is not material, as we must presume that the clerk of the court complied with the law in respect to the issuance of the order of attachment. The appraisal seems to be regular, except as to the contents of the safe, and it is not important that it was not completed until several days after the levy was made.

Two questions are presented: First. Was the Bank of Tribune in the hands of the bank commissioner at the time of the levy? Second. Was the levy valid and sufficient?

As to the first question, we think it could not be claimed by any one that the bank commissioner was given actual, personal possession of the property by virtue of the attempted delivery thereof made by Wightman in the city of Topeka. Nor do we see how it could be maintained that there was a constructive delivery of the bank property at that time and place. In fact, the attorney general does not make this contention in his brief. We think that the words "take charge," as used in section 26 of chapter 43, Laws 1891, are to be understood in the ordinary sense; that is, that the commissioner shall take actual charge of the bank, by going to the institution and there assuming control. We are strengthened in this view by reason of the fact that the banking law of 1897, which repeals said chapter

43, makes it the duty of the commissioner immediately to take charge of a bank when it shall appear to be insolvent, and, upon taking charge, to ascertain as soon as possible, by thorough examination into its affairs, its actual condition, and, if thus convinced that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, to report the fact of its insolvency to the attorney general, who shall thereupon immediately institute the proper proceedings for the appointment of a receiver. It is evident that "take charge" and "taking charge," as used in this law, have the meaning we have above indicated, as it would be impossible for the commissioner to examine into the affairs of an insolvent bank without having control of its books and property generally. Section 29 of the law of 1897 provides another method for placing the affairs and assets of a bank under the control of the bank commissioner; that is, by posting on its front door the following notice: "This bank is in the hands of the state bank examiner." Said section further provides that "the posting of such notice, or the taking possession of such bank by the commissioner shall be sufficient to place all its assets and property of whatever nature in the possession of the bank commissioner and shall operate as a bar to any attachment proceedings." It is contended by the attorney general that under the banking law of 1891 the property in controversy was not subject to attachment at the instance of its creditors, and that the general attachment laws are suspended whenever the same are inconsistent or in conflict with the said act. It will be proper to bear in mind that this bank was not authorized to do business, and that any general doctrine as to public policy in respect to authorized banks would not be applicable to the bank in question. Hence we think the decision of the supreme court of California in *Crane v. Bank*, 39 Pac. 215, which is cited by the attorney general, is not applicable to this case. In view of the fact that the last banking act provides that the posting of the notice above set forth shall operate as a bar to attachment proceedings, the conclusion seems proper that the legislature did not hold that considerations of public policy under the old law would be sufficient to bar attachment proceedings, and therefore the old law was amended in that respect. The supreme court of Nebraska, in the case of *Arnold v. Welmer*, 58 N. W. 709, holds that the property of an insolvent bank, prior to the appointment of a receiver therefor under the banking law of that state, is not exempt from seizure by attachment or other legal process at the suit of its creditors, and that the lien acquired by the levy of an attachment upon its property is not vacated by the subsequent appointment of a receiver for such bank. We hold that the bank property was subject to levy under an order of attachment at the time when the levy was

made in this case. Again, it is doubtful if the Bank of Tribune came within the terms of section 26 of chapter 43, Laws 1891, which provides for the appointment of a receiver for an insolvent bank in an action by the attorney general. Section 17 of said chapter evidently attempted to make it unlawful to conduct a banking business without having procured authority from the bank commissioner to do so; but the section is incomplete, and makes it unlawful to conduct such a business unless reports are made to the commissioner. It also provides that the commissioner shall make examinations of banks, and, if they are found in proper condition, he shall issue a certificate of authority to do a banking business. It is not a strained construction of the provisions of said chapter 43 to hold that it contemplates that banks which are brought within the provisions thereof by the examination and the certificate of authority are such as can be taken charge of by the commissioner, and for which a receiver can be appointed under the said law. It is anomalous to speak of a receiver being appointed at the suit of the state for the property of an individual, but, if such an individual is a banker, of course a receiver may be appointed under a law providing therefor. But, if he was not authorized to conduct a bank, would it be within the purview of the law to say that a receiver could be appointed for his property simply because he purported to conduct a bank? And without any authority therefor? As the banking law of 1897 covers the question here raised, by making it unlawful to conduct a banking business without a certificate of authority from the bank commissioner, the question we have for consideration becomes comparatively unimportant. In our opinion, it is extremely doubtful if any jurisdiction over the assets of the Bank of Tribune (Wightman) was acquired by the court in the action brought by the attorney general.

2. The record shows that the sheriff complied with the provisions of the statutes in making the levy, except as to the contents of the safe. He was in actual possession of the office furniture and of the safe on September 28th, when the appraisement was completed. The attorney general claims that this levy is invalid, for the reason that manual possession by the officer is essential to a valid levy, and that no such possession had been taken of the contents of the safe. The courts have generally held that the test of a valid attachment levy is this: Were the acts of the officer in making the levy such as would subject him to an action for trespass, but for the protection of the process? The officer, in attaching personal property, must reduce it to a manual possession, so far as, under the circumstances, can be done. What is such an actual possession must depend upon the nature and situation of the property. It has been repeatedly held by the courts that personal property may be attached without the officer touching it, but he

must obtain actual control of the property levied upon. In *Lyeth v. Griffin*, 44 Kan. 101, 24 Pac. 60, the court says, "The rule that the first duty of an officer holding a writ of attachment is to obtain and retain the possession of the property rests upon reason as well as upon authority," and quotes the following from a decision of the supreme court of Iowa: "To constitute a valid levy of a writ of attachment, the officer having the writ must do that which amounts to a change of the possession of the property, or something which is equivalent to a claim of dominion, coupled with the power to exercise it." *Crawford v. Newell*, 23 Iowa, 453. In the case cited the court was construing section 32 of the Justices' Code, which provides that "when property can be come at" the same shall be taken into custody by the officer, and held subject to the order of the justice of the peace. It will be observed that section 197 of the Code of Civil Procedure, which provides how an order of attachment shall be executed, does not contain the provision referred to above. Taking its language literally, a levy under an order of attachment would be valid if the sheriff should go to the place where the goods of the defendant are, and there declare that by virtue of said order he attaches such goods; but, of course, it would be necessary for him to remain in possession of the attached property, and to cause the same to be appraised. Section 199 provides that the officer shall deliver possession of the property attached to the person in whose possession it was found, upon the execution by such person of a proper forthcoming bond. The inference is plain that custody or control of the seized goods by the officer, to the exclusion of others, following the statutory declaration made in the place where the goods are found, is the true test of the validity of an attachment levy. If the property was subject to attachment, it was certainly levied on, and has remained in the possession of the sheriff. Neither the bank commissioner nor the receiver has ever obtained control thereof. The appraisement of the attached goods was proper, except as to the contents of the safe. The sheriff might have taken manual possession of the contents by the use of great force in breaking open the safe, or he might have had it opened by an expert. This could have been done by virtue of the authority the sheriff possessed under the order of attachment and under the levy. See *U. S. v. Craft*, 67 Barb. 304. He would very likely have had the safe opened in some way but for the fact that the bank commissioner was claiming certain rights as to the property, and the fact that the suit by the attorney general was to be brought, and was brought, so soon after the appraisement was returned. The sheriff performed his duty as he understood it. While we think it was not proper to have made the return to show an appraisement of the contents of the unopened safe, yet it amounts to an assertion on his part of exclusive custody of the attached

property, including the contents of the safe. Holding as we do the view that the levy substantially complied with the law, and that it gave the sheriff custody and control over the property seized, it follows that the order discharging the attachment was erroneous, and that the receiver appointed by the trial judge in the action brought by the attorney general has no authority over the attached property. The action of the sheriff in making an incomplete appraisal can be corrected by the issuing of an alias order of attachment, it being evident that plaintiff in error ought not to lose his rights by reason of the incompleteness of the appraisal. The order of the trial judge will be reversed, and the case remanded, with instructions to the trial court, or the judge thereof, to order the sheriff to open the safe and complete the appraisal, upon an alias order of attachment, and for further proper proceedings. All the judges concurring.

(6 Kan. A. 823)

NOBLE v. HARTER.

(Court of Appeals of Kansas, Southern Department, W. D. July 29, 1897.)

NEW TRIAL—AGREED STATEMENT OF FACTS—PETITION IN ERROR.

1. Where a case is submitted to the trial court upon an agreed statement of facts, a motion for a new trial is unnecessary, and the court does not err in overruling such motion.

2. When the parties to an action agree to admit all the facts upon which they desire to have the case submitted to the court, they have agreed upon what the facts in the case are; and when such facts are communicated to the court for the purpose of having it draw conclusions of law therefrom, and to render judgment thereon, they become an agreed statement of facts.

3. The case of *Beck v. Baden*, 3 Kan. App. 157, 42 Pac. 845, followed as to the requirements of a petition in error.

(Syllabus by the Court.)

Error from district court, Stafford county; J. H. Bailey, Judge.

Action by George M. Noble against Nathan Harter. Judgment for defendant, and plaintiff brings error. Affirmed.

Fuller & Whitcomb and Moseley & Dixon, for plaintiff in error. John W. Rose, for defendant in error.

DENNISON, P. J. This action was brought in the district court of Stafford county, Kan., by George M. Noble, to recover the possession of a quantity of wheat from the defendant, Nathan Harter. The case was tried by the court, without a jury, upon an agreed statement of facts; and the court found that the defendant was in the possession of the wheat, and that he was entitled to the possession of it, and rendered judgment accordingly. The case is brought to this court by the plaintiff upon a petition in error and case made, asking us to review some of the proceedings of the district court.

The petition in error complains of the court

below as follows: "First, that said court erred in overruling this plaintiff in error's motion for a new trial; second, that said court erred in rendering judgment on behalf of said defendant in error, Nathan Harter; third, that said court erred in rendering judgment declaring that the said Nathan Harter was entitled to the possession of the personal property in said action."

The trial court does not err in overruling a motion for a new trial in a case which is submitted to it upon an agreed statement of facts. Such a motion is superfluous. *Schnitzler v. Green*, 5 Kan. App. 356, 47 Pac. 990. The record recites that the case is submitted to the trial court upon an agreed statement of facts and admissions. Each fact is introduced in the following manner: "It is admitted by the parties to this action;" "It is admitted;" "It is further admitted;" and so on. The defendant's counsel says that, because of this introduction, the agreed statement of facts must be absent from the record. Where the parties to an action agree to admit all the facts upon which they desire to have the case submitted to the court, they have agreed upon what the facts in the case are; and when such facts are communicated to the court for the purpose of having it draw conclusions of law therefrom, and to render judgment thereon, they become an agreed statement of facts.

The other specifications of error are that the court erred in rendering judgment in favor of Nathan Harter. The plaintiff does not complain that the court erred in its conclusions of law, or that the judgment is contrary to the evidence or not sustained by the agreed statement of facts. Following the decisions of this court in *Beck v. Baden*, 3 Kan. App. 157, 45 Pac. 845, and the cases therein cited, we must decide that there is no alleged error set forth in the petition in error that appears upon the record. The judgment of the district court is affirmed. All the judges concurring.

(6 Kan. A. 921)

McFARREN v. ATHEY.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

JUDGMENT—COSTS—RELEASE.

The evidence in this case examined, and found to fully sustain the judgment of the court. (Syllabus by the Court.)

Error from district court, Cherokee county; J. D. McCue, Judge.

Action by O. G. Athey against J. F. McFarren. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

T. P. Anderson and John Wiswell, for plaintiff in error. E. M. Tracewell and A. H. Skidmore, for defendant in error.

SCHOONOVER, J. The defendant in error commenced an action in the district court of Cherokee county to enjoin the enforcement of a judgment rendered by a justice of the peace

in said county, in an action wherein the plaintiff in error obtained a judgment against the defendant in error for the sum of \$150, and the further sum of \$48.85, costs. The defendant in error contends that the judgment has been fully satisfied, and, in support of his allegations, introduced on trial the following: "Columbus, Kansas, Feby. 23d, '91. This is to certify that I have this day settled with O. G. Athey in full for the judgment I hold against him in Squire Hicks' court; and I hereby acknowledge full payment and satisfaction of the same, and I now release said judgment and all proceedings of the same. J. F. McFarren." Defendant in error contends that on the day this receipt is dated, and before execution was issued, the justice of the peace was fully informed as to the settlement and satisfaction of the judgment; that he was shown the receipt, and asked to record or file the same. There is no claim that the receipt was obtained by fraud or duress. The contention appears to be over the costs. The trial court found for the plaintiff below, and against the defendant below, and rendered judgment perpetually enjoining the defendant (plaintiff in error) from enforcing the judgment. The evidence contained in the record fully sustains the judgment of the court. The case will be affirmed. All the judges concurring.

(6 Kan.App. 428)

DEFORD v. SHEPARD.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

REAL-ESTATE AGENT—COMMISSIONS.

Where an agent to sell land negotiated a sale, which his principal refused to complete, and such agent probably became entitled to a certain commission, but made no demand for the same, and continued to act as agent for the sale of the land, and afterwards the land was sold through his agency, and was conveyed by his principal, under a new contract for commission, held, that the agent waived any right he may have had under the first sale, and is bound by his last agreement as to the amount of his commission.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by Gilbert H. Shepard against John W. Deford. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Deford and W. A. Deford, for plaintiff in error. Alford & Savage, for defendant in error.

MILTON, J. This action was brought by Gilbert H. Shepard to recover \$200, claimed to be due him from John W. Deford, from a judgment against him in the sum of \$199.25. Deford appeals. Plaintiff in error negotiated a sale to Mary J. Chandler of a quarter section of land in Franklin county, for Gilbert H. Shepard, upon an agreement to ac-

cept \$100 as his commission. The agency to sell was created by correspondence between Harvey N. Shepard, a brother of the vendor, and the plaintiff in error, both the Shepards being nonresidents of the state of Kansas. The evidence consisted almost entirely of letters written by Harvey N. Shepard to plaintiff in error, and by the latter to said Shepard. After the sale was completed, plaintiff in error made a remittance of part of the cash he had received, accompanied by a statement showing that he claimed to be entitled to \$200 for making a previous sale of this land, and \$200 for the last sale, and \$20.75 for other services in connection with the last sale, but that he retained only \$300, "without prejudice to his right to claim the remainder at any time hereinafter." His claim, in brief, as stated in his answer, was that Shepard had agreed, prior to the first sale, that the commission should be 10 per cent. if the land should be sold for \$2,000 or more; that he negotiated a sale for \$2,000, and Shepard declined to convey; that afterwards, and without revocation of the agency, with no change of agreement as to commission, an offer of \$2,000 was made by Mrs. Chandler, and duly transmitted to Shepard's brother, who was acting for the owner of the land; the latter wrote that the offer would be accepted on condition that he should receive \$1,900 clear; that, while plaintiff in error thereupon accepted this change of terms, the same was done without consideration; and that he was entitled to recover \$200 for negotiating the first sale, which Shepard refused to complete, \$200 for the last sale, and \$20.75 for expenses and extra services. It is difficult to see any merit in these claims. Under the evidence, plaintiff in error might, perhaps, have recovered the 10 per cent. commission which had been agreed upon for the first sale, if he had stood upon his rights. But he waived his claim thereto very effectually, by continuing to act as agent for Shepard for the sale of the same land, without making any demand for his commission. Thereafter the land was conveyed through his agency for a consideration of \$2,000, upon an agreement that the vendor was to receive \$1,900 clear. This agreement was binding on vendor and agent alike, and the vendor was entitled to the agreed amount. The trial court therefore very properly rendered judgment in favor of Shepard.

It is claimed that the court erred in overruling objections made on the trial to certain portions of the deposition of Harvey N. Shepard. As this testimony related to the agency of the plaintiff in error at the time he negotiated what he calls the "first sale," it need not be considered, as we hold that no issue is presented concerning such sale. The judgment of the trial court will be affirmed. All the judges concurring.

(6 Kan.App. 442)

CITY TRUST CO. v. TILTON, County Clerk,
et al.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

PAYMENT OF TAX LIEN.

Where the owner purchases land after a claim for taxes has attached, without assuming or agreeing to pay the same, and afterwards there is a tax-sale certificate issued to him by mistake, and he immediately assigns the same to the purchaser in good faith at the tax sale, it will not operate as a payment of the tax lien by the owner.

(Syllabus by the Court.)

Error from district court, Labette county; J. D. McCue, Judge.

Action by the City Trust Company against George W. Tilton, county clerk of Labette county, and E. P. Bayless. Judgment for defendants, and plaintiff brings error. Affirmed.

Wheeler & Switzer, for plaintiff in error.
Nelson Case, for defendants in error.

SCHOONOVER, J. In the year 1887, and prior thereto, C. M. Rivers was the owner of certain lots in Oswego, Kan., upon which there was a mortgage to H. E. Ball, trustee. The taxes on these lots for the year 1887 were never paid. On the 11th day of February, 1888, E. P. Bayless purchased said lots from C. M. Rivers, subject to, but without assuming, existing liens. On the 4th day of September, 1888, said lots were sold for the taxes of 1887, and certificate issued to E. P. Bayless. The Deming Investment Company claim to have been the purchaser, to have paid the money, and, without fault on their part, the tax-sale certificate, when issued, was, by mistake, made in the name of E. P. Bayless, who, upon the discovery of the mistake, immediately assigned the same to the Deming Investment Company. The contention, so far as the facts are concerned in the court below, was as to who was the real purchaser at tax sale. The trial court found for the defendant, dissolved the temporary injunction issued in the case, and rendered judgment against plaintiff in error for costs. We think the evidence in this case fully sustains the judgment of the court. There was no collusion between the Deming Investment Company and E. P. Bayless. The Deming Investment Company purchased the lots in good faith, and it clearly appears that the certificate was issued to the owner of the land, instead of the purchaser at the tax sale, by mistake. It is well settled that the owner of land, under legal obligation to pay the taxes thereon, can obtain no independent title by purchase at a tax sale. Such purchase simply amounts to a redemption of the land from the taxes. This rule cannot be applied to the facts in this case. The owner did not purchase the land at the tax sale. The lots were sold to the Deming Investment Company, and the certificates issued to the owner, E. P. Bayless, by mistake, on the 4th day of September, 1888, for the taxes of 1887. Bayless purchased the

land subject to, but without assuming the payment of, the tax lien, on the 11th day of February, 1888. From these facts, we conclude that Bayless having purchased the land after the taxes for 1887 became a lien, without agreeing or assuming the payment of the same, a tax certificate issued to him by mistake, and by him assigned to a purchaser in good faith at the tax sale, will not operate as a payment by him of the tax lien. The judgment of the district court will be affirmed. All the judges concurring.

(6 Kan.App. 405)

CRANE v. COX et al.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

SEPARATE TRIAL OF PARTICULAR ISSUES—INSTRUCTIONS—REVIEW ON APPEAL.

1. In an action on a promissory note against two defendants, one the guarantor, and the other the maker, the latter pleaded want of consideration and the fraud of his co-defendant in procuring the note as a defense, and asked that the note sued on be declared void, and that he have judgment against his co-defendant for the amount he had been obliged to pay in settlement of another note given at the same time and in the same transaction with the one sued on. *Held*, that said guarantor's demand for a separate trial of the issues between himself and the maker of the note was properly overruled.

2. The verdict of the jury, being based on conflicting evidence, and approved by the trial court, will not be disturbed.

3. Instructions given and refused examined, and the action of the trial court in respect thereof approved.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by C. W. Goodin against C. S. Cox and F. E. Crane. From a judgment against him in favor of his co-defendant, defendant Crane brings error. Affirmed.

John W. Deford, for plaintiff in error. J. D. Snoddy and Wm. H. Clark, for defendant in error.

MILTON, J. This is a suit on a "lightning-rod note." One Webb, by representing that a large part of the rod would be furnished free, induced C. S. Cox and his wife to sign a contract for the rodding of Cox's barn. Afterwards plaintiff in error came, and superintended the putting up of the rod, and demanded in payment therefor the sum of \$174. Cox protested, and finally yielded to pressure and threats on the part of Crane, and gave him \$25 in cash, and two notes, payable to F. J. Webb or bearer, one for \$49, and one for \$100. The \$49 note was sold to C. W. Goodin by Crane, who guaranteed the payment of the same. Goodin sued Cox and Crane on this note, and Cox set up that it was obtained by fraud, and was without consideration, and also averred that he had been obliged to pay to an innocent holder of the other note \$100 and interest thereon. He asked that the \$49 note be canceled, and that he have judgment

against Crane for \$100 and interest. The answer also alleged that Cox's mind was weak, and his understanding not strong, and that Webb and Crane knew his condition; that Webb overreached him, by getting him to sign a contract purporting to be in duplicate, but not really so, one of which was read by Webb to him, and left with him, and the other taken by Webb, and turned over by him to Crane; that, according to the contract he had kept, and the figures made at the time it was signed, the lightning rod would have come to only \$22.50; that, when Crane came to put up the rod, he induced Mrs. Cox, in the absence of her husband, to give him their copy of the contract; and that Crane then refused to show it to Cox, but figured from the one which Webb had taken with him; and that Cox never knew until that time that there was any difference in the pretended duplicate, having relied on Webb's representations regarding it. The answer also averred that Crane threatened that, if Cox did not sign the notes, he would send the sheriff after him; that he would not allow part of the rod free, as Webb had promised, and as was stated in the contract Cox had held; that he would make him pay \$243 and costs if he did not sign them; that Cox believed he could do as he threatened; and that Crane otherwise intimidated him. The evidence was conflicting on some points, but it appears that Cox was a deaf mute until he was about 12 years old, and that he was taught in an institute for the deaf and dumb in the state of Illinois, and also in a similar institute in the state of Kansas, to speak, and to understand what was said by others; but such understanding came more from close observation of the lips of the one speaking than from any improvement in his hearing. He could read and write, and was fairly versed in arithmetic. He was honest, and was of a trusting disposition, believing every man honest until convinced to the contrary, by evidence of dishonesty. He was also timid and excitable. His brother advised him generally in important transactions. There was evidence tending to sustain the averments of his answer. The contract was not introduced in evidence, but a blank exactly like that on which it was written was introduced. It contains an agreement to pay 75 cents per foot for ——— number of feet of rod, and the following consecutive sentences, the first of which runs to the end of the line: "Points and braces to be counted as twenty feet of rod Each, said building to be ornamented free of cost." There was no period after the word "rod," and it seems that Crane's plan was to read these two sentences together to the end of the word "Each," and to figure accordingly. In this way the amount to be paid was greatly increased. The verdict of the jury was for Cox, as against Goodin, and as against Crane; but the court entered judgment for Goodin, as against Cox, upon the special findings of the jury, on the ground that Goodin was an innocent purchaser.

Judgment was also rendered for Cox against Crane, for \$108.50, upon the verdict of the jury. This verdict, being based on conflicting evidence, and having been approved by the trial court, will not be disturbed by this court. We cannot refrain from remarking that it seems to be a righteous verdict.

Plaintiff in error demanded a separate trial in the court below of the issues between him and Cox, which demand the court refused. He claims there was error in this ruling. We think the ruling was correct. The notes sued on by Goodin, and the note which Cox had paid, were brought into existence and given currency by the action of Crane. They both grew out of the same transaction, and it was proper to try the whole issue as between the man who claimed to have been defrauded and the party who was charged with the fraud.

Plaintiff in error also claims that it was error to admit the evidence of Cox to the effect that his wife told him she had given their copy of the contract to Crane. The error in this was harmless, for the reason that further testimony of this witness showed that he saw Crane have the copy of the contract in question. The objection to the question asked Cox's brother, whether or not the latter had sufficient strength of mind to take care of himself in business dealings with shrewd, sharp men, ought, perhaps, to have been sustained; but, if there was any error in permitting it to be answered, it was waived, as the next question, which was similar, and was even more specific as to the strength of mind of Cox, was asked and answered without objection. We see no merit in the other contentions in regard to the admission of testimony.

Complaint is made of the refusal of the trial court to instruct the jury to the effect that the amount of the profits to be made by Webb and Crane in the transaction with Cox was not material to the issues joined in the case, the testimony of Crane having shown that the profits on the sales of lightning rods were very large. As the only purpose in allowing that testimony to be introduced was to show a lack of consideration for the notes beyond the amount Cox understood he was to pay, it would appear that the instruction asked for was not required, and was not proper.

Plaintiff in error contends that the court erred in instructing the jury to the effect that if they should find that the \$100 note was sold by Crane to an innocent purchaser, and that this was done by Crane with the intent to cheat and defraud Cox, and the latter thereby became bound to pay, and did pay, said note, then they would be authorized to find a verdict in his favor against Crane, with interest. It is claimed that there was no evidence whatever showing that Crane ever sold the \$100 note. We find that the record shows that the cashier of the bank at Blue Mound testified that he bought the note in question of a man by the name of Crane. This was some evidence, notwithstanding Crane denies having

sold it, and was sufficient to warrant the court in placing the matter before the jury. The judgment of the trial court will be affirmed. All the judges concurring.

(6 Kan.App. 438)

STEVENS v. BOARD OF COM'RS OF MIAMI COUNTY.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

REMOVAL OF PAUPER—LIABILITY OF COUNTY.

The discretion to determine whether or not a sick and indigent person, found within a county where such person has no legal settlement, can be safely and properly sent to the county where such settlement exists, rests with the trustee of the township, as overseer of the poor, and the county becomes bound for services rendered upon an order of the overseer of the poor in a case in which he has, upon investigation and inquiry, determined that aid ought to be extended to the indigent person so found within his township.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by S. G. W. Stevens against the board of county commissioners of Miami county. Judgment for defendant, and plaintiff brings error. Reversed.

John C. Sheridan, for plaintiff in error. W. H. Prowne and S. J. Shively, for defendant in error.

MILTON, J. This action was tried in the court below on an agreed statement of facts, and resulted in a judgment in favor of the defendant board for costs. The principal facts are these: One Elizabeth Mays, who lived in Johnson county, while traveling in a wagon on a public road on the line between Johnson and Miami counties, was thrown violently to the ground on the Johnson county side of the road, and seriously shocked, bruised, and injured. She was on her way to visit her daughter, Mrs. Winkler, who lived in Miami county, about three miles from the point where the accident occurred. Mrs. Mays requested that she be taken to her daughter's house, and she was taken there very soon after she was hurt, although some of the bystanders wanted to remove her to an hotel in Spring Hill, in Johnson county, less than half a mile away, or to her home, three miles distant. Dr. Stevens, the plaintiff, was at once called, and he attended her from that date until she was able to return home. Immediately after the injury, the trustee of Spring Hill township, in Johnson county, and the trustee of Ten-Mile township, in Miami county, held a conference regarding the care and treatment required to be extended to Mrs. Mays, and decided that the trustee of the latter township had jurisdiction of the case. Accordingly, he ordered the medical treatment and services for which this action was subsequently brought, but this order was actually made a day or two after the accident, and after the doctor had dressed the wounds, and set the broken bones of the in-

jured woman. The said trustee thereafter approved of all the services rendered by the doctor from the date of the injury. Plaintiff filed no claim against Johnson county, but the commissioners of Miami county requested the commissioners of Johnson county to pay the claim in question. This they refused to do. The services rendered by Dr. Stevens were such as the case required, and the amount asked for was agreed to be the proper amount if he was entitled to any recovery. The doctor lived in Spring Hill township, and had authority from the board of commissioners of Johnson county to treat patients in said township under orders of the trustee thereof. It was specifically agreed to be a fact that "he was ordered to render the services rendered in this case by the trustee of Ten-Mile township." The trial court made the following findings, upon which the judgment was based: "The court * * * does find that the said Elizabeth Mays, at the time of her injury, and during the time the care, services, and treatment were furnished and extended to her by the plaintiff as herein claimed, was a resident of Spring Hill township, in Johnson county, Kansas, and had a legal settlement therein, and because of such fact this defendant is not liable." It appears that the court regarded section 5, c. 79, Gen. St. 1889, as controlling, and no doubt considered that, since Mrs. Mays ought not to have been taken to Miami county, the latter county was not liable to plaintiff for services rendered to her. Three other sections in the same chapter require examination. Section 12 provides that, if any one within the description of a poor person specified in said chapter shall be found in any township, and the overseer of the poor of such township shall be unable to ascertain the last place of legal settlement of such person, the overseer may, in his discretion, provide for such person in the same manner as other persons are directed to be provided for. Section 14 provides for the removal of a person likely to become a public charge from a township where he has no legal settlement to the place where he belongs, upon complaint by the overseer of the poor. But this section contains a limitation in the following words: "If the same can be conveniently done; but if he or she cannot be so removed such persons shall be relieved by said overseer whenever such relief is needed." Section 24 makes it the duty of the overseer of the poor on complaint being made that any person, not an inhabitant of his township, is lying sick therein, or in such condition that he or she is likely to suffer, to examine into the case of such person, and grant such temporary relief as the nature of the same may require. It appears from the foregoing that our poor laws are comprehensive in their scope, and that they confer considerable authority and discretion upon the overseers of the poor. Cases frequently arise where a poor person is sent to his proper county; but, if he is sick, or severely injured, it cannot well be done. The law has provided for such persons, and

we think the case at bar is one of the exceptional cases. It is true that, simply because she so requested, Mrs. Mays ought not to have been taken into Miami county to be cared for at its expense; but it is a matter of no importance that she was taken there at her own request. The important fact is that the trustee of Ten-Mile township found her in his township, and it is very likely that she was then in such a condition that humane considerations influenced him to decide against her removal. The presumption that public officers perform their duties to the best of their abilities runs just as strongly in favor of a township trustee as in the case of a county commissioner. If the injured woman could not be removed from the place where he found her, she had to be cared for there under his directions. He had that duty under the law. The responsibility of determining the matter rested with him. He concluded that she must be cared for under his orders. We think there was ample authority for the action of the trustee of Ten-Mile township in the section of the law we have cited. The services having been rendered under his orders, the county became liable therefor. The trial court erred, therefore, in rendering judgment for the defendants. The judgment will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

MISSOURI PAC. R. CO. v. CLARK.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

APPEAL—REVIEW.

Where the question of negligence is submitted to a jury, under proper instructions as to the law, and the findings and verdict are sustained by competent evidence, the verdict will not be disturbed by this court.

(Syllabus by the Court.)

Error from district court, Allen county, L. Stilwell, Judge.

Action by Edward Eugene Clark, by his father and next friend, W. H. Clark, against the Missouri Pacific Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. H. Richards, C. E. Benton, and Campbell & Hankins, for plaintiff in error. Oscar Foust & Son and T. S. Stover, for defendant in error.

SCHOONOVER, J. The defendant in error commenced his action against the plaintiff in error in the district court of Allen county, to recover damages for personal injuries sustained in consequence of the alleged negligent acts of the defendant. He avers in substance that on and before the 3d day of June, 1892, "said defendant permitted a number of its box cars to stand for an unreasonable length of time on one of

the public streets of the city of Iola, blocking up a portion of said street, and that while he (said plaintiff) was riding on horseback along this street, as he attempted to pass said cars, his horse became frightened at them, and threw him; that his foot became caught in the stirrup, and, while in this position, the horse dragged and kicked him, and he thereby sustained the injuries complained of." The case was tried to a jury, and resulted in a verdict in favor of the plaintiff below for the sum of \$1,000 damages. The jury also returned, with their general verdict, answers to special questions submitted to them by the court.

Section 1 of the ordinance granting to the St. Louis, Ft. Scott & Wichita Railroad Company the right of way through the city of Iola reads as follows: "Section 1. * * * That there is hereby granted to the St. Louis, Fort Scott & Wichita Railroad Company the right of way to construct, maintain and operate its line or railway through said city, and upon and through Benton street, hereby granting said railroad company the right to perpetually use said street to operate its said railway: provided, that said railroad company constructs and maintains suitable crossings on said street at all points of intersection thereof by other streets and highways within the limits of said city."

The court instructed the jury in the following language: "If you believe from the evidence that the St. Louis, Ft. Scott & Wichita Railroad Company was authorized by the mayor and council of the city of Iola to construct its railroad and side tracks over and along Benton street, in said city, and that said mayor and council gave to said railroad company the perpetual use of said street for the purpose of maintaining and operating its railroad thereon, and that the only provision for such granting was that said railroad company should construct and maintain suitable crossings at places where other streets in said city intersect said Benton street; and if you further believe that said railroad company afterwards constructed its said railroad and side tracks along said street, and that, at the point where Buckeye street intersects said Benton street, a suitable crossing was constructed, and has since been maintained, not less than twelve feet long,—then I instruct you that the said railroad company and its successors had the right to use all of said Benton street in the operation of its railroad, and, in the operation of its said railroad, would have the right to permit its cars to stand upon its side track in any part of said Benton street except on the said crossings which it was required to construct and maintain by said city, subject, however, to the conditions and limitations I shall now mention." The plaintiff insists that the trial court erred in adding to the above instruction the words "subject, however, to the conditions and limitations I shall now mention," and in giving the following instruc-

tions: "(4) If you should believe from the evidence that the defendant railroad company left standing on its side tracks for an unreasonable length of time, prior to the time plaintiff sustained the injuries complained of, a number of its box cars, and that such cars were left in such close proximity to the crossing on Buckeye street that defendant was required to maintain, as indicated in the previous instruction, that horses of ordinary gentleness would be liable to be frightened by said cars; and if you should further believe that the horse plaintiff was riding was an ordinarily gentle horse, and that plaintiff, in the exercise of ordinary care and prudence, attempted to pass over said crossing, and his horse became frightened at such cars left standing on the track, and threw him, and he thereby sustained the injuries complained of,—then, and under these circumstances, if they exist, the plaintiff would be entitled to recover. (5) But, on the contrary, if the horse was not an ordinarily gentle horse, if he was one that was liable to take fright at strange objects, if the cars were simply left standing on the side track, and not taking up any appreciable portion of the crossing itself, and thereupon the horse got frightened at said cars, and ran away, and threw the plaintiff, then, and under these circumstances, if they exist, the defendant would not be liable in this action. (6) There is another phase of the case to which I will now proceed to call your attention. If you should believe from the evidence that the said defendant, for an unreasonable length of time, prior to plaintiff's sustaining the injuries complained of, left standing on its side track some cars, and that some appreciable portion of such cars or car projected over and impeded the street crossing itself, and that plaintiff's horse became frightened at such car, and threw and injured him, then, and under those circumstances, if they exist, the plaintiff, if he exercised ordinary care and prudence for his own safety, would be entitled to recover, regardless of the question whether the horse was an ordinarily gentle horse or not, only in so far as the disposition of said horse may affect the question as to whether or not the plaintiff exercised ordinary care and prudence in attempting to pass over said crossing, as will be subsequently explained."

The above instructions are correct in point of law, while the charge, considered as an entirety, in a clear, concise, and comprehensive manner, states the law applicable to the facts, and fully informed the jury as to what material facts must be found before the plaintiff could recover. The jury found that the horse plaintiff below was riding at the time complained of was a reasonably gentle and reasonably well-broken animal to ride; that it was about seven years old; that it was not in a fretful mood at the time

of the injury, but that it was in the habit of shying. To the following questions, answers were made as follows: "(13) After reaching the city limits, did the plaintiff pass over from the street running north and south, and parallel with Buckeye street, and immediately east thereof, and which was well traveled, and as near a route to the city? A. Yes; but followed the practicable route. (14) Did the plaintiff see both of the cars standing in the place they were from the point where he first entered Buckeye street, and about 100 yards distant? A. Yes. (15) From that point, was there a plain traveled road back to the street eastward leading to the town, and which the plaintiff had just crossed on his way to Buckeye street? A. Yes. (16) Could the plaintiff, from the point where he entered Buckeye street, have probably avoided crossing the railroad track in close proximity to cars by following said street? A. No. (17) Might he have crossed at a point where there were no cars in close proximity on the street parallel with and immediately west of Buckeye street? A. No. (18) Was there a roadway north of and running to the last-mentioned street, along the right of way and tracks of defendant company in Benton street? A. Yes; but not a public highway. (19) Did the horse perceive both the cars, looking from one to the other, on the right and on the left of the road, as it approached the crossing, and before it stopped and whirled? A. Yes. (20) Did the plaintiff know that the horse saw the cars, as stated in the last above question, before it got to the point where it finally stopped and whirled to the right? A. Yes. (21) Did the horse hesitate after it saw the cars, and was it urged along by the plaintiff, and that, in order to urge it, he hit it with the stick several times? A. Horse hesitated, but no evidence that plaintiff used stick more than once. (22) Did the horse go much slower after it perceived the cars from some distance before it whirled, being urged by the plaintiff? A. Evidence shows horse was walking when he perceived the cars. * * * (29) Did the car on the east side of the crossing extend over the end of the crossing planks? A. Yes. (30) If you answer the last above question in the affirmative, how far did it extend over, and what part of the car extended over? A. The bumper, about 18 inches."

The instructions of the trial court complained of by the plaintiff in error have been set forth in full in this opinion. The question of negligence was fairly submitted. There is competent evidence to support the verdict of the jury, and their answers to special questions. Other objections were made to the rulings of the court, but they afford no ground for reversal. The judgment of the district court will be affirmed. All the judges concurring.

STATE v. CHILDERS.

(Supreme Court of Oregon. Aug. 9, 1897.)

FORGERY—INDICTMENT—ALTERATION—VARIANCE—
NOTICE—EVIDENCE—NEW TRIAL—AP-
PEAL—REVIEW—PRESUMPTIONS.

1. It is unnecessary to set out in an indictment for forgery the tenor of the forged instrument, as the form prescribed for such indictment (Hill's Ann. Laws, p. 1004) does not require it.

2. Where an indictment for uttering a forged indorsement of a county warrant set out the warrant as "for road work. Desk No. 9," when in fact it was "for road work, Dist. No. 9," the variance was immaterial, there being no question as to identity.

3. In a prosecution for uttering the forged indorsement of a county warrant, wherein a forged order purporting to direct the county clerk to deliver such warrant to defendant was admitted, it will be presumed, where the bill of exceptions does not purport to contain all the evidence, that evidence had been introduced which rendered the order admissible.

4. Where defendant in a criminal prosecution did not offer himself as a witness, and his testimony as taken on a former trial on the same indictment was read to the jury on behalf of the state, as declarations tending to prove guilt, it must be presumed, in the absence of a certificate showing that the bill of exceptions contains all the evidence, that whatever foundation was necessary for the admission of such testimony was laid.

5. Where the person, alleged to have been defrauded by means of the forged indorsement of a county warrant, purchased it through an agent, who knew that defendant had no interest in it, and saw him indorse it, but did not know what names were written thereon, it cannot be said that he knew that such indorsement had been forged.

6. Under Hill's Ann. Laws, § 1340, providing that "an issue of facts arises (1) upon a plea of not guilty; or (2) upon a plea of a former conviction or acquittal of the same offense"; and section 1378, providing that, on a plea of former conviction or acquittal, "the verdict is either 'for the state' or 'for the defendant,'"—alleged error in denying a motion to set aside a verdict of guilty, and for a new trial, for want of a verdict on defendant's plea of former acquittal, cannot be reviewed on appeal, as such motion is addressed to the sound discretion of the trial court.

7. Where there was no verdict on a plea of former acquittal, it will be presumed that defendant either withdrew or waived such plea, in the absence of a bill of exceptions showing that he had requested the trial court to instruct the jury to find on the issue raised thereby, and it had refused to do so, or that the jury had been discharged without performing such duty after having been so instructed.

8. Where the dates on which an indictment purports to have been found and returned had been erased, and others inserted in lieu thereof, defendant was not prejudiced.

Appeal from circuit court, Multnomah county; T. A. Stephens, Judge.

Ben Childers was convicted of forgery, and he appeals. Affirmed.

B. P. Welch, for appellant. T. S. Potter, Dep. Dist. Atty., for the State.

MOORE, C. J. The defendant, Ben Childers, was indicted, tried, and convicted of the crime of knowingly uttering and publishing, as true and genuine, a forged indorsement of a county warrant of Multnomah county, with intent to injure and defraud one M. M. Bloch;

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and, having been sentenced to imprisonment in the penitentiary for the term of six years, he appeals from the judgment thus rendered, assigning numerous errors, which will be considered. The indictment having set out a warrant of the tenor following: "No. 8,117. Portland, Oregon, July 2, 1894. Treasurer of Multnomah County, Oregon: Pay to A. Hallock, or order, thirty-one and 56/100 dollars and — cents, out of the road funds in your hands, not otherwise appropriated. Class 32 for road work. Desk No. 9. By order of the county court. T. C. Powell, Clerk of Multnomah County, by H. C. Smith, Deputy,"—there was introduced in evidence, over the defendant's objection and exception, a county warrant of said county, issued for "road work, Dist. No. 9"; and it is contended that there was such a variance between the allegations of the indictment and the recital of the warrant as to render the latter inadmissible in evidence. The rules of the common law required the prosecuting officer to set out, if possible, in an indictment for forgery, the alleged fraudulent writing in *hæc verba*, to enable the court, from an inspection of the pleading, to judge whether the instrument claimed to have been unlawfully uttered was one of which forgery might be committed. 2 Bish. New Cr. Proc. § 403; State v. Callendine, 8 Iowa, 238; Santolini v. State (Wyo.) 42 Pac. 746. The form prescribed for an indictment for forgery does not provide that the instrument, which is the subject thereof, shall be set out in *hæc verba* (1 Hill's Ann. Laws Or. p. 1004); and in an action on an indictment, alleging the substance and legal effect only of a writing claimed to have been forged, it was held that a variance of two days in the dates stated in the pleading and as recited in the instrument was immaterial (State v. Thompson, 28 Or. 296, 42 Pac. 1002). It would seem that, under our statute, the common-law rule has been abrogated; that it is now unnecessary to set out in the indictment the tenor of a written instrument alleged to have been forged; and that the substance or legal effect thereof is sufficient to enable the court to judge whether the writing is the subject of forgery, and to permit the defendant to make his defense. The state having elected to set out in the indictment the tenor of the instrument, the question is presented whether it is bound to prove the fact as alleged, thus rendering the order inadmissible in evidence. It is an elementary rule that, when a thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity, and hence a variance in the proof is usually fatal. 1 Greenl. Ev. § 65. "It may be observed," says this learned author at section 58, "that any allegation which narrows and limits that which is essential is necessarily descriptive. Thus, in contracts, libels in writing, and written instruments in general, every part operates by way of description of the whole. In these cases, therefore, allegations of names, sums, magni-

tude, dates, durations, terms, and the like, being essential to the identity of the writing set forth, must, in general, be precisely proved." Under the very strict rules announced by Prof. Greenleaf, the variance complained of may have been fatal, but we think the better doctrine is expressed by Earl, J., in *Harris v. People*, 64 N. Y. 148, in which he says: "The strictness of the ancient rule as to the variance between the proof and the indictment has been much relaxed in modern times. Variances are regarded as material, because they may mislead a prisoner in making his defense, and because they may expose him to the danger of being again put in jeopardy for the same offense." Applying this modern rule to the case at bar, we think the defendant could not have been misled in making his defense by this variance; and, further, the identity of the county warrant described in the indictment with the one offered in evidence is unquestionable; and, such being the case, the judgment rendered will afford a bar to another prosecution for the same offense. From an inspection of the indictment, the court could say, as a matter of law, that the writing imported an obligation to pay a given sum of money, and was therefore a subject of forgery; and, the amount therein specified not being involved in the recital that it was executed for road work either in Desk or Dist. No. 9, we deem the variance immaterial.

2. It is also contended that the court erred in permitting the state to offer in evidence, over the defendant's objection and exception, what purported to be an order issued by A. Hallock, requesting the clerk of said county to deliver to the defendant the county warrant in question. The rule is well settled that where a party is charged with knowingly uttering a forged instrument, and the fact of his possession of the paper is shown, but his knowledge of its character is disputed, it is admissible to show that, shortly before or after the event charged, he held or uttered similar forged instruments, to an extent which makes it impossible that he should be ignorant of the forgery. *Whart. Cr. Ev.* § 30; 3 *Rice, Ev.* § 404. Mr. Wharton, in his work on Criminal Law (section 649), referring to this question, says: "Where the scienter or quo animo is requisite to, and constitutes a necessary and essential part of, the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct crime." To the same effect, see, also, 1 *Greenl. Ev.* § 53, and 3 *Greenl. Ev.* § 15, and notes. There is no evidence in the record, however, that tends to show that defendant disputed his knowledge of the character of the instrument, or claimed the right, as the agent of Hallock or otherwise, to indorse the county warrant for him; but inasmuch as the bill of exceptions does not purport to contain all the evidence in-

troduced at the trial, in the absence of which it must be presumed that such evidence was before the court, it thereby renders admissible the forged order of Hallock, upon the faith of which the defendant obtained the warrant in question from the county clerk.

3. The defendant, at the first trial on this indictment, was a witness in his own behalf, and, his testimony being taken in shorthand, the stenographer reporting it was permitted, over the defendant's objection and exception, to read the notes thereof to the jury; and it is now contended that, the defendant not having offered himself as a witness at this second trial, the record of his testimony given at the former trial could not be given in evidence against him, and that the court erred in permitting it to be read to the jury. The testimony in question was highly prejudicial to the defendant, being tantamount to a confession of his guilt; and as declarations against interest, when voluntarily made, are admissible, as tending to prove guilt (*Teachout v. People*, 41 N. Y. 7; *People v. Wentz*, 37 N. Y. 303; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Crocker*, Id. 404), it must be presumed, in the absence of a certificate by the trial judge showing that the bill of exceptions contains all the evidence, that a proper foundation was laid, if necessary, for the admission of the testimony given by the defendant at his former trial.

4. It is insisted that the court erred in its refusal to instruct the jury to return a verdict of acquittal after the state had rested its case. The point contended for assumes that the evidence did not support the allegations of the indictment. M. M. Bloch, the person alleged to have been defrauded by the defendant, testifies that he never had any conversation with Childers, nor did he know that the latter ever had the county warrant in his possession, but that he received it from, and paid the face value thereof to, one Gee. Gee also testifies that he bought the warrant from defendant; that he saw him indorse it; that he did not read the names written thereon, but that he knew Childers had no interest in it. Bloch, further testifying in relation to the county warrant, in answer to the question, "Under what circumstances,—how did you get it from Gee?" says: "Mr. Gee was buying warrants for me, and what he was buying he was turning over to me every evening, and among others was this paper." It will thus be seen that Gee was the agent of Bloch for the purpose of purchasing county warrants, so that a delivery by the defendant to Gee was a delivery to Bloch. It is claimed, however, that Gee, at the time he purchased the warrant, knew the indorsement thereof was forged, and, such being the case, his knowledge was that of the principal, and hence Bloch was not defrauded by the purchase of a county warrant, the indorsement of which he knew was forged. Gee, referring to the indorsement of the warrant, in answer to the question, "Did you see the

name signed on the back of it?" says: "Yes; I saw the name signed on the back of it, but I never read it to see what it was. I am not much of a reader anyway." While this witness testifies that he knew Childers had no interest in the warrant, and that he saw him indorse it, it does not appear that he knew what names were written thereon, and hence it cannot be said that he knew the indorsement had been forged, even if his knowledge thereof could be imputed to Bloch.

5. The defendant, in addition to his plea of not guilty, entered a plea of former acquittal; but, the jury having made no finding thereon, he moved the court to set aside the verdict of guilty as charged, and for a new trial; but, the motion being denied, it is maintained that the court erred in its refusal to grant his request. Our statute provides that: "An issue of fact arises (1) upon a plea of not guilty; or (2) upon a plea of a former conviction or acquittal of the same offense." Hill's Ann. Laws Or. § 1340. "And upon a plea of former conviction or acquittal of the same crime, the verdict is either 'for the state,' or 'for the defendant.'" Id. § 1378. In California it is held, under a similar statute, that a defendant is entitled to a verdict on each plea; that, when the record does not disclose that he withdrew or waived either plea, it will not be presumed that he did so; and that if more than one plea be interposed, and the jury return a verdict of guilty only, no judgment of conviction can be pronounced on such a finding. *People v. Kinsey*, 51 Cal. 278; *People v. Helbing*, 59 Cal. 567; *People v. Fuqua*, 61 Cal. 377. Whatever the rule may be in California, we do not think the action of the court, which is sought to be reviewed, is properly before us for consideration; for it has been repeatedly held by this court that a motion for a new trial is addressed to the sound discretion of the trial court, and that its ruling thereon cannot be assigned as error on appeal. See the cases cited to this effect in *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, and 33 Pac. 537. Neither would a motion in arrest of judgment, under our statute, correct the error complained of, since such motion is available only when the grand jury which found the indictment had no legal authority to inquire into the crime charged, because the same was not triable within the county, or when the facts stated in the indictment do not constitute a crime. Hill's Ann. Laws Or. § 1391, and subdivisions 1 and 4 of section 1322. Had the defendant requested the trial court to instruct the jury to find upon the issue raised by his plea of a former acquittal, and it had refused to do so, or the jury had been discharged without performing this duty, after having been so instructed, the question would have been undoubtedly reserved, and could be brought here by bill of exceptions for review, in the absence of which we must presume that the defendant either withdrew or waived his plea of a former acquittal.

6. It is also insisted that the grand jury which found the indictment was not selected in the manner prescribed by law, but, since the bill of exceptions contains no reference to the manner of impaneling that body, the point contended for must necessarily prove unavailing. Some objection is also made because the dates upon which the indictment purports to have been found and returned have been erased, and others inserted in lieu thereof, but we cannot think the defendant has been prejudiced thereby. Finding no error in the record, the judgment must be affirmed, and it is so ordered.

HESS v. OREGON GERMAN BAKING CO. et al.

(Supreme Court of Oregon. Aug. 2, 1897.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—WAIVER OF PRELIMINARY EXAMINATION—PRESUMPTION—REBUTTAL—QUESTION OF LAW—DEFENSE—ADVICE OF PROSECUTING OFFICER.

1. The waiver of a preliminary examination is tantamount only to a finding by the magistrate that there is sufficient cause for holding the accused to answer.

2. On a preliminary examination, a finding that there is sufficient cause for holding the accused to answer is only prima facie evidence of probable cause, and may be overcome by competent evidence on a trial for malicious prosecution.

3. Where a complaint for malicious prosecution alleges a want of probable cause, plaintiff may rebut the presumption of probable cause raised by his waiver of a preliminary examination.

4. In an action for malicious prosecution, though the credibility of the evidence and what facts it proves are for the jury, the question whether such facts do or do not constitute probable cause is for the court exclusively.

5. Where defendant pleads that, in instituting the prosecution, he acted on the advice of a public prosecuting officer, probable cause is established where it is shown that defendant disclosed to such officer all the facts and circumstances within his knowledge, or which he had reasonable ground to believe, though there were exculpatory facts which he might have ascertained by diligent inquiry.

Appeal from circuit court, Clackamas county; T. A. McBride, Judge.

Action by Elizabeth Hess against the Oregon German Baking Company and Theodore H. Liebe. From a judgment in favor of plaintiff, defendants appeal. Reversed.

H. M. Cake and W. D. Fenton, for appellants. Henry E. McGinn and N. D. Simon, for respondent.

BEAN, J. This is an action to recover damages for malicious prosecution, and comes here on an appeal from a judgment in favor of plaintiff. In the complaint it is averred that the defendant Liebe falsely, maliciously, and without probable cause charged the plaintiff in a criminal information before a magistrate with the crime of larceny, upon the hearing of which she waived an examination, and was bound over to appear before the grand jury, which body returned an indictment indorsed "Not a true bill," and she was thereupon discharged, and her bail exonerated.

ed. It is contended that the complaint does not state a cause of action, because it appears therefrom that, when the plaintiff was brought before the magistrate, she voluntarily waived a preliminary examination, which it is claimed was practically a confession or acknowledgment that there was probable cause for her arrest. There does not appear to be any provision in the law for the waiver of a preliminary examination by a person accused of a crime before a magistrate, although it is quite a common, and no doubt unobjectionable, procedure. Its effect, however, can be nothing more than an admission that there is sufficient cause for holding the accused to answer, and this is the only result which could flow from an examination. In other words, the waiver of an examination is tantamount in law to a finding by the magistrate that there is sufficient cause to believe the defendant guilty, and the authorities are substantially agreed that such a finding is not conclusive, but only *prima facie*, evidence of probable cause, which may be overcome by competent evidence on the trial, and that an allegation in the complaint of a want of probable cause is a sufficient averment for the admission of such proof. *Railway Co. v. Hendricks* (Ind. App.) 40 N. E. 82, and authorities there cited. This being so, the complaint is not open to the objection made.

It is next claimed that the court erred in instructing the jury that the waiver of an examination is not of itself conclusive evidence of the existence of probable cause, but "is a single fact, to be weighed by the jury for what it, under all the circumstances, appears to be worth in determining that question." The objection to this instruction is that it assumes the question as to whether probable cause has been shown to be one of fact, to be determined by the jury, and not of law, for the court; and this seems to have been the view of the trial judge as indicated by his general instructions. After defining probable cause, and giving an unusually clear and accurate statement of the law as to when it would be a defense to an action of this character, the court concluded its charge upon the subject as follows: "If therefore you find that the defendant had reasonable ground to believe and suspect that the plaintiff was guilty of larceny, or had knowingly received the avails of the larceny committed by another, and was assisting such other to secrete such avails, with the view to place them beyond the reach of the owner, and that, acting on such belief, he instituted the proceedings complained of, your verdict should be for the defendant." This instruction necessarily involved the submission to the jury of the question of probable cause. There is no distinction between the existence or nonexistence of a reasonable ground of belief, and the existence or want of probable cause. The difference is one of expression only, and not of substance. The existence of reasonable grounds for believing a charge to be true is

nothing more than probable grounds for making it. And, in determining whether the defendant had reasonable grounds to believe the plaintiff guilty, the jury must necessarily decide whether or not there was probable cause for instituting the prosecution. The charge of the court, therefore, was nothing more than defining probable cause, and permitting the jury to determine whether the facts which they might consider to be proved were within or without that definition.

The point for decision, then, is whether the question of probable cause in an action for malicious prosecution is one of fact, to be submitted to the jury, or of law, to be decided by the court. The decisions upon this question are not entirely uniform, but we think the great weight of authority is to the effect that in this class of actions the question of probable cause is a mixed one of law and fact, in the sense that the facts, when in controversy, are to be determined by the jury, but whether they constitute probable cause is for the court. "No rule of law is better settled, both in England and in America," says Mr. Thompson, "than that in civil actions for damages for the malicious prosecution of a criminal action the question of probable cause is a question of law, which the judge must decide, upon established or conceded facts, and which it is error for him to submit to the jury." 2 *Thomp. Trials*, § 1613. And Mr. Newell says that "what facts, and whether particular facts, constitute probable cause, is a question exclusively for the court. What facts exist in a particular case when there is a dispute in reference to them is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. These rules involve an apparent anomaly, and yet few, if any, rules of the common law rest upon greater unanimity or strength of authority." Newell, *Mal. Pros.* 277. In *Panton v. Williams*, 2 *Adol. & El.* 169, 42 *E. C. L.* 622, decided in 1841, where the question was elaborately examined both by counsel and the court, Tindal, C. J., reviewing the earlier authorities, at length concluded that, in cases of this character, whether the facts which are relied upon to show probable cause are true or not is a question for the jury, but whether they constitute probable cause is a question wholly for the court. "There have been some cases in the later books," he said, "which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury; but, upon further examination, it will be found that, although there has been an apparent, there has been no real, departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question

whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested it is obvious that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury, while at the same time they have received the law from the judge,—that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable or probable ground for the prosecution, or the reverse. And, such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them." In a great majority of the American states the same rule has been adopted, and it is held to be the duty of the court to determine, as a matter of law, whether a given state of facts, when conceded or established, no matter how numerous or complicated, constitutes probable cause for instituting a criminal prosecution. Whether the facts and circumstances alleged to show probable cause are true and exist is, of course, a question of fact, and, when controverted, must be determined by the jury, but whether, supposing them to be true, they amount to probable cause, is a question of law. If none of the facts are in dispute, the court must decide the question without the intervention of a jury; but, if the case cannot be so decided, it must go to the jury, with instructions from the court that certain facts, if found by them to exist, do or do not constitute probable cause; or, as put by Waldo, C. J., in *Gee v. Culver*, 12 Or. 223, 6 Pac. 776, "the judge must say to the jury: 'I tell you, if you think so and so, there is a want of reasonable and probable cause.'" In short, the jury must determine

the facts if controverted, but not their legal effect. "What facts and circumstances amount to probable cause is a pure question of law; whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, and the latter for the jury,"—says the supreme court of Massachusetts in *Stone v. Crocker*, 24 Pick. 84. "Probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury," says Judge Harrison in *Ball v. Rawles*, 93 Cal. 227, 28 Pac. 938, "and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not, however, necessary that the facts be found by the jury in the form of a special verdict. The court may instruct them to render their verdict for or against the defendant, according as they shall find the facts designated to it which the court may deem sufficient to constitute probable cause. But it is necessary for the court, in each instance, to determine whether the facts that they may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant, according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly."

Without further elaboration of this question or further special reference to the authorities, it is sufficient to say that, under the adjudged cases, it is generally the duty of the trial court, in instructing juries in cases of this character, to apply the law to the facts, by telling them whether the facts which the evidence tends to establish, if found by them to exist, will or will not constitute probable cause for the prosecution, leaving to the jury only the question as to the existence of such facts, and that it is error to define probable cause in general terms, and to submit to the jury the question as to whether the facts in the particular case do or do not come within such definition. The credibility of the evidence, and what facts it proves, are for the jury; but whether such facts do or do not constitute probable cause is a question exclusively for the court.

The court should therefore, by means of a hypothetical instruction, group the facts which the evidence tends to prove, and instruct the jury that, if they find such facts to have been established, they must find that there was or was not probable cause. 2 *Thomp. Trials*, §§ 1618, 1620, 1630; 2 *Greenl. Ev.* § 454; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937; *Driggs v. Burton*, 44 Vt. 124; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Bulkeley v. Smith*, 2 Duer, 261; *Masten v. Deyo*, 2 Wend. 424; *Bulkeley v. Keteltas*, 6 N. Y. 384; *Besson v. Southard*, 10 N. Y. 236; *Stewart v. Sonneborn*, 98 U. S. 187; *Railroad Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Cole v. Curtis*, 16 Minn. 182 (Ill. 161); *Burton v. Railway Co.*, 33 Minn. 180, 22 N. W. 300; *Smith v. Munch (Minn.)* 68 N. W. 19; *Brooks v. Bradford (Colo. App.)* 36 Pac. 303; 14 Cent. Law J. 82; *Emerson v. Cochran (Pa. Sup.)* 4 Atl. 498, and note. This rule is peculiar to this class of actions, but is one of long standing, and founded upon sound reason, good authority, and public policy. Actions to recover damages for malicious prosecution have never been favored in law, although they have been readily upheld, when it is shown that the prosecution was instituted through actual malice, and without probable cause. Malice in such cases is always a question for the jury, but as the authority to institute a criminal prosecution, and the extent of such authority, are derived from the law, the law must judge as to what will constitute probable cause therefor. The welfare of society imperatively demands that those who violate the law shall be promptly and speedily punished, and, to accomplish that purpose, the rule has been firmly established that any citizen who has good reason to believe that the law has been violated may cause the arrest of the supposed offender; and if, in doing so, he acts in good faith, the law will protect him against an action for damages, although the accusation may in fact be unfounded. This rule is founded on grounds of public policy to encourage the exposure of crime and the punishment of criminals, and when, therefore, the act of a citizen in thus enforcing the law is challenged, the court must determine the question, when the facts are admitted or established, as to whether he had probable cause for so doing, and not leave it to the arbitrament of a jury. Because this rule of law was not followed in the submission of the case under consideration, it must be reversed, and a new trial ordered, although the instructions as actually given by the court are unobjectionable and a lucid statement of the law, in view of the theory upon which the case was submitted by the trial judge.

One of the defenses relied upon was that, before instituting the criminal prosecution against the plaintiff upon which this action for damages is founded, the defendant in good faith sought the advice of the proper district attorney, and made to him a full and

fair statement of all the facts and circumstances bearing on the case within his knowledge or belief, and was advised by that officer that there was sufficient cause for instituting the prosecution, and that he acted upon such advice. Upon this question the court charged the jury that "where a party has communicated to the district attorney all the facts bearing on the case of which he has knowledge or could have ascertained by reasonable diligence and inquiry, and has acted upon the advice received, honestly and in good faith, the absence of malice is established, the want of probable cause is negated, and the action for malicious prosecution will not lie. But he must act in good faith, and fairly state the substance of all the material information he has in his possession in relation to the fact of the alleged crime." Objection is made to this instruction because, under the rule therein announced, in order to shield himself by showing that he acted on the advice of the district attorney, the defendant was required to show that he disclosed to that officer, not only all the facts bearing on the guilt or innocence of the plaintiff within his knowledge or belief, but also such facts as he could have found out by reasonable diligence and inquiry. The instruction in question is substantially in the language of *Newell on Malicious Prosecution* (page 310), and is an expression to be frequently found in judicial opinions, but is probably a little broader than the authorities warrant when the defense relied upon is that the defendant, in instituting the prosecution, followed and acted upon the advice of the public prosecuting officer. The rule seems to be that where one seeking in good faith the advice of a public prosecuting officer, about the commencement of a criminal prosecution, discloses to such officer all the facts and circumstances within his knowledge, or which he has reasonable ground to believe, relating to the offense, and is advised by that officer to institute the prosecution, his defense of probable cause will be established if he acted in good faith upon such advice, even though there were other exculpatory facts which he might have ascertained by diligent inquiry. He is bound to make a full and fair disclosure of all the material facts within his knowledge; and, if he has reason to believe that there are other facts bearing upon the guilt or innocence of the accused, he must either disclose that belief to the prosecuting officer, or himself make inquiry to ascertain the facts in relation to the matter, but more than this he is not required to do. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. If he honestly believes that he is in possession of all the material facts, and makes a full, fair, and candid statement of them to the prosecuting officer, and acts in good faith on the advice of that officer, he ought to be protected. See the following authorities, to which reference is made

for a fuller discussion of this question: Newell, Mal. Pros. 318; Johnson v. Miller, 69 Iowa, 562, 29 N. W. 743; Dunlap v. Insurance Co. (Cal.) 42 Pac. 20; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804.

There are several other assignments of error discussed in the brief of counsel, but, as they will probably not arise on another trial, they will not be considered at this time.

(9 N. Mex. 49)

CERRILLOS COAL R. CO. v. DESERANT.
(Supreme Court of New Mexico. Aug. 6, 1897.)

INJURY TO SERVANT—VICE PRINCIPAL—DANGEROUS PREMISES—ASSUMPTION OF RISK—MASTER AND FELLOW SERVANT—COMBINED NEGLIGENCE—FELLOW SERVANTS—CAUSE OF ACCIDENT—CONFLICTING THEORIES—COMPETENCY OF SERVANTS—STATUTORY PRECAUTIONS—NEGLIGENCE—DAMAGES.

1. A coal-mining company's employé, whose duty it is to make rounds of inspection, and advise the miners, as they go to work, of the condition of their places as to the presence of dangerous gases, represents the company in the discharge of that duty.

2. A coal-mining company was accustomed to place a danger signal on rooms in which standing gas had been detected, and such signal was well understood by all employés to be an imperative command prohibiting entrance with a naked light into any room or place where danger was thus indicated. There was no danger from the standing gas if it were not ignited. An employé went to work in the mine with knowledge of the rule, and that an explosion in another room would endanger life in his own room, and relying on his fellow servants' observance of the danger signal. *Held*, that he assumed the risk, and the company was not chargeable with negligence in not providing a safer place in which to work.

3. Where there is combined negligence of a master and a fellow servant, a servant is precluded from a recovery for personal injuries if the master's negligence was known to him, and acquiesced in without complaint, and was the efficient proximate cause of injury.

4. A coal-mining company's employés who assist in the getting out of coal, without actually drilling holes or doing any blasting with powder, are fellow servants of employés who are so engaged, and are paid according to the quantity of coal mined.

5. In an action for injuries causing death, where there are two theories of the accident, one exempting defendant from liability, and the other not, and there is evidence to support both, it is error to fail to submit both theories under appropriate instructions.

6. A master's duty to see that his servants are competent is discharged when he has taken all reasonable precautions to inquire into the competency of one proposing to enter his service, and, as a result, is satisfied that the applicant is competent.

7. It is error to submit an issue not raised by the pleadings or evidence, where it carries into the case many details calculated to mislead the jury, and draw their minds away from the questions at issue.

8. Where it is purely speculation as to which of two ways an explosion causing injuries originated, verdict should be for defendant, if by either or both defendant was exempt from liability.

9. Under Act Cong. March 3, 1891, providing that managers of coal mines shall provide adequate ventilation, but not prescribing the means to be adopted, failure to comply with the requirement is not negligence per se, but a reasonable effort must be exerted to maintain such ventilation; and, if this were not maintained, it is for the jury to say whether, under all the cir-

cumstances, the failure was due to negligence of the manager.

10. In an action for injuries causing death, the measure of compensatory damages is the present worth of the life of deceased, determined by the jury from the evidence as to age, earning capacity, health, habits, and probable duration of life, but with nothing added by way of solatium to the distributees, and nothing for suffering by deceased.

11. To give exemplary damages against a corporation in an action for injuries causing death, it must be shown by a preponderance of evidence that defendant exhibited such entire want of care as showed a conscious indifference to consequences, or participated in a bad intent.

Error to district court, Santa Fé county; before Justice N. B. Laughlin.

Action by Josephine Deserant, administratrix, against the Cerrillos Coal Railroad Company, for the death of plaintiff's intestate. From a judgment in favor of plaintiff, defendant brings error. Reversed.

H. L. Waldo and R. E. Twitchell, for plaintiff in error. N. B. Field and F. W. Clancey, for defendant in error.

COLLIER, J. For convenience, the parties to this record will in this opinion be referred to as they appeared in the lower court, i. e. plaintiff in error will be called defendant, and vice versa. This is an action by the administratrix of Henri Deserant, deceased, against the Cerrillos Coal Railroad Company, in which damages are claimed for negligence in causing death in its mine, called the "White Ash Mine," on Wednesday, February 27, 1895, as a result of an explosion occurring about 10:45 o'clock in the forenoon. The declaration charges the negligence in various ways conducing to bring about or cause said explosion, but the evidence will be at present considered only as it bears upon the theory which plaintiff's counsel have most insistently urged upon us. This theory is that, in room 8 of the fourth left entry of said mine, defendant negligently permitted to accumulate, and to remain standing for at least 48 hours prior to the explosion, gas in dangerous quantity and ratio to the surrounding air, and that the explosion occurred in the presence of the ordinary naked lighted miner's cap lamp, and that the same was exploded by employés of the company, producing after-damp, fatal to life, and causing the death of plaintiff's intestate, in room 17 of said fourth left entry, the working place to which he had been sent by defendant. It appears that, by this explosion, all the employés, 23 in number, who were at the time in the fourth left entry (except those in what was called the "plane") were killed, and therefore all evidence to show how the explosion occurred, and where was its initial point, is necessarily circumstantial.

The fire boss was an employé whose duty it was to inspect the working places, and inform miners, like deceased, who work by contract,—i. e. were paid according to the quantity of coal mined,—of the condition as to safety of their working places; and he told, or, as he expresses it, he must have told, the

deceased, that his working place was safe when he went to work at 7 o'clock, on the morning of the explosion. As to this duty, the fire boss must be considered, we think, beyond question, as representing the defendant. Thus, it is expressly held in *Cullen v. Norton*, 52 Hun, 9, 4 N. Y. Supp. 774, that a foreman intrusted with the performance of work stands in the place of and represents the master in assigning the servant to his place of labor, and in *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, it is held that "if no one is appointed by a railway company to look after the condition of its cars, and see that the machinery and appliances used to move and to stop them are kept in repair and good working order, it is liable for the injuries caused thereby. If one is appointed by it, charged by it with that duty, and the injuries result from his negligence in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company."

The fire boss had, in his round of inspection, two days before the explosion, discovered standing gas in said room 8 (how much does not appear), which caused him to place therein a danger signal, being what is known as the "fire boss' danger mark,"—a double X, or XX, with date and initial letters of his name. It is shown that such a signal was well understood by all employes to be an imperative command forbidding entrance with a naked light into any room or place where danger was thus indicated. The fire boss did not go again into room 8 until after the explosion, nor is there anything to show that any effort was made to clear this room of standing gas, which, by means of the safety or Davy lamp, he had detected there, notwithstanding that room 8 was considered the worst room in the mine for generating gas. It does not appear in precisely what place in room 8 the danger signal was placed, the fire boss merely saying it was "above the last crosscut." After the explosion, there were found in this room the corpses of two miners, Kelly and Flick,—that of Kelly in the crosscut, and that of Flick in the center of the track, about the end; that is, halfway up between the crosscut and the face of the room, about 45 feet from the crosscut. A tie with fire danger mark on it was found lying across the track, opposite the crosscut. The track was partially taken up. There were implements there commonly used for such purposes, and there were there also two miners' caps and the lamps which carry a naked light, which indicated that Kelly and Flick had gone to room 8 to take up the track, and had partially succeeded when the explosion occurred. According to the plan of ventilation, the air should, as to the rooms in the fourth left entry, have gone first to room 18, and, by brattice or curtains, been carried around its face; thence, by crosscut, to room 17, carried around face; and so on, to the rooms lower numbered, in consecutive order, until arriving at the third left entry air course, being drawn

through all air courses and entries by an exhaust fan at the exit from the mine. It is agreed also between all witnesses that a gas explosion in a mine invariably flies against the air, and therefore, if there were an explosion in room 8, it would have flown towards room 17, where the body of plaintiff's intestate was found, if air were circulating, as the testimony shows, through the fourth left entry of said mine. Defendant produced a considerable amount of evidence showing air circulation, and what was produced by plaintiff tended to show, at most, only a partial obstruction of the fourth left air course, diminishing, but not destroying, the current, the effect of which will be considered in another place in this opinion. We may assume, therefore, that there was, undoubtedly, some air current, because this seems necessary for plaintiff's theory of the effect of the explosion being carried back to room 17, and, further, because there is nothing tending to show the entire absence of an air current going in the direction intended.

The rule adopted in the White Ash Mine, of the fire boss making rounds of inspection, and advising miners, as they went to work, of the condition of their places as to safety, and the fact that all employes well understood that danger signals were used in the mine to prevent entrance into particular places or rooms, presupposed that deceased and his co-employes knew that work was or might be carried on without cessation, though there might be standing gas in places or rooms of the mine, and that they understood, when informed that their working places were safe, that such representation did not mean there was no standing gas in the mine, or in any particular entry of the mine. It can hardly be denied that if the fire boss, on the morning of Deserant's going to work in room 17, had expressly told him there was standing gas in room 8, but it was marked with a danger signal, and Deserant had, nevertheless, gone to his place to work, the presence of such gas could not be urged as negligence by defendant causing his death, unless it were also shown that the room was not danger marked. If the evidence shows that he impliedly agreed to such a condition, the same conclusion should follow. In *Sullivan v. Manufacturing Co.*, 113 Mass. 396, Devens, J., states the rule to be that "where the servant assents to occupy the place prepared for him, and incur the danger to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master to make it so. Having consented to serve in the way and manner in which the business was conducted, he has no ground of complaint, even if reasonable precautions have been neglected." If, in the case at bar, "the business was conducted" by placing a danger signal where there was

standing gas, it will not do to say the defendant should, in addition, have placed a man on duty to watch and warn against entrance with naked light, because it might be thought, as a reasonable precaution, such was demanded. In *Naylor v. Railway Co.* (Wis.) 11 N. W. 24, it is held that "if a servant, knowing the hazard of his employment as the business was conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury, because he may show there is a safer mode in which the business might have been conducted, and that, had it been conducted in that way, he would not have been injured." To the same effect, also, is *Hewitt v. Railroad Co.* (Mich.) 34 N. W. 659. In *Sheets v. Railway Co.* (Ind. Sup.) 39 N. E. 154, it was ruled that "where the foot of deceased was caught in an unblocked switch, and he is run upon and killed by the careless act of the engineer in kicking cars with great and unnecessary force, the railway company was not liable, because it was the act of fellow servant, and the fact of the frog being unblocked does not change the rule, as that was a danger known to the deceased, making the accident a risk incident to the service." Before that, the Indiana supreme court held to the same effect, in *Railroad Co. v. Henderson*, 33 N. E. 1021, where the defect, known to the plaintiff and defendant alike, was in the roadbed. The two cases just cited show defects which it was the plain duty of the master to have remedied, but knowledge and an appreciation of danger by plaintiffs were held to defeat their action. It is not suggested anywhere in argument that Deserant did not thoroughly realize that, if an explosion occurred from standing gas in the vicinity of his working place, his life would be endangered. He was a man 53 years of age, was a miner by occupation, and had worked formerly in the White Ash Mine, and again for seven weeks immediately prior to his death. It can scarcely be thought that, if he supposed that the danger signals were negligently or willfully disregarded, his life would not be jeopardized by explosive gas.

To similar effect of the cases above cited are those of *Ladd v. Railroad Co.*, 119 Mass. 412; *Hayden v. Railway Co.*, 29 Conn. 548; *Goltz v. Railway Co.* (Wis.) 44 N. W. 752; and *Haley v. Lumber Co.* (Wis.) 51 N. W. 321. Our supreme court has also held that the "rule of law perfectly well settled" is as follows: "If the servant, before he enters the service, knows, or afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow servant in connection with which or with whom he is to labor is unsafe or unfit in any particular, and if, notwithstanding such knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk

of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him." *Alexander v. Mining Co.*, 3 N. M. 255, 3 Pac. 740. In the case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, it is said that, "where the master has performed his duty in providing his servant with a reasonably safe place at which to work, he is not liable to any one of his servants for the acts or negligence of any mere fellow servant, or co-employé of such servant, where the fellow servant or co-employé does not sustain a representative relation to the master." Again, in the *Baugh Case* it is said: "If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor." If the doctrine laid down by the Massachusetts supreme court in the *Sullivan Case*, supra, is correct, and the defendant had complied with its positive duty to the satisfaction of plaintiff's intestate, there was certainly no personal wrong done by it; and then, if explosion came from ignition by the naked lamp of Flick or Kelly entering room 8, that was the act or negligence of the co-employé. In the *Herbert Case*, supra, the court approved the decision in *Beeson v. Mining Co.*, 57 Cal. 20, as being in harmony with its own views, where the injury ensued from the defective pipe put in by a tinner, which defective pipe caused a fire and death of plaintiff's intestate, holding that for such a pipe the master was responsible, but the decision expressly states that "it did not appear that the deceased knew, or had reason to know, of the defect." In *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, it is held that employers "are bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master falls in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery, which was or ought to have been known to him, and was unknown to the employé or servant. But if the employé knew the defect in the machinery from which the injury happened, and yet remained in the service, without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery." In *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16, Harlan, J., says: "It is undoubtedly the law that an employé is guilty of contributory negligence, which will defeat his right of recovery for injuries sustained in the course of his employment, when such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances,

would have avoided them if in his power to do so." The horns of a dilemma seem here presented to plaintiff. If standing gas in this mine was an obvious danger, the deceased was guilty of contributory negligence, if it was not in fact an obvious danger, it was only because deceased relied upon observance by his co-employees of the rule forbidding entrance into a room where a danger signal was posted. There is nothing to indicate in any way that there was any danger from this standing gas if it were not ignited by going into its presence with a naked light; and, if this were provided against in a way known to deceased, the existence of standing gas cannot, we think, be considered as making his place unsafe, or, if unsafe, only in such a way as he assented to. In *Hough v. Railway Co.*, 100 U. S. 224, it is said that "if the engineer, after discovering or recognizing the defective condition of the cowcatcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death." It would be strange if it could be argued that, though an action by the engineer could not be maintained under such circumstances, yet the fireman, having similar knowledge, and continuing without complaint to ride on the engine used by the engineer, could recover. In *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. 884, it was held, in effect, that if the jury deemed it reckless carelessness in a laborer to work near a dangerous bank for any length of time, however brief, then he could not recover, though injured while waiting the fulfillment of the master's promise to send assistance, so as to guard him against apprehended injury. There is no lack of recognition by us of the well-established doctrine that, where there is combined negligence of an employer and fellow servant, the master is liable for injury inflicted in the course of employment; but the cases we have referred to show, even if we concede failure of duty in this case on the part of the mine owner, that if such failure is known and acquiesced in without complaint, and is the efficient, proximate cause of injury, the servant is precluded from recovery. All these cases we have cited are in entire accord with *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, which states the general principle of liability of the master where he contributes to the injury, as this case speaks in no way of knowledge of defects or of failure of duty of employer had by the injured servant; and, as far as our investigation has gone, none of the cases following this principle deny the effect of knowledge by the employé killed or injured.

If Flick and Kelly were fellow servants of deceased, and it was by their act or negligence, in disobedience of the imperative command given by the danger signal, that death ensued,

it seems clear no recovery can be had upon the theory of explosion originating in room 8. In this we have assumed that deceased agreed to work in the White Ash Mine with rooms containing dangerous gas, merely guarded by a fire mark or danger signal. At least, there was evidence altogether sufficient for the court to have explicitly instructed the jury on this question, and it wholly omitted to do so; but we will discuss the court's instructions further on. While there are many decisions from which it might be strongly argued that the standing gas in room 8 could not be considered the proximate cause of the death of the plaintiff's intestate, because the act of Flick and Kelly was an intervening act of such character as to break the chain of causation, and because it was not probable or reasonably to be expected, with the safeguards employed to prevent entrance into a room where there was standing gas, that an explosion and consequent death would occur, yet, upon the principle rigidly stated in the *Cummings Case*, supra, it seems to the writer, at least, that these decisions, among which are those of *Sheffer v. Railway Co.*, 105 U. S. 249, and *Railroad Co. v. Kellogg*, 94 U. S. 469, and the argument upon which they proceed, do not apply. It is preferred, therefore, to place our conclusion upon the ground that the master in this case is not shown to be guilty of negligence of which plaintiff's intestate can complain, as he accepted, or at least there is evidence tending to show that he accepted, employment with an implied waiver as to there being standing gas in places in said mine, provided they were guarded by a danger signal. If injury resulted from a fellow servant's act or negligence under such circumstances, such injury must be considered to have arisen from the risk incident to the employment. That Flick and Kelly were fellow servants of the deceased, they being "company men," employed in assisting in the getting out of coal without actually drilling holes or doing any blasting with powder, as deceased was engaged in doing, we hold to be clear; and, without discussing the question so much gone over, we again cite the *Baugh Case*, supra, and also that of *Railroad Co. v. Charless*, 102 U. S. 359, 16 Sup. Ct. 848. We will close the discussion on this branch of the case by quoting from the case of *Berns v. Coal Co.*, 27 W. Va. 285, as follows: "If, therefore, it appears that the proprietors of the mine had been negligent in permitting fire damp to accumulate in their mine, which would not produce any injury until ignited, and if it were ignited by a fellow servant who went into the dangerous part of the mine with a lighted lamp, contrary to the orders of the proprietors of the mine, and by such lighted lamp the fire damp was ignited and exploded, by which the servants were injured, such explosion and injury would be directly and immediately caused by the act of the fellow servant, and not by the negligence of the master, and the master would not be responsible for such injury."

The other theory advanced as to the explosion is that it was not simply a gas explosion but was a gas and powder explosion, originating in one of the rooms in the fourth left entry, where work in getting out coal was going on, these rooms running from 12 to 18, inclusive, and that it was caused by what is known as a "gunning or windy shot." This kind of shot was described as being caused by an insufficiency of powder to break the coal, or from insufficient or careless tamping. In either event there would issue from the hole drilled into the coal a sheet of flame, extending in some instances a distance of 60 or 70 feet. This flame, it was testified, would ignite dust, impregnating the air, and cause explosion where the gas only amounted to $1\frac{1}{2}$ to 2 per cent., so small as not to explode in the presence of naked lights carried on the caps of the miners. These gunning or windy shots are shown to "occur occasionally, but are not a regular occurrence." This theory was sought to be maintained by the defense. In the brief of its counsel it is urged that a windy or gunning shot is evidence of negligence by fellow servants, and that, if an explosion so occurred, the defendant should be held exempt from liability. In the first place, it is not at all clearly shown that such a shot is evidence of negligence; and, even if it were, we do not think that under the Cummings Case, supra, such would necessarily excuse the defendant from liability. These shots were not so rare as to be improbable, and there was testimony pro and con as to the quality of the air. If the jury believed from a preponderance of the evidence that the air was bad, and made so by partial obstruction of the air course, and that such obstruction was negligence of the defendant, which resulted in the accumulation of gas of sufficiently large percentage to be exploded by a gunning shot, and they further believed that defendant should have reasonably anticipated such accumulation from this cause, the fact that gunning shots evidenced contributory negligence by fellow servants would not prevent the returning of a verdict against the defendant. It appears in evidence that the presence of this gas is not perceptible to the senses, and that it is an insidious, and not an obvious danger. The jury might believe, under proper instructions, that deceased would not be guilty of contributory negligence in continuing at work until an explosion resulted from a gunning shot, or that the mere presence of bad air, if there was bad air, was a sufficient warning to him to retire to safety, as it is in testimony that frequently the air would be better and worse in the mine. If, however, the jury should believe that defendant caused to circulate through the mine the statutory quantity of air, and that an explosion nevertheless occurred, whether from a gunning shot or by ignition from naked lights, because of an accumulation of gas casually occurring, then defendant should not be held liable, as to hold otherwise would be to make defendant a guarantor of safety in the

working places, when, instead, an explosion from an accumulation of gas so casually occurring is to be considered a risk incident to the employment in which deceased was engaged. We are unable to say upon which theory the jury found defendant liable in this case, but the court was in error in not clearly drawing to their attention the law applicable to each theory.

These instructions were error also in other respects. Their general import as to everything relating to the duty of the defendant was not that reasonable diligence and care should be exercised by defendant in an endeavor to perform its duty, but that the duty must be performed, or it be deemed guilty of "culpable negligence." We so understand instruction 7, and, if it was intended to lessen its severity by No. 8, the language is not explicit enough to effectuate that intention. Thus, in No. 7 the court instructs that it was incumbent on defendant to employ fit, suitable, competent, and experienced men to operate and manage the mine; while in the Baugh Case, supra, we find the following language: "If the master has taken all reasonable precautions to inquire into the competency of one proposing to enter his service, and, as a result of such reasonable inquiry, is satisfied that the employé is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this notwithstanding that, after the servant has been employed, it shall be disclosed that he was incompetent and unfit? No human inquiry, no possible precaution, is sufficient to absolutely determine whether a party under certain exigencies will or will not do a negligent act. * * * Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act, resulting in injury to a fellow servant, does not in itself prove any omission of care on the part of the master in his employment." The portion of the instructions of the learned judge that it was incumbent on defendant to employ and use proper, necessary, and suitable machinery and appliances for forcing a sufficient and necessary quantity of pure air into the said White Ash Mine, etc., should not have been given, as no attack whatever was made upon the system or plan of ventilation, and this was calculated to mislead the jury, and draw their minds away from the questions at issue. The instruction that it was "incumbent on the defendant to keep open all air courses, slopes, crosscuts, entries, and crossentries in said mine for the proper, necessary, free, and unmolested circulation of the air in said mine while the men were working therein, and to provide an adequate amount of pure air for the safe and proper ventilation of said mine, for the protection, safety, comfort, and convenience of the men so working in said mine, at the time and immediately prior to the time of the alleged explosion, and at the time of the death of plaintiff's intestate," is also objected to. This is

faulty, in that it strongly implies that the defendant guaranteed all these things. It is conceded that it is the positive duty of the master to make the place of work reasonably safe, but, again quoting from the Baugh Case, we find that this "positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety." The including also of all the things mentioned in the instructions, such as keeping open all air courses, slopes, crosscuts, entries, and crossentries, and providing for "comfort" and "convenience," etc., has the effect of carrying into the case questions tending to confuse the jury, and to make them hunt about for faults committed by the defendant, having no bearing upon or connection with the questions involved at the trial. All this may have been done upon the theory that the act of congress, embodied in the instructions, required such strict performance by the defendant as to make nonperformance not merely evidence of negligence, but negligence per se. In the first place, if it might even be held that this showed negligence per se, there was no evidence going to show that any slope, crosscut, entry, or crossentry was not open, or that the comfort or convenience of any miner was impaired, but there was evidence to show one air course partially obstructed. To the ignition theory in room 8 this part of the instructions could have no reference, under the view we have taken of this case.

The act of congress passed March 3, 1891, provides that managers or owners of coal mines shall provide adequate ventilation of not less than so many cubic feet of air per minute for so many men, and, by proper appliances, force same through the mine to the face of each working place, so as to dilute and render harmless noxious and poisonous gases, and to keep all working places clear of standing gas. It has been laid down in a recent work of high authority that a breach of statutory duty is negligence per se. 3 Elliott, Ev. § 1155. Such, however, does not seem to be the view of the United States supreme court. That court, speaking by Mr. Justice Lamar, in the case of *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, where the question related to the violation of an ordinance prohibiting the running of trains at greater than a named speed, after noticing the conflict in authority on such questions, says: "Perhaps the better or more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence." Breaches of statute or ordinance were similarly treated in the cases of *Randall v. Railroad Co.*, 109 U. S. 485, 3 Sup. Ct. 322; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, and *Railway Co. v. McDonald*, 152 U. S. 282, 14 Sup. Ct. 619. Where the means to be adopted for securing requisite ventilation were not prescribed, but congress contented

itself with general directions, it should be held that reasonable effort is to be exerted to attain and maintain this result. If this result were neither attained nor maintained, it would then be the jury's province to say whether, under all the circumstances, this failure was or not due to negligence by the defendant.

Instruction 9 should not have been given, as it is not considered that such an instruction had any possible application to this case, except as to violation by Flick and Kelly of the rule against entering places marked with danger signals, and we have already indicated what the court should have done in that regard. All the instructions must be changed from 7 down to 14, inclusive, on the lines we have indicated, and it is unnecessary to further specially advert to them.

It is our view that, upon the record as it comes before us, the court should have, clearly and in a distinguishing way, submitted to the jury the theories of explosion originating in room 8, and of its originating elsewhere in the fourth left entry of the mine. The instructions should have told the jury, in effect, as to the explosion originating in room 8, that if they believed it there originated, and that deceased consented to work in said mine with places dangerous, because of standing gas, guarded by danger signals, and knew, or had good reasons to know, that the business of the mine was conducted in this way, and should further believe that the standing gas was exploded in such room by the miners Flick and Kelly, or either of them, then such explosion was by act or negligence of the fellow servants of the deceased; and, for plaintiff to recover, it must be shown to the jury by a preponderance of the evidence that the said room was not danger marked by defendant at the time Flick and Kelly entered the same with naked lights. The court should have submitted the other theory, upon the proposition of defendant's negligently or not permitting gas to be generated and remain in and around the working places in the mine, upon the lines we have laid down. The court should further have instructed the jury that if it were not shown by a preponderance of the evidence where or in what way the explosion originated, one of the ways exempting from liability, and the other not, a verdict should be returned for defendant. We do not intend by this opinion to prescribe any form of instructions, but rather to indicate the general line upon which they should proceed.

Only one other question is it deemed necessary for this opinion to refer to, and that is upon the measure of damages. The personal representative of the deceased is merely the nominal or statutory plaintiff in this action. Thus, it appears that she will be a distributee, along with her five children, of whatever may be finally recovered in this action, while, as to the two cases consolidated with this upon the trial, she has no pecuniary interest in the result; yet, as administratrix of her hus-

band and each of her two sons, all killed at the same time in said fourth left entry, she is the plaintiff in each case. It is plain that the court should not have instructed that a nominal plaintiff could recover for loss of comforts and protection. It may be that this language is merely inaccurate, and does no harm if the rule of damages is otherwise correctly stated. The rule in statutory actions for injuries causing death is, as shown by abundance of authority, that the damages recoverable is compensation for the pecuniary loss to the parties entitled to recovery. *Railroad Co. v. Morris*, 26 Ill. 400; *Conant v. Griffin*, 48 Ill. 412; *Railroad Co. v. Butler*, 57 Pa. St. 338; *Telfer v. Railroad Co.*, 30 N. J. Law, 199; *Brady v. Chicago*, 4 Biss. 451, Fed. Cas. No. 1,796; *Railroad Co. v. Paulk*, 24 Ga. 366; *Moffatt v. Tenney* (Colo. Sup.) 30 Pac. 348. It cannot be readily seen how, arguing from the relations and obligations of one human being towards another, the life of any one can be of pecuniary value to another, except it be the life of a husband and father to his wife and children, to whom he owes support and education. It must be considered, however, that as our statute gives a right of recovery to any one who is of kin, in the same way that it gives it to the wife and children of deceased, merely prescribing who are prior distributees of what is recovered, the rule for estimating the loss in each case should be the same. Such a rule must be that, from the proof as to age, earning capacity, health, habits, and probable duration of life, the jury shall say what is the present worth of the life of deceased, with nothing to be added by way of solatium to the parties or party entitled as distributees to the proceeds of recovery, and nothing for suffering or anguish of mind or body by the deceased. It is resolved into a cold question of dollars, with sentiment in no way to be taken into account. Neither does the question of mitigating or aggravating circumstances have any weight so far as the damages denominated by our statute "compensatory" are concerned. If there should be a recovery, full compensation should be awarded, mitigating or aggravating circumstances having effect only on the question of allowing or not allowing exemplary damages in addition to full compensation.

Our statute appears to mean that if there are "aggravating circumstances attending the wrongful act, neglect or default" for which the defendant is responsible, then exemplary damages should be added to those which are merely compensatory. In the case of *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, Mr. Justice Gray goes into a very elaborate discussion of exemplary damages as relating to the liability of a corporation therefor, and from it we will deduce our conclusions, that being a court whose decisions should be held controlling with this court. The portion of that decision most applicable to this case is the affirmance of the case of *Railway Co. v.*

Arms, 91 U. S. 495, in which an instruction that, if the jury "find that the accident was caused by gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages," was held error. The court said that, whether that was called "gross" or "ordinary" negligence, the jury could not give damages beyond the limit of compensation. "To give exemplary damages there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference of consequences." The words of our statute do not, we think, change the rule thus announced, but circumstances of aggravation to bind the principal for the act of the agent must be as above stated, or where the principal participated in a bad intent. The decision in *Railway Co. v. Harris*, 122 U. S. 610, 7 Sup. Ct. 1286, was approved in holding the corporation liable for exemplary damages; but this was because the corporation, by its governing officers, participated in and directed all that was done, the thing done being in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by another company. There bad intent by the corporation was proven. There is nothing in this record that tends in the least to show bad intent on the part of the defendant, nor is there anything to show that a servant knowingly unfit was employed or retained, whose unfitness would or did expose its employes to danger, or anything from which an argument might have been advanced that defendant was so careless of the lives of its employes that a presumption of conscious indifference as to consequences arose, unless the obstruction of the fourth left air course may be thought to show it. The defendant is shown to have resorted, as usual, to its inspections, and the air in the mine was never bad enough to be a warning to the employes to desist from working, even if we disregard all testimony that it was not bad at all. We scarcely think there was sufficient basis for any instruction as to exemplary damages, but, if there should be produced sufficient evidence on a retrial, the court should inform the jury that exemplary damages may be added to compensatory damages if it is shown by a preponderance of evidence that the defendant exhibited such entire want of care as showed a conscious indifference to consequences. Mere neglect of a fellow servant, however gross, would not authorize exemplary damages, unless defendant, knowing his unfitness, employed or retained him, or in some way ratified his act. If there is evidence on a retrial on this subject, an instruction as to exemplary damages should be given. At all events, the jury should be explicitly informed of the nature of exemplary damages, and their attention confined to a consideration of what in the evidence, in the way of aggravating circumstances, may warrant their being given. Wherefore it is considered that the refusal of the lower court to award a new

trial was error, and a new trial should be granted; this case to be remanded, with directions to the lower court to grant the same.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

(6 Kan.App. 422)

MORRIS et al. v. LEMMON et al.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

EJECTMENT—PARTIES.

Where one of the defendants in an action of ejectment under a tax deed had held actual possession of the real property for more than five years preceding the date of the trial, under a deed which conveyed the property to him as trustee for the other four defendants, who were his children, only one of them being a minor at the commencement of the action, and which deed gave the trustee power to dispose of the premises during the minority of the children, and where the defendants raised no question as to the fact and rightfulness of the possession of the trustee, *held*, that he was a necessary party defendant, and that failure to serve summons on him within the time fixed by law for commencing an action for possession under a tax deed defeated plaintiff's right as to both possession and lien.

(Syllabus by the Court.)

Error from district court, Chautauqua county; M. G. Troup, Judge.

Action by W. F. Lemmon and C. M. Shartel against Josephus Morris and others. Judgment for plaintiffs. Defendants bring error. Reversed.

Gillett & Sadler and H. E. Sadler, for plaintiffs in error. Peckham & Peckham, John W. Shartel, and Lemmon & Shartel, for defendants in error.

MILTON, J. This was an action of ejectment, begun against the plaintiffs in error, as defendants below, by the defendants in error, who claimed the premises in controversy under a tax deed. The cause was tried by the court, who made findings of fact and conclusions of law. It is brought here on a transcript of the record. The defense relied upon the two-years statute of limitation, in subdivision 3 of section 16 of the Code. The court found that the tax deed was valid on its face, but invalid for irregularities otherwise appearing, and awarded plaintiffs judgment for \$186.25, and a lien on the premises for the said amount for taxes paid and interest. The tax deed was recorded on September 17, 1889. The petition was filed September 7, 1891, together with precept for a summons for the defendants, who all resided in the state of Kansas. A summons was issued and served on the defendant Josephus Morris, the party in possession of the premises, on September 11, 1891; but this summons and service was afterwards, and on November 11, 1891, set aside, upon the ground that no seal of the court was attached to the summons. On November 13, 1891, said defendant voluntarily appeared and answered, and the other

defendants, who had never been served with process, appeared on November 9, 1891. The possession of Josephus Morris purported to be that of a trustee for his four minor children, who were joined as defendants, under a deed dated March 26, 1893, the children then being minors. He had remained in such possession in such capacity for several years prior to the commencement of the action. He had held the title under a patent from the United States, and had conveyed the land to one J. L. Cox, who reconveyed to him as trustee. The deed from Cox gave Morris power to sell the property for the benefit of the children at any time during their minority. No question was raised by any of the other defendants as to the facts of the rightfulness of the possession by Josephus Morris of the premises, except by the pleadings generally that they were the equitable owners of the property, and were in the actual possession thereof. The ninth finding of fact is as follows: "The defendant Josephus Morris has resided continuously on the premises in controversy, occupying the same as a farm, and cultivating it in the usual course of husbandry, since prior to the date of his patent aforesaid, and claiming a right thereto either as owner or trustee for his co-defendants. After September 16, 1889, and prior to November 14, 1891, the defendant Josephus Morris was temporarily absent from the state of Kansas for thirty-one days altogether; and the defendant Emma Morris was absent from the state of Kansas from June 19, 1891, to December 19, 1891; and the defendant Francis Morris was so absent from the state of Kansas during the months of April, May, and June of 1891, and also from July, 1891, to September 19, 1891. The defendant Emma Morris is twenty-five years old, and the defendant Francis Morris is now a minor, about 19 years old." Under the terms of the deed creating the trust, Josephus Morris had no power to dispose of the real property except during the minority of the children, three of whom had attained their majority before this action was brought. It appears, therefore, that he was still trustee as to the interest of the minor child. As to the others he was a tenant by sufferance, and each of the latter was the legal and equitable owner of an undivided one-fourth of the land.

Counsel for defendant in error urge that the possession of Josephus Morris for a longer period than two years after the recording of the tax deed would not bar their right of action, and that such right of action would not be barred as to any one of the other defendants, unless such defendant had been present within the state of Kansas for two years after the recording of the tax deed, and that the judgment of the trial court must, in any event, be upheld as against Emma Morris and Francis Morris. He cites the case of *Railway Co. v. Cook*, 43 Kan. 83, 22 Pac. 988, as sustaining this claim. We cannot agree with this position. Under subdivi-

vision 3 of section 16 of the Code, the holder of the tax title could bring his action for the recovery of the real property within two years after the recording of his tax deed, and not thereafter, unless it should appear that the defendant in possession was absent from the state during the two years, in which event the time of such absence would be added to the two years given by section 16. In the case of *Mitchell v. Liles*, 36 Kan. 382, 13 Pac. 594, it appears that the trial court had found the amount of taxes due to the plaintiff in that action, and declared the same a lien on the land, the deed being held invalid. The court, in its opinion, says: "The defendant, in his cross petition, raises but one question, and that is: Did the court err in finding the amount of taxes due to the plaintiff on his tax deed, and in declaring the same a lien upon the land? We think this was error. The plaintiff, to recover the possession when the actual possession was in another, must within two years after putting a deed upon record, or within two years after the possession is held adverse to him, bring his action; and, if he neglects so to bring his action, his right to recover is barred; and section 142, c. 107, Comp. Laws 1879, cannot help him. That section is to help a person who is defeated in an action by reason of a defective deed, or proceedings up to the deed, and was not made to help those who refuse or neglect to commence their action for the recovery of the possession of the premises until the statutes had run against them. The court, in rendering judgment, seems to have acted upon the theory that, because the plaintiff's title is bad, he is entitled to recover his taxes; yet finding that defendant is in actual possession, claiming title, for more than two years prior to the bringing of this action. This finding alone is sufficient to defeat plaintiff's title and right of possession, and, with it, defeat his taxes. Following *Corbin v. Bronson*, 28 Kan. 532." To the same effect is the decision in the case of *Smith v. Jones*, 37 Kan. 294, 15 Pac. 186. There the plaintiff sued in ejectment under his tax deed, and the court, in deciding that he was not entitled to recover possession or to have a lien for taxes paid, used the following language: "We think the two-years statute provided in the Code bars a recovery by the plaintiff. His action was not begun until about four years after the tax deed was executed and recorded. During this time, and earlier, the defendant was in the actual possession of the land. The defendant was not there as a trespasser, but was in actual possession, under a claim of ownership in the land. We need not inquire whether his claim of title was strong or weak, because 'possession with claim of ownership is not only evidence of title, but it is of itself title in a low degree,' and one which may in time ripen into a perfect title. *Hollenback v. Ess*, 31 Kan. 87, 1 Pac. 273. The defendant was therefore in a position to contest the plaintiff's right to recover. The plaintiff

must recover upon the strength of his own title, and not upon the weakness of that asserted by Jones. To maintain his action, he must establish not only his paramount title to the land, but also that he has brought his action within the time allowed by the law. By virtue of the defendant's possession and claim, the plaintiff's cause of action, if he had one, was maintainable immediately on the recording of his tax deed. He was a tax-title holder, out of possession, seeking to recover upon the strength of a tax title. The limitation insisted on is applicable to all such persons, and an action cannot be maintained for the recovery of the land, unless it is brought within two years after the recording of the tax deed under which he claims. *Thornburgh v. Cole*, 27 Kan. 490; *Myers v. Coonradt*, 28 Kan. 215."

From these cases it would appear that the plaintiffs below delayed too long in bringing the defendant Josephus Morris, who was a necessary party, and who was in possession of the land, into court as a party to their action. In our opinion, this view does not conflict with the doctrine of the case of *Railway Co. v. Cook*. There being no contest among the defendants below respecting the right of possession of Josephus Morris, we think the defendants in error are not entitled to raise any question as to the matter. We conclude that, under the facts as presented to us, the defendants in error were not entitled to the judgment awarded them, allowing a lien for taxes paid. The case will therefore be reversed, with instructions to the district court to grant a new trial. All the judges concurring.

(6 Kan. App. 922)

NATIONAL BANK OF PAOLA v. BANTA
et al.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

FRAUDULENT CONVEYANCES—SALE IN PAYMENT OF
DEBT—KNOWLEDGE OF PURCHASER—
REVIEW ON APPEAL.

1. The instructions examined *held* to be correct in point of law, and conforming to the facts at issue, and, considered as an entirety, fully presented to the jury the law applicable to the issues and facts presented by the evidence in the case.

2. Where a question of fact, upon proper instructions, is fairly submitted to a jury, and there is evidence tending to support all the necessary elements of the verdict, and it being approved by the trial court, it will not be disturbed by this court.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by the National Bank of Paola against D. O. Banta and E. L. Moore. Judgment for defendants, and plaintiff brings error. Affirmed.

W. H. Browne, for plaintiff in error. John C. Sheridan, for defendant in error E. L. Moore.

SCHOONOVER, J. On the 27th day of August, 1892, the National Bank of Paola, plain-

tiff in error, commenced an action in the district court of Miami county against the defendant in error D. O. Banta, on five promissory notes, amounting in the aggregate to the sum of \$3,168.48, and on the same day caused to be attached 1,400 bushels of wheat, 125 acres of growing corn, and certain real estate. On the 19th day of September, 1892, E. L. Moore, by consent of the plaintiff and leave of the court, filed his answer and interplea, in which he claimed to be the owner of all the personal property attached, and also claimed to be the owner of a certain mortgage upon the real estate attached, and prayed judgment for the restitution of said property, and for \$500 damages for the alleged wrongful seizure of the same. Plaintiff replies by a general denial. The issue between the plaintiff and the defendant Banta was submitted to the court without a jury. The issues joined upon the interplea of E. L. Moore, defendant, so far as the same related to the wheat and corn attached, were tried by a jury. The jury found that, at the date of the levy of the attachment, the defendant E. L. Moore was the owner of the wheat and corn in controversy. The plaintiff filed its motion for a new trial, which was overruled, and the court rendered judgment in favor of defendant E. L. Moore, for his costs, and restitution of the corn and wheat attached. The plaintiff brings the case here for review, contending that the agreements between defendant Banta and defendant Moore are fraudulent and void, and the verdict of the jury is against the law and the evidence.

The record contains the following agreement:

"(Copy.) Paola, Kansas, August 23, 1892. In consideration of certain personal property this day sold and delivered to me by D. O. Banta, which property is fully described in his bill of sale of same to me of even date herewith, I hereby agree to pay the following described notes and debts of the said D. O. Banta, upon and for part of which I am surety: One note to F. M. Wilgus, for \$220.00 and interest; two notes to T. H. McWilliams, amounting, with interest, to about \$322.00; one note to Frank Casida, for \$167.00 and interest; one note to L. C. Gilmore, for \$366.00 (about), including interest; one note at the Miami County National Bank, for \$150.00 and interest; an account to G. W. Homrighausen, for \$165.00; an account to Wm. Bowen for threshing, for \$70.00. It is further agreed that I have received and shall pay for said property,—all wheat at 55 cents per bushel; all of said corn at 35 cents per bushel; all of said hay at \$6.00 per ton; the team, wagon, and harness at \$175.00; the mule colt at \$30,—upon which property I have already paid, by satisfaction and surrender of three notes I held against said Banta, the sum of \$974.50. And it is agreed said Banta and his wife shall secure me by mortgage on land for any and all deficiency of the balance of the price of said property to pay said above-mentioned notes and debts of said Banta, and that, in case said notes and debts exceed the balance of said

price of said property, I shall not be liable for the same in any event, unless I shall realize enough net, from said proposed mortgages, to pay such excess of indebtedness, or for more than such portion thereof as I shall realize. E. L. Moore.

"The foregoing is correct in every respect. D. O. Banta."

On the same day there was executed a bill of sale from Banta to Moore, regular in form, and conveying the wheat and corn in controversy. On the following day, Banta and wife executed to E. L. Moore a mortgage covering certain real estate in Miami county, containing the following: "Provided, always, and these presents are upon the express condition, that whereas, said E. L. Moore has by said agreement bound himself to pay, from the balance of the price of certain personal property bought and received by him from said D. O. Banta, certain notes and debts of said D. O. Banta, and there is a probability that said notes and debts will exceed the said balance of the price of said personal property, in which case said party of the second part will have advanced or be required to advance sufficient moneys of his own to pay the balance of said notes and debts: Now, it is therefore here provided that this mortgage shall secure said party of the second part, and protect him from all loss upon said agreement, in so far as the balance of said price shall be found insufficient to pay all of said debts and notes of said D. O. Banta. Now, if said parties of the first part shall pay or cause to be paid to said party of the second part, his heirs or assigns, said sum of money in the above-described agreement, after the balance of this price of said property has been paid thereon, together with the interest thereon, according to the terms and tenor of the same, then these presents shall be wholly discharged and void; and otherwise shall remain in full force and effect."

The court gave the following instructions: "A sale by Banta to Moore of the property in controversy and other property, in payment of the debts of Banta to Moore, would not be a fraud on other creditors of Banta, provided such sale was made in good faith, and to satisfy a real and valid indebtedness to Moore. A sale by Banta to Moore, in payment of a valid indebtedness of Banta to Moore, or to provide for the payment of debts to other creditors of Banta, on which Moore was liable as surety or indorser, would not be fraudulent if made in good faith. A sale by Banta to Moore of the property in controversy and other property, to pay the debts of Banta to Moore, and to provide for the payment of certain other debts of Banta, upon which Moore was liable as surety or indorser, and also to provide for the payment of still other debts of Banta, and upon which Moore was not legally liable, and leaving still other debts and creditors of Banta unsecured and unprovided for, would be fraud-

ulent upon the part of Banta as to such other debts and creditors so unprovided for. Such sale would also be fraudulent upon the part of Moore, provided he purchased with knowledge of such facts." The court also gave the following instructions: "If you find from the evidence that the contract of sale and purchase between Banta and Moore was entered into by them for the purpose or with the intent to cheat or defraud the plaintiff, or to hinder or delay him in the collection of his debt against Banta, then you ought to find for the plaintiff. If you find from the evidence that, in the contract of sale and purchase between Banta and Moore, Banta sold to Moore all of his personal property which was subject to the payment of his debts, and thereby paid or provided for the payment of all the debts of Banta to Moore, and all the debts of Banta upon which Moore was legally liable, and also certain other debts of Banta, upon which Moore was not legally liable, and left the debts of Banta to the plaintiff unpaid, unsecured, and unprovided for, and that Moore entered into said contract and accepted said bill of sale with knowledge of such facts, then you ought to find for the plaintiff. But if you find from the evidence that Moore acted in good faith, and in ignorance of the existence of the debt of Banta to plaintiff, then you ought to find for the defendant." "Whether or not there was fraud in the sale and transfer of the property in controversy, from Banta to Moore, is a question of fact for you to determine from the evidence, and under the instructions of the court. Fraud is not presumed, but must be proven by a preponderance of the evidence before a jury is authorized to find that it exists." Other instructions, correct in point of law, and conforming to the facts at issue, were given by the court, and, considered as an entirety, fully presented to the jury the law applicable to the issues and facts presented by the evidence in the case.

The jury found for the defendant Moore. Plaintiff insists that the verdict was against the law and evidence. Whether or not there was a fraudulent transfer of the property in controversy was a question of fact for the jury, there being evidence tending to support all the necessary elements of the verdict; and, it being approved by the trial court, it will not be disturbed by this court. The judgment of the court below will be affirmed. All the judges concurring.

(6 Kan.App. 417)

KANSAS CITY, FT. S. & M. R. CO. v.
CAMPBELL.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

CARRIERS—INJURY TO LICENSEE—DEMURRER TO EVIDENCE.

Where, in an action to recover damages for injuries resulting in the death of plaintiff's in-

40 P.—52

testate, the petition alleged that such death was caused by gross negligence, amounting to wantonness, on the part of the defendant company, and the evidence of plaintiff tended to prove such allegation, it was not error for the trial court to overrule defendant's demurrer to plaintiff's evidence.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by James Campbell, administrator of Charles Campbell, deceased, against the Kansas City, Ft. Scott & Memphis Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Wallace Pratt, Charles W. Blair, and B. S. Gaitskill, for plaintiff in error. Morris Cligitt, for defendant in error.

MILTON, J. The only issue presented for our consideration is the alleged error of the trial court in overruling the demurrer filed by the railroad company to the evidence of the plaintiff below. The petition alleged that plaintiff's intestate was killed while on a local freight train of the defendant company, by the gross and wanton negligence of said company, its agents, servants, and employes. The answer, besides a general denial, averred that the alleged injury was caused by the negligence of the deceased. The principal facts in the testimony of the plaintiff are as follows: Plaintiff's son, Charles W. Campbell, 19 years of age, was in the habit of riding on defendant's cars over its railway between Pittsburg, Kan., where he resided, and Minden, Mo., a few miles distant, where he had been engaged for several months in learning telegraphy. He made these trips without paying fare, but by and with the consent of the company, through its agents, servants, and employes. On July 6, 1891, he started from Pittsburg, on a local freight train of the defendant company, to go to Minden. This train was operated regularly between and beyond the stations named, and regularly carried passengers. Besides the deceased, there was one passenger, a lady, on that train. The conductor saw the deceased, and did not demand or require the payment of fare when he collected the fare from the other passenger, and no fare was paid by deceased. Three men were in a freight car next in front of the caboose, with six horses, which they had loaded at Pittsburg for shipment. The trainmen knew that all of said persons were on the train at that time. The train stopped when about one mile and three-quarters from Pittsburg, near a large smelter, where there was a spur track; and the caboose and two or three cars in front of it were left standing about 100 yards from the switch from which the side track led out, while the engine, with several cars attached, was moved up a considerable grade, to and beyond the switch. After the cars were stopped, young Campbell came out on the platform of the caboose, and sat down on the railing near the brake wheel.

with his back to the box car immediately in front, where the men and horses were, and was shortly thereafter thrown under the wheels, and so badly crushed that he died a few minutes later. His fall and death were occasioned by a sudden shock communicated to the car upon which he sat by a collision of two loaded coal cars, which were "kicked" down the grade from near the switch by the engine, against the cars which were left standing. No brakeman was on the coal cars. They were set in motion by the engine, and then detached from it, and allowed to run down the grade. Deceased could not have seen the cars as they came down, and it does not appear that the trainmen saw him on the railing while switching. The cars started at a moderate rate of speed, but were running very fast, and faster than the witness had even before seen cars run while being switched, when they reached the standing cars, which they struck with great violence. The horses in the box car were separated by temporary partitions of pine scantlings. The concussion threw the men about the car, brought the horses to their knees, and broke the partitions. Deceased was thrown under the freight car, two wheels of which passed over him. The cars were driven back about one car length by the shock. None of the persons on the train knew that these cars were approaching it. The petition alleged that the acts of the defendant, through its agents, servants, and employes, in sending said loaded cars downgrade without a brakeman, with great force and violence, against the cars on which were the deceased and other persons, were gross, reckless, and wanton negligence, which directly caused the death of plaintiff's intestate. Defendant's demurrer to plaintiff's evidence was overruled, and thereupon it introduced its evidence. The instructions of the court were according to the theory of the petition; that is, the question as to whether or not the fatal injury occurred because of gross negligence amounting to wantonness on the part of defendant company was the only issue presented to the jury. The instructions defined gross negligence, amounting to wantonness, in the language of our supreme court. Verdict and judgment in the sum of \$1,500, in favor of plaintiff.

A distinction between gross negligence and gross negligence amounting to wantonness is insisted upon by counsel for defendant in error, and he cites *Railway Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730, Beach, Contrib. Neg. § 62, and other authorities, as supporting his position. "Reckless negligence" would express pretty accurately the ordinary conception of such conduct as that of the men who, in this case, sent two loaded cars, unattended by a brakeman, down a steep grade, towards and against other cars, which contained unwarned and unsuspecting people. It is true that plaintiff's intestate was in an unsafe place, but harm in some degree was done to the men in the cars with the horses, and to the horses,

by the concussion. It is not necessary to take into account the negligence of the deceased if we hold that the case ought to have gone to the jury under plaintiff's petition and evidence. *Railway Co. v. Whipple*, supra; *Battishill v. Humphreys* (Mich.) 38 N. W. 581; *Palmer v. Railroad Co.* (Ind. Sup.) 14 N. E. 70, and cases there cited; 2 Wood, Ry. Law, p. 1-08; Beach, Contrib. Neg. § 64. If there had been no person on the train, it would have been very negligent to send those cars downgrade without a brakeman, as property was thereby endangered. In this case the danger was not only to property, but also to life and limb of persons on board the train. The employes must have known it was unsafe to send down those cars unattended, and, while they ought to have cared, they did not care, for the probable consequences of their negligent act. In the case of *Palmer v. Railroad Co.*, supra, the supreme court of Indiana quotes from one of its former decisions, as follows: "It is beyond question that, to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequences would produce injury to others. There must have been either an actual or constructive intent to commit the injury." The court further observes: "These last cases distinctly recognize the rule that direct and positive intent is not always requisite to constitute a willful act. If it were not so, what is said about a reckless disregard of the probable consequences, and a constructive intention, would be meaningless." In *Railway Co. v. Whipple*, supra, it is said: "A party may recover for the reckless or wanton conduct of another, or, as we have said, 'for gross negligence amounting to wantonness,' without a formal or direct intention to injure any particular person." It is evident that injuries to persons and property would be likely to result from doing what the employes of the company did in this case. If such injuries would likely result from such conduct, then we ought not to say that such conduct does not show a reckless disregard for the safety of others. *Smith v. Railroad Co.*, 25 Kan., at page 744. We are not willing to declare, as a matter of law, that the conduct of the trainmen in this instance was free from the elements characterizing "gross negligence," amounting to recklessness or wantonness; and this is precisely what we would do if we should hold that the demurrer to the evidence ought to have been sustained. What we do say is that the evidence tended to prove such negligence, and that it was a proper case for the jury. *Railroad Co. v. Brown* (Ill. Sup.) 39 N. E. 243; *Railway Co. v. Sanford*, 45 Kan. 372, 25 Pac. 891; *Railway Co. v. Rice*, 38 Kan. 308, 16 Pac. 817; *Railway Co. v. Fitzsimons*, 22 Kan. 686; *Railway Co. v. Rollins*, 5 Kan., at page 181. In the latter case the court says: "Neg-

ligence is a question of fact for the jury. It is for them to determine whether there has been any negligence, and its nature and degree. Even where the circumstances are all admitted, if there is any doubt as to what they may prove, it is still a question for the jury. It is not the duty of the court to draw inferences from the evidence, but only to pronounce legal conclusions from the facts admitted or properly found." As we view the matter, the court did not err in overruling the demurrer to plaintiff's evidence. The jury inferred from the whole evidence that the railroad company, through its employes, was guilty of that kind of negligence which entitled plaintiff to a recovery, notwithstanding the negligence of his intestate. The judgment of the trial court will be affirmed. All the judges concurring.

(6 Kan.App. 410)

ST. LOUIS & S. F. RY. CO. v. TOOMEY.
(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

DEMURRER TO EVIDENCE—INJURY TO EMPLOYEE—
DEFECTIVE APPLIANCES—REASONABLE CARE
—DIRECTING VERDICT.

1. Before a demurrer will be sustained to the evidence, the trial court must be able to say: "Admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the plaintiff, still the plaintiff has utterly failed to make out some one or more of the material facts of his case." *Brown v. Railway Co.*, 1 Pac. 605, 31 Kan. 1.

2. The instructions refused and the instructions given by the court set forth. *Held*, that the instructions given are correct in point of law, and applicable to the issues and facts presented by the pleadings and evidence, and, considered as an entirety, they sufficiently cover the instructions refused so far as they apply to the facts in this case.

3. A jury should not be directed to return a verdict for the defendant when, in the judgment of the trial court, the plaintiff, according to the rules of evidence, has produced sufficient testimony—admitting its truth, and drawing from it all the inferences that reasonably can be drawn from it—that the jury might reasonably find a verdict for the plaintiff.

4. The evidence examined. *Held* sufficient to sustain the general verdict.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by Miles Toomey against the St. Louis & San Francisco Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Glead and C. Hamilton, for plaintiff in error. Morris Cliggitt and B. S. Gaitskill, for defendant in error.

SCHOONOVER, J. Miles Toomey, plaintiff below, filed his petition in the district court of Crawford county, alleging, in substance, that he was employed by defendant (plaintiff in error) as a switchman to work at night; that on November 19, 1890, in the nighttime, at a point on the main line of defendant's road, about one mile east of the

city of Litchfield, while riding on what is commonly known as the "footboard" of a switch engine and tender, he was injured. "Plaintiff further avers: That the footboard of said engine was defective, in this: that the end thereof at the right-hand side of said engine (as it was going east) was much lower than at the other side of said engine; that said footboard slanted downward from said engine and tender, when it should have been level in all directions; that one end of said footboard (the end on the right-hand of said engine and tender as it was going east) had theretofore been shoved partly under the end of said tender, and was then in said condition. That the track of said defendant's road was defective, in this: that a short distance east of the place where the A., T. & S. F. Railroad crosses defendant's road, in the eastern portion of said city, the ends of some of the rails were mashed down, so that it became and was unsafe for engines and cars to pass thereover; that said defendant, in the exercise of reasonable care, could have known, and in fact did know, the defective condition of said engine, and of said railway track, as above stated. That the condition thereof was wholly unknown to this plaintiff. * * * While plaintiff was so standing on the south end of said defective footboard of said tender, the wheels of said engine and tender struck a place where the ends of said defendant's railway tracks were mashed down, causing said engine to bounce upward, and come violently down upon said track. That, by reason of said defects in said track and said defective condition of said footboard, as hereinbefore set forth, plaintiff's feet were thrown from said footboard, his right foot caught on a tie; and, by reason of the forward motion of said engine, both bones of his right leg were broken about three inches above his ankle joints. That said injuries so sustained by plaintiff were the direct result of the negligence of the defendant, as hereinbefore set forth. That plaintiff was free from fault or negligence on his part. * * * That said injuries so sustained by him are permanent." The defendant below filed its answer, containing a general denial, and setting up contributory negligence. The case was tried to a jury. A verdict was returned in favor of the plaintiff below, and against the defendant below, for \$650. The court rendered judgment upon the verdict. A motion for a new trial was overruled, and the defendant below brings the case here for review.

Plaintiff asserts, first, that the trial court erred in overruling the demurrer to the evidence. In answer to this first assignment of error, our supreme court, in the case of *Brown v. Railway Co.*, 31 Kan. 1, 1 Pac. 605, have said: "Where the defendant in a case which is being tried by a jury files a demurrer to plaintiff's evidence, on the ground that the evidence does not prove a cause of action, held, that unless the plaintiff has ut-

terly failed by all his evidence to prove his case, or some material fact in issue in the case, the demurrer should be overruled.

* * * Where the court sustains a demurrer to the evidence the court must be able to say that, admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the plaintiff, still the plaintiff has utterly failed to make out some one or more of the material facts of his case." Applying this rule to the evidence before us, it is clear that a prima facie showing of liability on the part of the defendant had been made, and that the demurrer to the evidence was properly overruled.

It is contended that the trial court erred in refusing to give the following instructions: "(8) And proof of a single defective or imperfect operation of any such machinery or instrumentalities, resulting in the injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities. (9) As between a railroad company and its employes, the railroad company is not necessarily negligent in the use of defective machinery, not obviously defective; but it is negligent in such cases only where it has notice of any defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them, and in remedying them." The trial court did instruct the jury as follows: "To warrant a verdict for plaintiff, you must find from a preponderance of the testimony—that is, the greater convincing force of the evidence—that plaintiff was injured as alleged; that the alleged defects in the footboard and track directly caused or directly and materially contributed to the injury, so that otherwise it would not have occurred; and that such defects existed by reason of the defendant's failure to exercise ordinary care and diligence in keeping said track and footboard safe. If you thus find all these points, the plaintiff is entitled to recover, unless you should find, as defendant claims, that the injury arose by reason of plaintiff's own carelessness, or was so directly contributed to thereby that otherwise it would not have occurred. It is for the plaintiff to prove the defendant's negligence, and for the defendant to prove the plaintiff's contributory negligence, as neither will be presumed in the absence of proof. Ordinary care and diligence is such as persons of ordinary prudence and carefulness would use under like circumstances. You are instructed that the mere fact of plaintiff's being in the employ of the defendant company, and, while so employed, receiving an injury which resulted in his damage, would not alone warrant you in finding for the plaintiff; nor would you be warranted in so finding unless you further find that said injury was the direct result of neg-

ligence on the part of the defendant company. You are further instructed that in case you find that the defendant was negligent in permitting the use of a defective footboard, and you further find that plaintiff's injury was materially contributed to by his own negligence or carelessness, then your verdict should be for the defendant. You are further instructed that an employe of a railway company, by virtue of his employment, assumes all the ordinary risks and hazards incident to his employment. As between a railway company and its employes, the railway company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad. As between a railway company and its employes, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes safe machinery and instrumentalities for the operation of its railroad. And, where an employe seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon him to show either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice." The instructions given by the court, as above set forth, are correct in point of law, and applicable to the issues and facts presented by the pleadings and evidence. Considered as an entirety, they sufficiently cover the instructions refused, so far as they apply to the facts in the case.

We are asked to reverse this case for the further reason that the trial court refused to instruct the jury to return a verdict for the defendant, and in overruling the motion of plaintiff in error for a new trial. In submitting the issues, it is the duty of the trial court to determine whether, as to each issue, competent evidence has been produced, which, if believed by the jury, will justify men of reasonable minds in finding a verdict in favor of the party upon whom rests the burden of proof. There must be competent and sufficient evidence showing want of reasonable and ordinary care before a jury can find negligence. It is the duty of the trial judge to determine whether a jury of reasonable men, believing the testimony, giving full weight to it, and drawing all the inferences from it, would be justified in finding a verdict for the party producing the evidence. Justice Miller, in the case of *Pleasants v. Fant*, 22 Wall. 121, said: "It is the duty of a court, in its relation to the jury, to protect a party from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in those issues,

and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied; and, finally, when necessary, by setting aside a verdict which is unsupported by evidence, or contrary to law. In the discharge of this duty, it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether, on all the evidence, the preponderating weight is in his favor,—that is the business of the jury,—but, conceding to all the evidence the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it is not, then it is the duty of the court, after a verdict, to set it aside, and grant a new trial. Must the court go through the whole ceremony, in such a case, of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd, and, accordingly, we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury can justifiably draw from the testimony, the evidence is sufficient to warrant a verdict for the plaintiff, the court should say so to the jury." Applying this rule to the case under consideration, it was for the trial judge to say, before submitting the issue to the consideration of the jury, whether or not the plaintiff, according to the rules of evidence, produced sufficient testimony in his behalf—the truth of the testimony being admitted, and all necessary and reasonable inferences being drawn from it—that the jury might reasonably find a verdict for the plaintiff. From an examination of the testimony before us, we are agreed that no error was committed by the district judge in refusing to instruct the jury to return a verdict for the defendant. There are no special findings in this case, and none were submitted to the jury. We have examined the testimony, and find sufficient evidence to support the general verdict. The judgment of the district court will be affirmed. All the judges concurring.

(6 Kan.App. 431)

GOODIN et al. v. NEWCOMB.

(Court of Appeals of Kansas, Southern Department, E. D. July 31, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SCHEDULE—ATTACHMENTS—RES JUDICATA—ACTION BY ASSIGNEE.

1. Where a schedule of liabilities of an insolvent debtor was filed two days after the deed of assignment for the benefit of all his creditors was filed, and where the trial court found that the assignment was made in good faith, *held*, that such assignment is valid as against an attachment levied after the filing of the schedule, where the ground of said attachment is that such assignment had been attempted.

2. Where, in such case, the attaching creditor

caused the assignee to be summoned as garnishee, and where the assignor filed a motion to discharge the attachment, and the justice of the peace, after final judgment in favor of the creditor and against the assignor was rendered, overruled such motion, and sustained the attachment, and no appeal was taken from such rulings, and where the assignee was present at such hearing, and testified as a witness in the hearing upon the motion, but was not required to answer, and did not answer, as garnishee, *held*, that said proceedings and rulings did not become *res adjudicata* as to the assignee.

3. Where, in such case, the assignee had, prior to such hearing, served on the constable who made the attachment levy and the attaching creditor a written notice that he claimed the attached property by virtue of the assignment, and that a trial of the right of property would be had on a day named in such notice, but such notice was not filed with the justice, and no trial thereunder was had, *held*, that the assignee was not estopped by reason of the giving of said notice to institute an action against the parties so notified to recover the value of the property which was taken and sold under such attachment proceedings.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by T. L. Newcomb, as assignee of A. E. Geyer, against C. W. Goodin and R. T. Darby. Judgment for plaintiff, and defendants bring error. Affirmed.

John W. Deford and W. A. Deford, for plaintiffs in error. F. A. Waddle, for defendant in error.

MILTON, J. This action was brought by defendant in error to recover damages for goods taken by plaintiffs in error under attachment proceedings against one A. E. Geyer. Judgment was rendered in favor of the assignee, and against the plaintiffs in error, for \$357.40, and they bring these proceedings to reverse said judgment. On the afternoon of May 7, 1892, A. E. Geyer executed and filed in the office of the register of deeds of Franklin county a general assignment to T. L. Newcomb, as assignee, for the benefit of all his creditors, of all his property and effects liable to the payment of his debts, consisting of a retail stock of furniture, and the business house in which it was kept in Pomona, and another tract of land. He was in failing circumstances, and was being pushed by his creditors for payment or security, and particularly by C. W. Goodin, who, on the day the deed of assignment was made, demanded that Geyer give him a chattel mortgage to secure a debt of \$221 due him. The schedule of liabilities was filed on Monday, May 9, 1892, at 7:20 p. m., and within an hour from that time a garnishee summons had been served on Newcomb, who was not yet in possession of the property and the stock of goods levied on by R. T. Darby, a constable, in an action brought by Goodin upon his claim before a justice of the peace. Before the trial was had in said action, Geyer filed a motion to discharge the attachment, the grounds of the latter being that Geyer had assigned, removed, or disposed of, and was about to dispose of, his property, with the intention to defraud, hinder, and delay his creditors.

Geyer made no defense to Goodin's claim for a judgment. The motion to discharge the attachment was heard after the judgment was rendered, and Newcomb was present, and was examined as a witness, on the hearing. He was not asked or required to answer as garnishee in the action, and no entry was made on the docket concerning said garnishee, except as to the summons, and no order was asked for or taken against him except that he was examined as a witness. Newcomb had no connection with the trial or the hearing of said motion. The motion to discharge was overruled, and the attachment sustained. Afterwards the attached property was sold under an order of the justice of the peace for \$220. It was actually worth \$350. On the day of sale, and just prior to it, Newcomb served a written notice on both Goodin and Darby that he claimed to own and hold said property as assignee. Goodin received the proceeds of the sale, and kept the same except the costs, which he paid to the justice. No appeal was taken from the orders of the justice in the attachment proceedings. Newcomb had taken actual possession of all the assigned property not attached directly after the attachment was levied. He was appointed permanent assignee by the judge of the court, the creditors having failed to choose an assignee. Prior to the hearing of the motion to discharge the attachment, Newcomb had served notice on the constable who made the levy, and on the attachment creditor, that he claimed the attached property by virtue of the assignment, and that a trial of the right of property would be had at a day named in such notice; but the notice was not filed with the justice, and no trial or further proceedings were had thereunder. The court found that the assignor was insolvent when he made the assignment, and that the same was made in good faith, and concluded from the foregoing facts, as a matter of law, that the assignment took effect at the time of the filing of the schedule of liabilities in the clerk's office; that the attachment levied after that time was wrongful; and that the service of the garnishee summons on the provisional assignee, and his examination as a witness on the motion to discharge an attachment, and the giving of the notice as to trial of the right of property, did not estop him from maintaining the action against Newcomb and Darby for the value of the property taken and sold under the attachment proceedings.

Counsel for plaintiffs in error make the following contention: "The proceedings before Justice Comings, on May 22, 1892, wherein, after a full hearing of the merits of the motion of Geyer to dissolve the attachment, he sustained it, made the matter *res adjudicata*, were and are a bar to this action. Newcomb was a party to that suit by garnishee summons, under paragraphs 4901 and 4902, Gen. St. 1889. He was in privity of estate with Geyer, and was estopped by that order." In this, we think, counsel are mistaken. The contention has the merit of novelty alone.

They seek an unwarranted expansion of the doctrine of *res adjudicata*. See *Thomas v. Baker*, 41 Kan. 350, 21 Pac. 252; *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 109; *Railway Co. v. Reid*, 34 Kan. 410, 8 Pac. 846.

It is also contended that Newcomb is estopped in this action by reason of the fact that he gave notice to Goodin of a trial of a right of property. We remark that, since there was no trial, there could be no estoppel, and that our supreme court has held that such a trial is not conclusive on the rights of the party in a subsequent action. *Graves v. Butcher*, 24 Kan. 291; *Dilley v. McGregor*, Id. 361.

The really important question in the case is as to the validity of the assignment, the schedule having been filed two days after the deed of assignment was executed and filed. No cases in point are cited. Prior to 1876 an assignor was not required to file a schedule of liabilities. By section 1, c. 101, Laws 1876 (section 42, c. 6, Gen. St. 1889), it is provided that, "In every case of assignment under the provisions of the act to which this act is supplemental, there shall be filed in the office of the clerk of the district court of the county in which the assignment is recorded, on the day of executing such assignment, a schedule of the liabilities of such assignor," etc., the same to be verified by the assignor. The second section of this chapter makes it the duty of the clerk of the district court, within 2 days next following the filing of such schedule, to mail to each creditor a notice of such assignment, and requires him to name therein a day not less than 20, nor more 30, days from the day of such assignment on which a meeting of the creditors of such assignor will be held at the office of said clerk to choose an assignee for such trust. The latter section uses the words "from the day of such assignment" as designating the date from which the clerk is to determine the time for the meeting of the creditors, under the limitation fixed by the statute. It is evident that the day of the assignment here meant is that on which the schedule is filed, and that, if a deed of assignment is filed for record before the schedule is filed, such deed would be wholly inoperative, and would remain so until the schedule is filed. Is not such the condition in this case, and did not the subsequent filing of the schedule make the deed effectual and operative? Our supreme court has held that a deed of assignment drawn up, signed, and acknowledged on a given date, but not delivered until a later date, took effect from the time of delivery. *Walker v. Newlin*, 22 Kan. 106. Obviously, such a deed has no force until it is not only delivered, but filed for record, and then it cannot operate as a conveyance of the assignor's property as against his creditors until the law is fully complied with. The filing of the schedule of liabilities is not only essential to the validity of the assignment, but it is also the initial point in the administration of the assigned estate. All the creditors are

to be notified by the clerk of the court, and they have the power to choose a permanent assignee. Such notification cannot take place until after the schedule is filed. It would seem that their rights cannot be affected injuriously by reason of the fact that an inoperative deed of assignment is of record. It may well be, if some fraudulent purpose in withholding the schedule is disclosed by the evidence, and it appears that an attachment was actually levied before the schedule was filed, that such an attachment would be sustained. We are not deciding that it would not be held good under such conditions. But in this case the court found that the assignment was made in good faith, and we must therefore conclude that the schedule was not withheld for any wrongful purpose. It follows, then, that the attachment ought not to have been sustained, and that, since it was levied after the schedule was filed, the assignment must be held good as against the attachment proceedings. An assignment made by an insolvent debtor, in good faith, for the benefit of all his creditors, ought to be sustained. Our supreme court has said that fraud is not to be presumed from the provisions of an assignment where it will admit of an interpretation favorable to honesty and good faith. *Long Bros. v. West & Co.*, 31 Kan. 298, 1 Pac. 545. But here we have a positive finding of good faith. The assignment ought not to be overthrown in favor of an attaching creditor under such circumstances. Both the deed of assignment and the schedule having been filed prior to the levy of the attachment, we hold that the assignment was made effectual before the levy, and that the latter was invalid. Possession by the assignee was not essential to the validity of the assignment. *Lowe v. Kean* (Ill. Sup.) 29 N. E. 1036. It follows that the assignee was entitled to recover from the defendants below the value of the goods taken under the attachment proceedings. The judgment of the district court will be affirmed. All the judges concurring.

(15 Utah 158)

IN RE DE CAMP.

(Supreme Court of Utah. July 7, 1897.)

HABEAS CORPUS—ATTEMPT TO COMMIT A CRIME—PERIOD OF SENTENCE.

1. Attempts to murder otherwise than by poisoning or assault are included in the general description of attempted crimes defined in section 4744, Comp. Laws Utah 1888.

2. Petitioner was sentenced to imprisonment for 12 years for an attempt to commit murder. *Held*, that under section 4744, Comp. Laws Utah 1888, providing that a person attempting to commit a crime may be sentenced to imprisonment not exceeding half of the longest term for which he might have been imprisoned had he committed the crime, the petitioner might be sentenced for twelve years, although it was uncertain that he would have lived 24 years had he committed the crime and been sentenced for life.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Application by Frank De Camp for a writ of habeas corpus. From an order denying the same, petitioner appeals. Affirmed.

J. H. Murphy and S. P. Armstrong, for appellant. A. C. Bishop, Atty. Gen., and Benner X. Smith, for the State.

ZANE, C. J. This is an appeal from an order of the district court denying petitioner's motion for discharge from imprisonment on a writ of habeas corpus. It appears from the record that the petitioner was convicted on the 13th day of October, 1894, of an attempt to commit murder, as described in the indictment, on the 17th day of July, 1894, and sentenced to 12 years' imprisonment in the state prison. The crime of which he was found guilty is defined in section 4744 of the Compiled Laws of Utah of 1888 as follows: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: (1) If the offense so attempted is punishable by imprisonment in the penitentiary for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary, or in a county jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense so attempted." The administration of poison with intent to kill, when death does not result, and assaults with intent to commit murder, are specially defined as crimes, and their punishment is provided for in other sections of the statute. From this the petitioner insists it should be inferred the legislature did not intend to include other attempts to murder as crimes in the general section quoted. Murder without the use of poison, or without assault, is equally as wicked as with the use of those means, and the punishment of attempts to murder by other means is equally essential to the protection of human life. We are of the opinion that attempts to murder otherwise than by poisoning or assault are included in the general provision of attempted crimes defined in section 4744. For attempts to commit crimes punishable by imprisonment in the penitentiary for five years or upward, the above-named section prescribes punishment by imprisonment for a term not exceeding one-half the longest term prescribed, upon conviction of the offense attempted. The offense attempted in this case was murder, and the statute fixing the punishment for murder declares that every person found guilty of murder in the first degree shall, upon the recommendation of the jury, suffer death, or imprisonment for life, in the discretion of the court, and that every person guilty of murder in the second degree shall be imprisoned at hard labor for a term not less than 10 years, and it may extend to life. The longest term for imprisonment in the first and second de-

grees is the same. In the one case the term must be for life, and in the other it may extend during life. For murder in the second degree the court may fix the term for any number of days, months, or years, not less than 10 years. It may extend to 24 years or more, but, if the convict dies before that time, his term ends. It cannot extend beyond his life. No term of imprisonment can extend longer. All sentences for terms are for life, when the convict dies before the time fixed ends. It is clear that the court could have sentenced a person convicted of murder for 24 years or more, and the defendant's term did not exceed one-half of such a term. While the court had no legal right to sentence the defendant for more than one-half the longest term for murder, he could make the term less than one-half. Of course, the court could not ascertain one-half of a life sentence; but he could say that the longest term of years for which a person convicted of murder could be sentenced might be 24 years or more, and fix the defendant's term at 12 years. *People v. Gardner*, 98 Cal. 127, 32 Pac. 880. We find no error in this record. The judgment appealed from is affirmed.

MINER, J., and HART, District Judge, concur.

(15 Utah 453)

REESE v. MORGAN SILVER MIN. CO.

(Supreme Court of Utah. July 2, 1897.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Deceased came to his death while descending defendant's mine. A nonsuit was granted on evidence respecting the manner of his descent, which the court regarded as the cause contributing to the loss of his life; but, as there were reasons and theories upon which such a manner of descent might be reconciled, not only with reasonable care, but safety, on the part of the deceased, and as there was further evidence to show gross negligence on the part of the defendant in not repairing and keeping in safe condition the ladder upon which deceased descended, it was error in the court to grant a nonsuit.

2. When a given state of facts is such that reasonable men might fairly differ upon the question as to whether there was contributory negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of contributory negligence is considered one of law for the court.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. G. Norrell, Judge.

Action by E. W. Reese, administrator of Meredith Reese, against the Morgan Silver Mining Company. Judgment for defendant, and plaintiff appeals. Reversed.

Powers, Straup & Lippman, for appellant. Moyle, Zane & Costigan, for respondent.

MINER, J. This appeal is taken from a judgment of nonsuit. Plaintiff's intestate was in the service of the respondent as a

common miner in its mine at Park City, and was killed by falling from a ladder extending down the shaft in its mine, the rungs of which had, as alleged, become rotten, dangerous, and unsafe. It appears that the mine was worked through a shaft and incline. The incline ran down at an angle of about 36 to 40 degrees for the first 100 feet, and then almost perpendicular for the next 100 feet, and at an angle of about 80 degrees for the next 100 feet, making an incline of about 300 feet. Reese, the deceased, had worked there in the shaft for 10 days. Plaintiff's witnesses say in going down and returning the men used a ladder. This ladder was built on mud sills. Then came the rungs of the ladder, and the stringers to which the rungs were nailed. The steps or rungs of the ladder were nailed on underneath,—the ladder was upside down, so to speak. The ladder was laid with the rungs down, so that the bucket could be hauled up along the stringers. Down the incline, at a point where it turned steeper, there was an iron roller over which ran the cable that pulled the bucket. Reese used this ladder, and had opportunity of becoming acquainted with its condition, so far as he could see with a candle going up and down to work. After the accident, there was one broken rung below where the iron roller was, and where the incline turned down very steep. This rung was gone, and another one was hanging by one nail on one side. There was one rung in the ladder between the two missing ones. Prior to this accident, this ladder was out of repair, and the superintendent had been notified of its dangerous condition several times some two or three weeks before the accident. He was told that some one would get hurt. He replied that he would have it attended to, but it was not repaired. The ladder, before the accident, was badly worn, a number of steps had been broken off of it, and it was patched up in different ways, and it was almost impossible to get a hand or foot hold anywhere on it. The bucket slid on it, and the dirt fell very often out of the bucket, and in being dragged over the rungs the bucket caused the rungs to be worn off. The ladder was so filled with dirt and mud that a person could not take hold of it. In many places it was necessary to take a candlestick and dig in to get any kind of a hold. Many of the rungs were nearly worn in two by the bucket. The ladder and stringers were rotten, and the sills would not hold the nails to the rungs, because they were so rotten. This was its condition the morning before the accident. At the time of the accident, Reese, the deceased, and several other workmen, started down the ladder. Reese was ahead, and went down the ladder with his back to it. Witnesses could not tell what position he was in, whether facing the ladder or not, when his light went out. He went 15 or 20 feet with his back to the ladder. The rungs were out just below the

iron roller five or six feet. The incline is 75 to 80 degrees,—almost perpendicular. At the top of the ladder at the first incline a person could walk with his face from the ladder, if so inclined, and then turn around afterwards. Deceased fell $1\frac{1}{2}$ minutes after he started. He went faster than any of the workmen. His companions requested him not to go so fast, for fear rocks would fall. At this time Reese was near the iron roller, 40 to 60 feet ahead of his fellow workmen, and it was at this time that his light went out, and it was the last time he was seen alive. He was afterwards found dead at the foot of the shaft. No one could tell where he fell. The rung was out of the ladder just below the iron roller, and the ladder was found to be in a very rotten and defective condition after the accident, as it was before the accident. Deceased was 21 years of age, had no mother, wife, or children, but contributed towards the support of his father. Other formal proof was introduced. At the close of plaintiff's case the court, on motion of defendant, granted a nonsuit, on the ground that the plaintiff contributed to cause the injury.

The question of negligence and contributory negligence, as affecting the right of recovery, such as is presented by this appeal, has often been presented and passed upon by this court. It appears from the testimony that the first 100 feet was on an incline 36 to 40 feet; that deceased started on ahead of his two companions, walking with his back to the ladder, and continued to walk in this way for a minute or two for 15 or 20 feet; that one could walk down the first 100 feet of the ladder with his back to the ladder, if so inclined, on account of its gradual descent, and could then turn around, and walk with his face to the ladder. The iron roller was 100 feet down from the starting point. At this point the incline was 75 to 80 degrees,—almost straight down. The rungs of the ladder were out 5 or 6 feet below the roller. The light that deceased held went out near the roller, but witness could not say whether deceased was going down with his back to the ladder or not when his light went out. Whether in going down the ladder rapidly, with his back to it, was negligence, depended upon the agility, dexterity, and care exercised by the deceased, the condition of the ladder, and whether he was familiar with that manner of descent. One person might be able to descend a ladder with agility and safety with his back to it, and that might be the only convenient and safe way he could descend it, while it might be dangerous and negligent for another man to make the descent in that manner. A left-handed man might do a certain act without being negligent, while it might be negligence in a right-handed man to attempt to do the same thing left-handed. What might be deemed ordinary care and prudence in one case may, under different surroundings and circumstances, be gross negligence. The jury

might have found that it was the proper way for deceased to descend the ladder. The solid heel might take better hold of the rung, the rear of which was filled with dirt, than the more supple toe of a shoe. The proof shows that back of the rungs the dirt was packed so hard that it was necessary to get a pick, and dig it out, before one could get a hand hold of the rungs. Under these circumstances, could he have gone down the ladder, facing it, as safely as with his back to it? When the deceased reached the roller and the steep descent, he might have turned, facing the ladder. There is no proof that he did not. There is proof that he could do so. The jury might have found that he did. Negligence cannot be presumed; it must be proved. The court cannot presume that he went down negligently, in the absence of proof, for the presumption would be that he went down using due care. Prior to the accident, there were no broken rungs on the ladder. After the accident, a broken rung was found hanging by a nail on one side of the ladder, next but one above another one broken. In descending the ladder, using due care, deceased may have stepped upon and broken the rung found hanging by a nail, and then have fallen to his death. This theory is reasonable at least. This rung was in before deceased went down. It was found broken after he went down. Who broke it? The jury might have found that the deceased broke it without knowledge of its defective condition. There is no proof that the deceased knew of these particular rungs being defective. There is proof that the defendant did know that the whole ladder was rotten and dangerous to life before the deceased went down it to his death. Why should not the question of contributory negligence have been submitted to the jury? No one saw the deceased below the roller. No one could tell how he descended the ladder below the roller. We have no right to presume that he was negligent at this point, in the absence of proof; and, as we have seen, the proof does not necessarily warrant that presumption.

As we have said, that which amounts to negligence in one person might not be so in another, because the agility, dexterity, caution, skill, and the surrounding circumstances of the one might differ from that of the other. The question of negligence or the want of it in such cases must depend, not upon one fact alone, but upon all the facts and circumstances of the case. It is made to appear from the testimony that the first 100 feet was on an incline of 36 to 40 degrees, and that a person could walk down it face foremost, and when he got to the roller he could change. It does not appear from the testimony that the deceased was on this 100 feet when he fell from the ladder; nor does it appear that he was walking with his face from the ladder when he did fall; nor does it appear that in walking down this first 100 feet he was not exercising such due and reasonable care as a person in his situation would ordinarily use with safety.

How the deceased went down the ladder, if he did so, below the roller on the steep incline, where the two rungs were gone, no one knows. This incline was almost perpendicular. It will not be presumed without proof that deceased did a foolish, criminal act, by attempting to destroy his own life. Prior to the time of the accident, the ladder was out of repair; the rungs were badly worn, and some of them were broken off. It was so rotten that nails would not hold the steps or rungs onto the stringers securely. It was apparent that some one would get hurt unless it was repaired. These facts concerning the condition of the ladder were communicated to the superintendent before the accident, and he, recognizing its bad and dangerous condition, promised to have it fixed, but failed to do so. If the testimony as to the condition of the ladder before the accident is true, it established a clear case of negligence on the part of the defendant. The defendant was bound to furnish a safe ladder upon which the deceased could, while using reasonable care, descend to his labors in safety. This shaft was so dark that candles were required to be carried by each workman, and it could not be required or expected that in going up and down the ladder, with a candle, to his work, the deceased should investigate and discover the rotten, unsafe, hidden defects of the ladder. He was not employed for that purpose. Yet he was held bound to use his eyes and use reasonable care to avoid known dangers, and those which could be seen by the use of reasonable care. If he knew of the dangerous condition of the ladder which caused the injury, he should have exercised reasonable care in proportion to the danger. Whether Reese was negligent, and contributed to cause the injury complained of, as the case is here presented, was a question of fact for the jury to pass upon. When a given state of facts is such that reasonable men might fairly differ upon the question as to whether there was contributory negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of contributory negligence is ever considered one of law for the court. This general rule, so often laid down by this court, following the case of *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, should always be kept in mind when considering these questions. *Wines v. Railway Co.*, 9 Utah, 232, 33 Pac. 1042. In the case of *Dederichs v. Railway Co.*, 44 Pac. 649, this court said that: "As the question of negligence and want of ordinary care on the part of the defendant was one of the facts for the jury to determine under all the facts and circumstances of the case, and under proper instructions from the court, so, also, the question as to whether or not the plaintiff, by his negligence and want of ordinary care and caution, contributed to cause the injury, and whether or not there was negligence in the plaintiff

which was the proximate cause of the injury, and whether or not the defendant, by the exercise of reasonable care and prudence, might have avoided the consequences of the plaintiff's negligence, if it was such, were likewise questions of fact for the jury to determine, under like rules." In *Saunders v. Pacific Co.* (Utah) 44 Pac. 932, the court said: "Whether or not the appellant, under the peculiar circumstances of the case, was himself guilty of a want of ordinary care which contributed to the injury was a question for the jury, and not a question of law for the court." We are of the opinion that it was for the jury to pass upon the testimony, and determine from it the question of the negligence of the defendant in the matter complained of, and as to the contributory negligence of the plaintiff's intestate under the peculiar circumstances in proof. Each case involving this question must be weighed by such a reasonable standard of care as would be applied to the conduct of ordinarily prudent, reasonable men acting under like circumstances, taking into consideration the place, time, locality, and general circumstances surrounding the whole transaction. Under the facts and circumstances shown in this case, we are of the opinion that the court erred in taking it from the jury. *Dederichs v. Railway Co.*, 44 Pac. 649, 13 Utah, 34; *Hall v. Railway Co.*, 44 Pac. 1043, 13 Utah, 243; *Smith v. Railway Co.*, 9 Utah, 141, 33 Pac. 626; *Woods v. Southern Pac. Co.*, 9 Utah, 146, 33 Pac. 628; *Wines v. Railway Co.*, 9 Utah, 232, 33 Pac. 1042; *Lowe v. Salt Lake City*, 44 Pac. 1052, 13 Utah, 91; *Saunders v. Southern Pac. Co.*, 44 Pac. 932, 13 Utah, 275; *Railway Co. v. Ives*, 144 U. S. 428, 12 Sup. Ct. 679; *Handley v. Mining Co.*, 49 Pac. 295, 14 Utah, —. The judgment of the district court is reversed, and a new trial granted.

BARTON, J., concurs.

(15 Utah, 391)

VICTOR GOLD & SILVER MIN. CO. v. NATIONAL BANK OF THE REPUBLIC et al.

(Supreme Court of Utah. July 10, 1897.)

EXECUTION—REDEMPTION—FINDINGS OF COURT—OFFICER OF CORPORATION—AUTHORITY.

1. Plaintiff, a mining company, alleged that, from a sale on an execution against it, defendant bank had no right to redeem on a judgment against Groesbeck, on the ground that Clawson, who purchased at the execution sale, held the title to the mine in equity for Groesbeck, for the reason that Groesbeck was the president of the mining company, and advanced its money to pay the purchase price; and alleged further that in due time it duly tendered the money to redeem from the sale on execution from which the bank was permitted to redeem. Held, that the presidency of Groesbeck, the advance of the money of the mining company to pay the purchase price, and the tender by it of the redemption money, were essential and ultimate facts, and that the court should have found that they did or did not, respectively, exist.

2. Held, further, that, if Groesbeck was the president of the mining company, he could not

bind the company by consenting to the sale of the property to Clawson, to be held for himself.

3. Also, *held*, that, when any officer of a corporation is acting partly for himself and partly for the corporation, notice to him will not affect the rights of the company.

(Syllabus by the Court.)

Appeal from district court, First district; W. H. King, Judge.

Action by the Victor Gold & Silver Mining Company against the National Bank of the Republic and others. Judgment for defendants, and plaintiff appeals. Reversed.

Brown & Henderson, for appellant. Booth, Lee & Gray, Dey & Street, and Samuel A. King, for respondents.

ZANE, C. J. It appears from the pleadings and findings in this case that the plaintiff corporation was the owner of the four mining claims described in the complaint, and that, by virtue of an execution issued upon a judgment against it in favor of Tucker & Wallace, they were sold to one Clawson, who received a deed from the sheriff; that afterwards J. M. Wheeler, G. W. Parks, and E. D. R. Thompson obtained judgment against the plaintiff for \$805.25, and in aid of an execution issued thereon they filed a bill to set aside the deed and sale to Clawson on the ground the money paid by him was furnished by the plaintiff, and that the sale and deed were made to Clawson to prevent the creditors of the plaintiff from collecting their debts. A default was entered, and the deed and sale were set aside, and the property was held to belong to the plaintiff, the mining company, and subject to the executions. The executions were levied upon them as plaintiff's property, and upon the sale Frank Knox, president of the National Bank of the Republic, became the purchaser, for \$979.01. It further appears that the bank, by virtue of a judgment against William Groesbeck, and an execution thereon, redeemed from the sale to Knox, if the right to do so existed; and, the time for redemption from the bank having expired under the statute, the sheriff executed a deed to the bank. The foregoing facts were alleged in the pleadings, and established by the findings of the court. Other facts are alleged in the pleadings, as to the existence and effect of which there is much controversy. The court below found the title to the property in dispute in defendant, and so decreed, and decreed further that the title of the bank should be quieted, and granted a writ of possession. From the decree the plaintiff has appealed, and assigns numerous errors upon the exceptions to the rulings of the court, and to its findings. The appeal was not taken in time to allow us to review the exceptions to the decision on the ground it was not supported by the evidence.

The plaintiff claims it had the right to redeem, under subdivision 1 of section 3443, Comp. Laws Utah 1888, from the sale on the

execution of Wheeler et al.; and the bank claims it had the right to redeem as redemptioner under the second subdivision of the same section, and that its redemption was valid in law and in equity. The section is as follows: "Property sold subject to the redemption as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest: (1) The judgment debtor, or his successor in interest in the whole or any part of the property. (2) A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners." It appears from the findings that the executions by virtue of which the sale was made from which the Bank of the Republic redeemed was issued on a judgment against the plaintiff, and the property sold was levied on as plaintiff's. But the bank claimed on the trial of this case that the sale to Clawson and the sheriff's deed to him passed the legal and equitable title, and the decree in aid of the Wheeler, Parks, and Thompson executions only set that sale and deed aside as to the execution in favor of Wheeler, Parks, and Thompson, and left the title subject thereto in Clawson, in trust for Groesbeck, and that the bank by virtue of its judgment against Groesbeck acquired a lien, by virtue of which the bank was a redemptioner, with the right to make the redemption on which it relied, and, further, that plaintiff, having been divested of its title, had no longer any right to redeem as a judgment debtor. The bank places its right to redeem by virtue of the judgment against Groesbeck (1) on the ground that the plaintiff agreed with Groesbeck and Clawson that the latter should buy the property at execution sale, and the deed should be made to Clawson, and the property held in trust for Groesbeck; (2) because Groesbeck advanced the money which was paid by Clawson upon the purchase; (3) because the plaintiff allowed the sale to remain unquestioned, and took no steps to set the deed or sale aside, for 21 months; (4) because of the apparent acquiescence of the plaintiff, the defendant expended money in establishing Groesbeck's title to the property.

The answer of the mining corporation to the cross complaint of the bank denied the above facts relied upon by the bank, and in its complaint, as amended, and in its answer to the cross complaint of the bank, the plaintiff alleged that Groesbeck, before and when the transactions upon which the bank relies occurred, was the president of the mining corporation, and while president he caused his son-in-law, Clawson, to bid off the property for the sum of \$176, which was furnished to Clawson by Groesbeck out of the funds of the plaintiff,

and paid by him for the property; that the purchase was made fraudulently by Clawson, with the advice of Groesbeck, for the purpose of defrauding the plaintiff of its property; and that the officers of the plaintiff, except its president, knew nothing of the sale, or the fraudulent purposes and action of Groesbeck and Clawson. The plaintiff also alleges that the decree in favor of Wheeler, Parks, and Thompson set the deed and sale to Clawson aside as to the plaintiff, as well as to the plaintiffs in that case; that plaintiff made a lawful tender of the amount necessary to redeem from the sale on the Wheeler, Parks, and Thompson executions, and denied the validity of the sheriff's deed to the defendant; and denied that Groesbeck had any authority to file an answer for the plaintiff, or to answer for it. The plaintiff also alleged that Groesbeck was acting for himself, in hostility to the interest of plaintiff, and without authority to bind it by any of the admissions or agreements alleged by the bank, and denies any consent that the property might remain in Clawson, or acquiescence therein, or that the plaintiff was estopped from asserting its title to the property. The allegation that Groesbeck was the president of the mining company was essential to the plaintiff's cause of action, and to the defense set up in the answer to the defendant's cross complaint. If Groesbeck was president of the Victor Gold & Silver Mining Company, he could not consent, for the plaintiff, to the sale of its property to Clawson, to be held in trust for himself. The law will not permit an officer of a corporation to act for the company and for himself in making any contract between them, or in any transaction to the subject-matter of which they may have, or may thereby acquire, conflicting interests. In such case the agreement or assent of the officer will not bind the company. Officers of corporations are bound to exercise their official powers in the utmost good faith for the benefit of their principals, in making or consenting to any transaction, and the law will not allow them, as to the same transaction, to act for their own benefit. The agent cannot act for himself and his principal as to anything with respect to which their interests may vary. The reason is that self-interest may prevent him from the performance of the duties he owes his principal. 4 Thomp. Corp. §§ 4657, 4658, 4630; Claffin v. Bank, 25 N. Y. 293; Bank v. Gifford, 47 Iowa, 575. When the officer is acting partly for himself and partly for the corporation, a notice to him does not affect the corporation. In section 4657, Thomp. Corp., the rule is stated: "But it should be borne constantly in mind that the cases where a notice to the president or any officer of a corporation will affect the corporation are cases where such president or officer is acting exclusively for the corporation. In cases where they are acting partly for the corporation and partly for themselves, a notice to them does not affect the corporation, because the fact that their personal interest is opposed to that

of the corporation may induce them to withhold the information thus communicated from the directors, or from the appropriate corporate officer. In receiving a communication under such circumstances the president or other officer is held not to represent the corporation, but to represent himself only."

The allegation in plaintiff's complaint that Groesbeck was president of the mining company at the time the sale and the deed to Clawson were made, and when he filed the answer for himself and for the plaintiff to the complaint of Wheeler and others to set the deed and sale aside, and when he withdrew it, and during the time of the acquiescence and admissions of Groesbeck and the plaintiff, relied upon by the bank, is one of the facts alleged by the plaintiff as its cause of action. It was an essential fact, not an evidentiary fact to prove a primary or essential fact. This fact, with the other facts alleged by plaintiff, constituted its cause of action. The facts alleged by the plaintiff necessary to his cause of action should always be found, but facts merely affording an inference of the truth of indispensable facts need not be found. If Groesbeck was president of plaintiff, and was acting for himself in procuring Clawson to purchase and hold plaintiff's property in trust for himself, such agreement was fraudulent. Such acts of the president would not bind his principal, the mining company. The fact of Groesbeck's presidency was also essential to plaintiff's defense as stated in its answer to the bank's cross complaint. The allegation that the money paid by Clawson on the purchase was advanced to him by Groesbeck from plaintiff's money was also a fact essential to plaintiff's case, and its defense to the bank's cross complaint. There is no express or direct finding as to this fact. There is a finding to the effect that Groesbeck advanced the money, but there is no direct finding that the Clawson purchase was not paid with plaintiff's money. If the mining company's money was used, a trust resulted in its favor. The plaintiff also alleged in its complaint, and in its answer to the cross-complaint of defendant, an offer to redeem from the sale to Knox upon the Wheeler execution, and a tender in due time of the amount necessary to redeem. As to this allegation there is no finding. The finding that there was no redemption was not sufficient. The Victor Gold & Silver Mining Company, being a legal person, could not act except through natural persons,—its directors or other officers. The powers of these officers were defined and limited by its charter and by-laws. The directors, within the scope of their authority, were authorized to direct and transact the business of their principal. The court did not find that the board of directors consented to or acquiesced in any of the transactions of the plaintiff complained of; nor is it found that the stockholders at any meeting authorized or ratified any fraudulent acts, or were guilty of negligence in any respect. Before holding that the company should be deprived of its proper

ty, it should appear that its directors authorized the acts which the defendant relies upon, or that they made the admissions, or authorized them, or that they acted or failed to act in such a way as to estop the plaintiff from asserting its right to its property, or that its president was authorized to do so. For the reasons stated, we hold that the court below failed to make any sufficient finding upon the facts and issues pointed out.

Inasmuch as the evidence upon which the court made its findings is not before us, we will not decide whether the decree in the case of Wheeler and others set the sale and deed to Clawson aside as to the plaintiff, or as to the effect of filing the answer by Groesbeck for himself and the plaintiff, and the withdrawal of it. Such determinations can be better made by the court below upon a retrial in the light of all the evidence bearing upon them. Other errors are assigned, but, in view of the fact that the case must be retried, we do not think it necessary to consider the case further in this opinion. For the reasons stated the decree appealed from is reversed, and the cause is remanded to the court below, with directions to set aside the findings upon which the decree was based, and to retry the case upon the evidence taken, so far as competent, relevant, and material, and upon such further legitimate evidence as may be offered by either party.

BARTCH and MINER, JJ., concur.

(15 Utah, 215)

In re HANDLEY'S ESTATE.

(Supreme Court of Utah. June 28, 1897.)

CONSTITUTIONAL LAW—POLYGAMOUS CHILDREN—INHERITANCE—FINAL JUDGMENT—LEGISLATIVE POWERS.

1. Where the legislature of the state by statute declares that in all cases involving the right of polygamous children to inherit, determined against them before the act in any of the courts of the territory, a motion for a rehearing or new trial shall be entertained on their application who were parties at any time within one year after the act took effect, and the court is required to entertain the motion for a new trial or rehearing regardless of when the judgment or decree became final, the legislature assumed a control over the judiciary not warranted by the constitution, and such a statute, destroying vested rights, and the finality of judicial determinations, is unconstitutional and void.

2. When the court construes the law, and holds that it has a certain effect, and bases its judgment upon it, the legislature cannot declare that the law as to that case has any other effect than that declared by the court.

(Syllabus by the Court.)

On rehearing. For former opinion, see 24 Pac. 673. Denied.

Sutherland & Murphy and John W. Judd, for petitioner. Dey & Street and W. H. Bramel, for respondent.

ZANE, C. J. It appears from this record that the late George Handley was a resident of Salt Lake City; that he died on the 25th

day of May, 1874, leaving a lawful wife, Elizabeth Handley, and a polygamous wife, Sarah A. Chapman, and the following children: John Handley, William Handley, Charles J. Handley, and Emma N. Handley, of the lawful marriage, and Ruth A. Newson, Benjamin T. Handley, Mary F. Handley, and Harvey F. Handley, of the plural marriage; that both wives and all of the children except Mary Handley are still living; that he died seised of real estate estimated to be of the value of \$25,916.92; that on April 12, 1888, his widow, Elizabeth Handley, was appointed administratrix of her husband's estate by the probate court; and that she filed an inventory and final account as such. It also appears that the surviving children of the plural wife, and their mother, as the heirs of the deceased Mary, filed their petition in said court, asking that the children of the polygamous marriage be recognized as lawful heirs of their father, and that his estate be divided in equal parts among the children of both marriages. After hearing the evidence and proofs, the court made findings of fact and stated its conclusions of law to the effect that the petitioners were not entitled, under the law, to any part of the estate of the deceased father, and entered a decree accordingly, and for costs. It further appears that the petitioners appealed to the supreme court of the territory of Utah, and upon a hearing in that court the decision of the lower court was affirmed, with costs, on July 28, 1890 (24 Pac. 673); that the petitioners then appealed to the supreme court of the United States, and the appeal was dismissed for the want of jurisdiction, and its mandate was sent down to the supreme court of the territory, and the latter issued its writ of mandamus or mandate to the district court. After the lapse of six years from the expiration of the time within which a motion for a rehearing could be made under the rules of the supreme court of the territory or of this state, the legislature of the state of Utah passed the act in force March 9, 1896, in pursuance of which the petitioners present this motion for a rehearing. The statute is as follows:

"Section 1. That section 2742 of the Compiled Laws of the territory of Utah, included when enacted and effectually operated at all times thereafter and now operates to include the issue of bigamous and polygamous marriages, and entitles all such issue to inherit, as in said section provided, except such as are not included in the provision in section 11, of the act of congress called the 'Edmunds-Tucker Act,' entitled 'An act to amend an act entitled "An act to amend section 5352" of the Revised Statutes of the United States, in reference to bigamy and for other purposes.'

"Sec. 2. That in all cases involving the rights of such issue to so inherit, heretofore determined adversely to such issue in any of the courts of the territory of Utah, a motion for a new trial or rehearing shall be entertained, on application of such issue who was or were parties at any time, within one year after this act

shall take effect; and the case or cases in which said motion is so directed to be heard shall be deemed to be transferred to the courts of the state of Utah corresponding to that of the territory of Utah, in which such adverse decision was made, and the courts shall thereupon proceed to hear and determine said motion, and if granted to proceed to hear and determine said case or cases without prejudice from the lapse of time since the former hearing or any prior determination of a like motion; provided, that this act shall not be construed to affect the rights of bona fide purchasers from any such parties before the approval of this act."

Handley, the ancestor, died in 1874,—10 years before section 2742 mentioned in the act became a law, and its meaning, operation, and effect declared by the act quoted. An act of the territorial legislature of March 3, 1852, was in force when the father and polygamous husband died. By that law the court determined the rights of the parties to his estate by the decree which the petitioners seek to set aside. This decree gave the entire estate to the children of the lawful wife, and it became final after the time for filing a petition for rehearing had passed. If it were conceded that the right of the children of the plural wife to inherit a portion of their deceased father's estate should have been determined by section 2742, Comp. Laws, and the decree sought to be set aside had been rendered under it, section 1 of the act of March 9, 1890, could have no effect upon that decree, because it became final six years before that law took effect. After the court has interpreted or construed a statute on the trial of a case, and rendered judgment, the legislature cannot affect it by a declaratory or explanatory law, giving the law under which the decree was rendered a different construction. To hold that the legislature can, would recognize the lawmaking department as a court of errors, with power to overturn all judgments and decrees depending upon the interpretation or the construction of statutes. The purpose of separating and classifying the powers of government, and of intrusting the lawmaking power to the officers of one department and the right to execute laws to another, and the power to interpret and construe and apply laws to the conduct and contentions of mankind to another, was to prevent the evils that would arise if all were concentrated and held by the same hand. Such a concentration of power would give to the class of officers possessing it absolute power, and that would amount to a despotism.

The second section of the act upon which the petitioners rely is subject to fatal objections. That section declares that in all cases involving the right of polygamous children to inherit, determined against them before the act in any of the courts of the territory, a motion for a new trial or rehearing shall be entertained on their application, who were parties, at any time within one year after the act took effect. The court is required by it to

entertain the motion for a new trial or rehearing regardless of when the judgment or decree became final. And the section further declares that such cases shall be deemed transferred from the territorial court to the state court. The state court is then directed to hear and determine the motion, and, if granted, to hear and determine the case without prejudice from the lapse of time since the former hearing, or any prior determination of a like motion. The court is peremptorily commanded by the legislature to entertain the motion for a new trial or rehearing upon the application of the polygamous issue, no matter what reasons may be brought to the attention of the court or may appear for not entertaining it. Though a final hearing may have been entered 25 years before, the motion must be entertained. If the right to inherit was decided against a polygamous issue, no matter for what reason, the legislature has decided the new trial must be entertained. The court is denied all discretion or right to judge for itself, as to its jurisdiction or otherwise. It is commanded to proceed at once, without first hearing any reasons or listening to any argument one way or the other. And, if a rehearing or new trial is granted, the court is directed to proceed to hear the case without prejudice from the lapse of time since the former hearing, or any prior determination, though the case may have been tried on much evidence, and a decree rendered a generation before. The court is forbidden by the act to take such matters into consideration; all laches and limitations must be disregarded. Under the territorial law the right to a new trial was lost unless the motion was served and filed with the clerk of the court within 10 days after the verdict, or, in case of a trial by the court, within 10 days after notice of its decision; and the same rule exists under the state. And a right to a rehearing in the supreme court under the territory was lost unless the petition was filed within 20 days after the decision, and this is also a rule of the supreme court of the state. According to this act, any number of years may have intervened. The act in question appears to be a plain attempt on the part of the legislature to exercise judicial powers. Section 1 of article 5 of the state constitution declares: "The powers of the government of the state of Utah shall be divided into three distinct departments, the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the case herein expressly directed or permitted." Section 1 of article 8 of the same instrument is as follows: "The judicial powers of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace, and such other courts inferior to the supreme court as may be established by law." The senate, while sitting as a court of impeachment, has judicial authority, so far as necessary, to try such issues. Otherwise the con-

stitution has not intrusted any part of the judicial power of the state to the legislature. The petitioners claim that the provisions of the second section relate alone to the remedy. When the estate of the deceased, Handley, was ready for distribution, the four children of the lawful wife claimed all of it, while the four children of the plural marriage claimed the right to one-half of it. This made it the duty of the court to ascertain the heirs,—the persons entitled to inherit. The remedy provided by law was employed, and the issue was tried, and upon the evidence heard, and the law as interpreted, construed, and applied to the facts, the court found the entire estate to belong to the four children of the lawful wife, and entered a decree accordingly. That decree was affirmed by the court of last resort, and it became final when the 20 days given within which to file a petition for a rehearing expired,—six years before the act of 1896 in question. That decree determined the interests of the children of the lawful wife to the estate in litigation, and gave them an immediate right to its possession. The remedy was exhausted, and the rights of the parties were established by that decree, and the title to the entire estate was vested in the four children of the lawful wife. The right was a vested one. It was finally ascertained and settled by the decree beyond the power of the court or the legislature to unsettle or divert it. The remedy which the law afforded the petitioners was employed by them, and it had completed its work. It was exhausted six years before the legislative enactment upon which they rely. After the decree became final, there remained no legal right to be enforced by the remedy which the act attempted to provide, or any legal wrong to be redressed. The legislature attempted by a retrospective act to furnish a method by which vested rights could be divested, and to compel the courts to employ it. The rights of the children of the lawful wife to the estate in question were ascertained and settled by the decree. Thereafter their rights were subject to no contingency. They were completed and consummated. They were vested, and beyond the reach of any remedy the court could employ, or the legislature could invent. No retroactive, explanatory, or declaratory enactment thereafter could have any effect upon them. The court, having tried the case, construed the law in force at the time; and, having applied it to the facts, and entered a final decree, the legislature could not afterwards, by a declaratory or explanatory act as to that case, give to the law a different construction, requiring a different decree, and invent a new remedy or change the old one, and require the court to retry the case and enter a new decree according to its new construction, and new and changed remedy.

If we were to affirm the validity of the law in question, we would, in effect, say that the legislature may exercise judicial powers, authorize and require the courts to set aside final judgments and decrees, divest titles, and destroy and annihilate vested rights. The people

of the state have not intrusted such powers to the legislature. Cooley, Const. Lim. (6th Ed.) p. 111; *Merrill v. Sherburne*, 8 Am. Dec. 52; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Reiser v. Association*, 30 Pa. St. 137; *Hooker v. Hooker*, 10 Smedes & M. 399; *Moser v. White*, 20 Mich. 59; *Gilman v. Tucker* (N. Y. App.) 28 N. E. 1040; *People v. Board of Sup'rs of New York*, 16 N. Y. 424. Judge Cooley (Const. Lim. p. 111) says: "It is always competent to change an existing law by a declaratory statute, and, where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retract upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts." In *Merrill v. Sherburne*, 8 Am. Dec. 52, the plaintiff claimed the estate of Nathaniel Ward by virtue of an instrument purporting to be his last will, which the heirs at law of Ward contested, and after a hearing the issues were found against Merrill, and in 1814, at the November term of the court, final judgment was rendered, disallowing the instrument. Merrill then petitioned the legislature for another trial, and they, at their June session, 1817, passed an act granting to the plaintiff, as administratrix of Merrill, then deceased, liberty to re-enter the cause in the superior court, and there have it tried like a common case for review; and upon due notice the case was entered upon the docket, and the heirs, appearing as defendants, moved the court to quash the proceedings on the ground that the act was unconstitutional. The court held the nature and effect of the act was judicial, that it was also retroactive, and that the legislature had no power to pass such an act, and quashed the proceedings. In a very learned opinion the court said, among other things: "Be that as it may, however, it is clearly unwarrantable thus to take from any citizen a vested right, a right 'to do certain actions, or possess certain things,' which he has already begun to exercise, or to the exercise of which no obstacle exists in the present laws of the land. * * * But previous to the passage of the act granting a new trial to the plaintiff the defendant had become authorized by the laws of the land to possess all the estate of which Ward died seised. Every obstacle to the exercise of their rights had been removed or annulled; and whether their rights became vested by Ward's death, or by the final judgment in November, 1814, is immaterial, because both these events had happened before the passage of this act. * * * The defendants being thus situated, the legislature interfered; not to enact what is in its nature and effect a law, but

to pass a decree; not to prescribe a rule for future cases, but to regulate a case which had already occurred; not to make a private statute by the consent of all concerned, but, at the request of one party, to reverse and alter existing judgments; not to promulgate an ordinance for a whole class of rights in the community, but to make the action of a particular individual an exception to all standing laws on the subject in controversy. The expense and inconvenience of another trial were also imposed upon the defendants, and all their claims to the property in dispute, which had become indefeasible by the law then in being, were launched again upon the sea of litigation to be lost or saved, as accident and opinion might afterward happen to injure or befriend them. The misfortune of having vested rights thus disturbed is not small when we consider that on this principle no judgment whatever in a court of law is final." In the case of *Gilman v. Tucker*, supra, the court said: "We also think the act violated the constitutional guaranty, because it assumes to nullify a final and unimpeachable judgment, not only establishing the plaintiff's right to the premises in dispute, but also awarding him a sum of money as costs. After rendition, this judgment became an evidence of title, and could not be taken from the plaintiff without destroying one of the instrumentalities by which her title was manifested. A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. * * * In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property. Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as where it attempts to do the same thing directly. We are therefore of the opinion that the repugnancy between the law and the constitutional rights of the citizen is so irreconcilable that the law must fail." The first section of the act of 1896 declared the operation and effect of section 2742 of the Compiled Laws of 1888, at the time it took effect, and at all times thereafter, included the issue of polygamous marriages, notwithstanding the court might have held in any given case it did not include such issue. The legislature assumed the right to declare the law had an operation and effect with respect to such cases, different from that which the court may have declared it had, and upon which it may have based its judgment. When the court construes the law, and holds it has a certain effect, and bases a judgment upon it, the legislature cannot declare that the law, as to that case, had any other effect than that declared by the court. By the second section of the act of 1896, the legislature decided and assumed that all judgments and decrees that had been entered involving the right of polygamous children to inherit were not final, and assumed to direct the courts to disregard their effect as such,

and to entertain applications to set them aside, and assumed to command the state courts to deem such cases transferred, and to take jurisdiction of them, to proceed to hear and determine such applications, and, if granted, to hear and determine the cases regardless of limitations or laches. In effect, the courts are required to disregard as final all judgments and decisions rendered in such cases. We must hold the act of 1896 invalid, because in its passage the legislature assumed to exercise judicial powers, and also because they assumed the right to require the courts to regard judgments as impeachable that were unimpeachable under the laws in force at the time they were rendered, and by which vested rights were established and evidenced.

MINER, J., and HART, District Judge, concur.

(15 Utah 445)

SALT LAKE LITHOGRAPHING CO. et al.
v. IBEX MINING & SMELTING CO.
et al. (BLACK et al., Interveners).

(Supreme Court of Utah. July 29, 1897.)

MORTGAGES—MECHANICS' LIENS—DEBTS DUE
LABORERS—PRIORITY.

Chapter 30, Sess. Laws 1892, declaring that debts of corporations or natural persons due for services performed by laborers within six months before the seizure of the debtor's property on process, or the suspension of his business by the action of creditors, or before his property shall be put into the hands of a receiver or trustee, shall be treated as preferred, does not affect the rights of existing grantees, mortgagees, or lien holders.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Suit by the Salt Lake Lithographing Company and others against the Ibox Mining & Smelting Company and others. G. W. Black and 120 other interveners appeal from the decree in favor of plaintiff. Affirmed.

Samuel A. King and Benner X. Smith, for appellants. Frank B. Stephens, for respondent Sierra Nevada Lumber Co. Frank Pierce, for respondent W. S. McCornick.

ZANE, C. J. This is an appeal by G. W. Black and 120 others, interveners, from the decree of the lower court for the Sierra Nevada Lumber Company and W. S. McCornick for the amounts found to be due them, and directing the receiver of the smelter plant of the Ibox Mining & Smelting Company to convert the same into money, and out of the proceeds to pay—First, the lumber company the amount found due it; second, the amount found due McCornick; and, third, the interveners the amounts found due them respectively. It appears from the record that the lumber company obtained a lien for material furnished the Ibox Company and used in the erection of a smelter plant on its land, and that the lien related to and attached on the 14th day of

September, 1894, and that McCornick held a mortgage on the same property, executed on the 18th day of March, 1895, and recorded on the 11th day of the following month; that the mortgage was given by the Ibox Company to secure a note for \$60,000, dated the 6th day of March of the same year. It appears further that attachments were levied on the smelter property on the 3d day of May, 1895, and the company then ceased to operate its smelter and to do business, and that the court appointed one Humphreys receiver of the smelter on the 11th day of the same month; that he qualified, and took possession of it; that the interveners filed their statements, duly verified, with the officer serving the attachments, within 10 days after the levy of the attachment writs; that some of the interveners worked in the smelter, and others were engaged in extracting ore from the mine and hauling it for the Ibox Company, during the months of February, March, April, and May, 1896. The question for decision is, did the court err in holding the lien of the lumber company and the lien of McCornick's mortgage superior to the claims of the interveners? Chapter 30, § 1, Sess. Laws 1892, is as follows: "That hereafter, when the property of any company, corporation, firm or person shall be seized by any process of any court of this territory, or when their business shall be suspended by the action of creditors, or be put into the hands of a receiver or trustee, then in all such cases the debts owing to laborers or servants for work or labor performed within six months next preceding the seizure or transfer of such property shall be considered and treated as preferred debts, and such laborers or employes shall be preferred creditors, and shall be first paid in full; and if there be not sufficient to pay them in full, then the same shall be paid to them pro rata, after paying costs. Any such laborer or servant desiring to enforce his or her claim for wages under this act, shall present a statement under oath, showing the amount due after allowing all just credits and set offs, the kind of work for which such wages are due, and when performed, to the officer, person or court charged with such property, within ten days after the seizure thereof on any writ of attachment, or within thirty days after the same may have been placed in the hands of any receiver or trustee; and thereupon it shall be the duty of the person or court receiving such statement to pay the amount of such claim or claims to the person or persons entitled thereto (after first paying all costs occasioned by the seizure of such property) out of the proceeds of the sale of the property seized." This section declares that debts of a corporation, company, or person, due laborers for labor performed within six months before the seizure of the debtor's property on process, or the suspension of business by the action of creditors, or before the debtor's property shall be put in the hands of a receiver or trustee shall be treated as preferred debts;

that the property or funds held under the conditions named shall be appropriated first to the payment of laborers rendering service within the time named. The act does not mention property that may have been sold before the seizure, suspension, or possession designated, or upon which a mortgage may have been executed, or to which the lien of a mechanic or a material man may have attached. At common law, a mortgage passed the title to the mortgagee, subject to redemption. Under our statute it creates a lien,—an interest in the land to the extent of the debt secured; and that interest, being created for a valuable consideration, is equally entitled to protection according to the instrument creating it, as the entire interest or title is upon a conveyance of the fee. And so with the lien or interest in the property of a mechanic or material man. Their labor or material creates, in whole or in part, the building or other improvement. Not so with the laborers of the class to which the interveners belong. They did not perform labor in the erection of the smelter, or furnish materials therefor. Some of them worked in a mine not a part of the smelter plant, and others hauled ore. The interveners base their right to a preference on the statute. The facts out of which their demand arises are not analogous to *Litzenberger v. Trust Co.*, 8 Utah, 16, 28 Pac. 871, cited by interveners, or *Miltner v. Railroad Co.*, 106 U. S. 311, 1 Sup. Ct. 140. In those cases the railroad employes had continued to operate roads for the benefit of their owners, bondholders, creditors, and the public. Their superior claims were based on equitable principles, not on the statute. When property of a debtor is seized on process, or the business is suspended by the action of creditors, or a receiver or trustee takes possession of it, the act quoted prefers demands for labor of the class named; but such preferment does not affect the rights of existing grantees, mortgagees, or lien holders in good faith. The decree appealed from is affirmed.

BARTCH and MINER, JJ., concur.

(117 Cal. 624)

PEOPLE v. WONG CHUEY. (Cr. 206.)¹
(Supreme Court of California. Aug. 3, 1897.)
EVIDENCE—RELEVANCY—TRIAL—WAIVER OF OBJECTIONS—ERROR CURED—WITNESSES—CROSS EXAMINATION—IMPEACHMENT—DYING DECLARATIONS—ADMISSIONS—EXPERT TESTIMONY.

1. The fact that a train was due at a certain station at a certain time is some evidence, however slight, that it actually was there at that time.

2. If an answer is nonresponsive to the question asked, but no motion to strike it out is made, the objection is waived.

3. Where the presence of a train at a certain place at a certain time is material, testimony that the train was in fact there at that time is proper, and will not be stricken out, unless it appears upon cross-examination that witness had no knowledge of the fact testified to.

4. For the purpose of showing the bias of a defendant's witness it is proper to ask him on cross-

examination if he has not attempted to obtain perjured testimony for the defense by bribery.

5. When witness, on cross-examination, denies any attempt on his part to secure perjured testimony in the case, the opposite party may impeach him by the testimony of the person on whom the attempt was made.

6. Defendant and W. were brought into the presence of deceased, then in extremis, and about to make a dying declaration to the district attorney. W. spoke to deceased in Chinese, and the district attorney asked deceased what W. said, and he answered, "You better not tell him." *Held*, that the answer formed no part of the dying declaration.

7. Nor was it admissible as a statement made in the presence of the accused.

8. A surgeon experienced in examining gunshot wounds and extracting bullets therefrom may testify to his opinion of the size of the bullet that made the wound in question.

9. A witness not questioned in direct examination as to occurrences between certain parties at a certain time and place cannot be cross-examined as to them, although they form part of the res gestae.

10. If a dying declaration is not introduced during the progress of case in chief, but is brought forward in rebuttal, without objection on the part of the defense, the latter will not be heard on appeal to complain of its tardy introduction.

11. Evidence was introduced by the prosecution that accused, speaking in English, had identified a pistol lying on a table as his own. The defense, to impeach such testimony, offered evidence that accused could not see the top of the table. This evidence was erroneously rejected. The defense thereupon introduced evidence that accused could not speak English, but the witness was impeached. *Held*, the court having afterwards admitted the testimony as to relative heights of accused and the table, that the error in ruling out the competent evidence was cured, without the court's striking out, as moved by defendant, the testimony of the witness that was impeached and the evidence impeaching him.

In bank. Appeal from superior court, Los Angeles county; Smith, Judge.

Wong Chuey was convicted of murder in the second degree, and he appeals. Affirmed.

H. T. Gage, Marble & Phibbs, and W. I. Foley, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

GAROUTTE, J. The defendant has been convicted of murder of the second degree, and appeals to this court. He presents for our consideration many alleged errors of law occurring during the progress of the trial. We will address ourselves to those which we deem of sufficient importance to demand special notice.

1. Certain witnesses for defendant gave evidence as to the facts and circumstances of the homicide. The prosecution sought to impeach their evidence by showing that a passing freight train obscured their view of the killing. To establish the fact that a freight train was passing the point where the murder occurred at that particular time, the train dispatcher of the company was placed upon the stand. He testified that this particular train left the Arcade depot at 6:35 p. m., going towards the river station. He was then asked what time it would be due there. An objection to this question was overruled, and the witness answered, "The train arrived at the

river station at 6:50." This answer is somewhat confusing when the question addressed to the witness is considered, and from one standpoint may be said to be nonresponsive to the interrogatory. But, from any view, the court committed no error. The question in itself was clearly proper. The fact that the train was due at the river station at 6:50 was some evidence, however slight, that it arrived there upon schedule time this particular afternoon, and, weighing the answer from that standpoint, defendant's objection went to the weight of the evidence, rather than to its admissibility. As suggested, the answer was, from one view, nonresponsive; but no motion to strike it out was made upon that ground, and such objection is thereby waived. Again, this answer bore either one of two constructions: If it be considered to be a statement that freight trains, such as this particular one, were due at River station at 6:50, then, as already suggested, the evidence was clearly proper. If the only remaining construction be placed upon the answer of the witness, then his answer amounted to a direct and positive statement that this particular train arrived at River station, upon this particular day, at 6:50 p. m., and, being a direct and positive statement as to the fact, it was clearly proper and material evidence. If counsel for defendant had shown upon cross-examination of the witness that he had no knowledge as to the time of the arrival of this train at River station, then, upon motion, he would have been entitled to have this evidence stricken from the record; that is, he would have been so entitled upon the second construction we have given his answer to the question. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106, does not support appellant's contention upon the proposition here considered.

2. Wong Chee, as defendant's witness, testified that he had known defendant for 10 years, and never knew him to speak English in his presence. Upon cross-examination he was asked, in effect, if he had not met one Courtney and one Morrison, in his rooms, prior to the pending trial, and there attempted to bribe Courtney to give false testimony in the interest of the defendant. Under objection the witness answered in the negative. There was no error in allowing the question. For the purpose of fairly and fully weighing the evidence of any witness the jury are entitled to know his bias and feeling in the case, if such there be. *People v. Lee Ah Chuck*, 66 Cal. 667, 6 Pac. 859; *People v. Thomson*, 92 Cal. 506, 28 Pac. 589. If the witness was such an active partisan of the defendant as to be engaged in suborning witnesses in his behalf, that fact was most material in weighing his testimony. In rebuttal the prosecution contradicted the witness Chee by placing Courtney upon the stand, who testified to the attempted bribery. This evidence was given under objection, but we see no valid objection to it. The case of *People v. Dixon*, 94 Cal. 258, 29 Pac. 504, and *People v. Choy Ah Sing*,

84 Cal. 276, 24 Pac. 379, in no way support defendant's contention. The evidence proposed to be shown in those cases in no way attacked the credibility of the witness giving it. Here the evidence is a direct attack upon his credibility. The evidence was not offered as tending to show the guilt of the defendant, or as in any way smirching his character by intimating that he was a party to the proposed bribery. But it was offered for the purpose of shedding light upon the evidence of the witness himself. In the case of *Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884, it is said: "It is not to be doubted that where a witness for the defendant has attempted to dissuade one of the plaintiff's witnesses from attending the trial, and denies on his cross-examination that he has done so, the plaintiff is entitled to give evidence to contradict him in this respect. * * * So, in the case under consideration, it was competent for the defendant to show that the witness Miller had endeavored to corrupt the witness Webster, and induce him to swear false in this particular suit, to the prejudice of the defendant." See, also, *People v. Murray*, 85 Cal. 350, 24 Pac. 686.

3. A short time after the murder, the defendant and one Wong Wing, who was charged as a co-defendant, were brought before the deceased, who was then in extremis, and at that time the deceased made a written dying declaration, which was subsequently offered in evidence. In this declaration is found the following question by the deputy district attorney, and the answer of the deceased: "Q. What did Wong Wing say to you when he came in, in Chinese? A. 'You better not tell him' [referring to the deputy district attorney]." This interrogatory referred to a statement made by Wong Wing in the presence of the defendant at the time the defendant and Wong Wing were brought before him, some hours subsequent to the shooting. This statement of Wong Wing's, whatever it may have been, was no part of a dying declaration. A dying declaration, in contemplation of law, refers to the facts and circumstances immediately surrounding the homicide,—the *res gestæ*. *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233. Neither was the foregoing evidence admissible as a statement made in the presence of the defendant. It being no part of the dying declaration, as far as the deceased was concerned it was the purest hearsay. It was in no sense evidence given under oath, and was clearly inadmissible. But defendant's counsel withdrew his objections to the question, stating that he desired to explain the evidence at the proper time, and in answer to this statement the judge stated that he had that right. The objections being withdrawn, the record presents no tangible ground upon which to base a valid complaint in this court. Neither do we find any objection to the course subsequently adopted by the court bearing upon this matter. Conceding that it would have been proper for defendant's counsel in due course to have placed Wong Wing upon the stand, in order that he might have the oppor-

tunity to explain what was meant by his statement to the deceased, still this course was not adopted, and the evidence attempted to be produced upon the point was properly rejected. Of course, it cannot be claimed for a moment that under the statement of the court, when counsel withdrew his objection to the former question, the defendant was entitled to place matters before the jury not legal and competent evidence.

4. The surgeon who attended the deceased prior to his death testified that he examined the gunshot wound which caused the death, and that he had examined gunshot wounds in the past, and taken bullets therefrom, and knew the size of the bullets making these various wounds. Under objection he then testified that, in his opinion, the wound upon deceased was inflicted by a 41 or 44 caliber bullet. There is no substantial objection to this evidence. The witness was sufficiently versed in the subject of gunshot wounds and the respective size of bullets to give evidence of the character here adduced. Neither did the court commit error in limiting the cross-examination of the witness McKenzie. He was not asked in his examination in chief as to anything that occurred between the defendant and deceased while deceased was lying upon the street. Hence any cross-examination by defendant as to such matters was properly denied. If those facts and circumstances formed part of the *res gestæ*, as counsel now contend, then it was in their power to show them when defendant's case was being placed before the jury.

5. It is strenuously insisted that during the course of the trial both counsel for the people and the trial judge were guilty of such misconduct that a second trial of defendant should be had. This alleged misconduct consisted in various statements made by counsel and judge in the presence of the jury; and also consisted in the asking of improper questions of witnesses by counsel for the people. We are not prepared to order a new trial upon the grounds urged, and again indorse the views of the court as expressed upon this subject in *People v. Ward*, 105 Cal. 340, 38 Pac. 945, and *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

6. Error is claimed in this: that the prosecution failed in their case in chief to offer in evidence the dying declaration of deceased. In view of the fact that such dying declaration was offered by the prosecution in rebuttal, and also offered without objection, the merit of appellant's contention in this regard, if the contention ever possessed merit, has been dissipated.

7. Witnesses testified in behalf of the prosecution that the defendant, while in custody, recognized a certain pistol lying upon a table, and thereupon stated in English that he thought that it was his pistol. Defendant proposed to impeach these witnesses by showing the comparative height of the table and the height of the defendant, as thereby establishing the fact that it was not possible for the defendant to see the pistol lying upon the table. This evi-

dence, which was clearly admissible for the purpose proposed, was rejected under objection. Thereupon defendant's counsel, for the same purpose, attempted to show by the witness Chee that defendant could not speak the English language. This evidence was admitted without objection, and thereupon, in rebuttal, the prosecution offered evidence tending to impeach the witness Chee. After all these things had occurred, the court set aside its ruling as to the evidence pertaining to the relative heights of the table and the defendant, stating to defendant's counsel that the ruling was erroneous, and that the evidence so rejected could now be introduced if counsel so desired. Counsel claim that defendant suffered such injury by the course previously adopted by the court that his only remedy was to be placed in the position he originally occupied prior to the introduction of the evidence of the witness Chee. Counsel further claim that this could only be done by striking out the evidence of the witness Chee and the evidence subsequently offered tending to impeach him. The court refused to grant the motion to strike out. There are cases where an erroneous ruling of the court in admitting evidence cannot be cured by a subsequent reversal by the court of its own action. In those cases the incompetent matters have gone to the jury, and the injury is beyond repair. Instructions of the judge to disregard such evidence are, in such cases, no adequate remedy for the wrong done; but no case now presents itself to our minds where error has been successfully predicated upon a state of facts similar to these here presented. The reason of the rule certainly is not the same where improper evidence is admitted, and subsequently stricken from the record, and a case where proper evidence is rejected, and subsequently allowed to go into the record. Upon principle the distinction between the two cases is plainly marked.

Counsel for the defendant claims that, if the court had allowed his impeaching evidence as to the comparative heights of the table and the defendant to have gone before the jury in the first instance, deeming the impeachment complete, he would not have placed the witness Chee upon the stand at all; and therefore the defendant would not have been in the unhappy position of standing sponsor for a false witness. Upon similar lines defendant's counsel could contend, in every case where an erroneous ruling in rejecting evidence was subsequently corrected, that the error was placed absolutely beyond any correction by the trial court. Yet this court has often held these errors cured by the practice of the course here adopted by the trial court. Again, the evidence of Chee that the defendant could not speak English was very important. It was directly in point, as contradicting in a most substantial manner the evidence of the other side. It served the purpose of impeachment as fully and as completely as the rejected evidence would have done if originally admitted. With a due regard to the duty owing by counsel to

his client, coupled with the zeal with which that client was defended, we believe defendant's counsel neither could nor should show that Chee's evidence would not have been offered if the other impeaching evidence had been admitted. Especially may this be said in view of the further fact that the evidence as to the respective heights of the table and the defendant was finally offered on the part of the defendant under the last ruling of the court; and those heights were disclosed to be 3 feet 10 inches, and 4 feet 9¼ inches, respectively. Able and experienced counsel, such as were retained by defendant, could hardly have been satisfied with the sufficiency of such impeaching evidence, when substantial evidence of impeachment of a different character was at hand.

8. The court has examined with care the remaining assignments of error disclosed by the record and noticed in appellant's briefs, and we find none of them possessing such merit as to demand a reversal of the judgment and a new trial of the cause. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

117 Cal. 633

LIVINGSTON v. SUPERIOR COURT OF
LOS ANGELES COUNTY. (L. A. 374.)

(Supreme Court of California. Aug. 5, 1897.)

HUSBAND AND WIFE—SUPPORT—ENFORCEMENT—
EQUITY JURISDICTION—REMEDY AT LAW—
IMPRISONMENT FOR DEBT.

1. Since equity has jurisdiction to decree alimony to a wife, though no divorce is sought, it has jurisdiction also when the husband applies for support from the wife, in view of the fact that Civ. Code, §§ 155, 176, provide that husband and wife contract towards each other "obligations of mutual * * * support," and that the wife must support the husband if he is rendered unable to do so by infirmity.

2. The obligation of the wife to support the husband out of her separate property, pursuant to an order made under Civ. Code, § 176, providing that she must support him when he is unable to do so from infirmity, is not a debt, within the constitutional provision against imprisonment for debt.

3. There is no adequate remedy at law for the enforcement of such obligation, and the same may be enforced by contempt proceedings.

In bank. Writ of review to superior court, Los Angeles county.

Petition by Mary A. Livingston to have declared void an order of the superior court of Los Angeles county adjudging petitioner guilty of contempt. Affirmed.

I. H. Johnson and E. W. Forgy, for petitioner.

TEMPLE, J. It is sought in this proceeding to have reviewed and declared void an order made by the above court adjudging that the petitioner was guilty of a contempt, and ordering her to be punished therefor. The contempt order was made in a proceeding instituted by the husband of the petitioner, un-

der section 176 of the Civil Code, to compel her to support him out of her separate property. He obtained an order requiring her to pay for his support \$24 per month. An injunction was issued, enjoining her from conveying her property so as to defeat any judgment he might obtain against her. In violation of this injunction, petitioner conveyed all her property to her daughter on the day the decree was made. At the hearing in the superior court, petitioner presented her affidavit showing that she had no means from which to make the payment. Upon this question the court found against her, and with that issue we have no concern in this proceeding. The attack made here is solely upon the power of the superior court to make such an order on any state of facts. This contention seems to be based upon the fact that, in section 137 of the Civil Code, provision is made for compelling the husband to support the wife, and it is provided that the final judgment in such case may be enforced by the court "by such order or orders as in its discretion it may from time to time deem necessary." This, it is said, authorizes such procedure when the wife is suing her husband for separate maintenance, but the statute does not authorize such orders when the husband sues the wife for his support. In *Galland v. Galland*, 38 Cal. 265, this court said, "It is within the general powers of courts of equity, independent of the statute, to decree alimony to the wife, without divorce." The question has been variously decided in the United States, and it is said that in England courts of equity do not give such relief except as an incident in an action seeking some other redress. It is said in 2 Story, Eq. Jur. § 1422, that, to the question whether courts of equity have general authority to decree alimony to the wife when she is left without other means of maintenance, "It can scarcely be said that, according to the results of the authorities, an answer in the affirmative can be given in positive terms." This jurist further says, however (section 1423), that a broader jurisdiction over the matter has been asserted by some of our courts of equity, and it has been held that "a court of equity may in all cases decree her a suitable maintenance and support out of his estate upon the very ground that there is no adequate and sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine that it might be wished that it were generally adopted." The question has been much discussed, and in many cases is very fully and elaborately considered. Among these cases, *Garland v. Garland*, 50 Miss. 604, contains an able review of the English cases, and shows that even there some cases support the jurisdiction. *Prather v. Prather*, 4 Desaus. Eq. 33, contains another thorough discussion of the question, and upon principle and authority the jurisdiction of courts of equity to decree alimony is maintained. A later case in which the same doctrine is held is *Milliron v. Milliron* (S. D.) 68

N. W. 286. Such being the state of the authorities, there is no reason why we should not adhere to the doctrine announced in *Galland v. Galland*. It is in accord with the general principle that where a right exists, and there is no adequate legal remedy, equity will take jurisdiction. If, independently of any statute, courts of equity had jurisdiction to decree alimony to a wife, although no divorce was sought, it would necessarily follow that they have jurisdiction when the husband applies for support from the wife. In each case the right comes from the same source,—the obligations assumed by the marriage, as expressed in section 155 of the Civil Code: "Husband and wife contract towards each other obligations of mutual respect, fidelity and support." Primarily the husband is the bread winner, and assumes the responsibility for the support of the family, and he becomes the owner of the marital accumulations. But in the exceptional case provided for in section 176 of the Civil Code the burden of maintenance shifts to the wife. It is an obligation of the same kind, however, as that which ordinarily rests upon the husband; and the legal remedy, if it can be said that there is any, is as inadequate in the one case as in the other.

It has been held that the obligation to pay alimony is not a debt, within the provisions of the constitution against imprisonment for debt. *Ex parte Perkins*, 18 Cal. 60; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, and 8 Pac. 700. The power of the court to enforce payment of an allowance by proceedings in contempt cannot be doubted, and in *Smith v. Smith*, 113 Cal. 268, 45 Pac. 332, this court sustained the authority of the superior court to change a final decree for permanent maintenance of the wife after it had been entered, and then to enforce it by the process of contempt. But I think the order complained of cannot be considered an order changing or modifying the final decree. The petitioner was already in contempt for disobeying the lawful order of the court, and the subsequent proceedings were simply to ascertain if her failure to obey was contumacious. The obligation to pay not being a debt, I see no inability on the part of the court to provide a remedy which shall be adequate. It is said the remedy of the husband must be by an ordinary action. Counsel have not pointed out by what ordinary action the obligation could be enforced, and I know of none. In what action, at law, could the court ascertain and determine what monthly allowance should be made for the future support of the husband, and enter a judgment awarding an execution each month for the amount? If such a thing could be done, the remedy would not be adequate. A defendant who, in defiance of the injunction of the court, transferred her property to put it beyond the reach of an execution, would easily so delay the collection as to render the relief of no avail. An action by the administrator of the husband for damages

for permitting him to starve, in violation of her duty, is not a support for the husband. The order is affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; VAN FLEET, J.

(5 Cal. Unrep. 735)

KNIGHT v. TRIPP. (S. F. 735.)

(Supreme Court of California. Aug. 9, 1897.)

GIFTS—CONDITIONS—DELIVERY—PRACTICE—DEMAND.

1. A person about to undergo a surgical operation, the result of which was uncertain, transferred all her property to defendant, the real estate being conveyed by deed in due form, and the personal property, consisting of furniture, notes, clothing, etc., being transferred by a bill of sale, but no physical change in possession taking place. The intention was that the property should be used for the donor's benefit, and remain in her possession during her life, and, in the event of her death from the operation, defendant was to distribute it according to the directions of an unsigned written memorandum. *Held*, the donor having retained possession, and the right to expend as much of the personality as she might need during her life, that the transaction was void as a gift.

2. An administrator seeking to recover personal property of deceased, held by a transferee under color of title by gift, need not make a demand therefor before instituting suit.

Department 2. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by W. H. Knight, administrator, against W. G. Tripp. After judgment for plaintiff, a new trial was granted, and plaintiff appeals. Reversed.

F. E. Whitney and Reed & Nusbaumer, for appellant. Welles Whitmore and Carey Howard, for respondent.

TEMPLE, J. This is an action brought by the administrator of E. L. Cook, deceased, to recover personal property alleged to be the property of the estate, and which, it is charged, is wrongfully withheld by defendant. The answer denies that the property belongs to the estate, or that it belonged to the deceased at the time of her death, or that plaintiff is entitled to the possession thereof. From the evidence it appears that the property belonged to the deceased on the 31st of May, 1895, and that on that and the following day certain transactions were had which defendant claims constituted a gift of said property to him, partly for his own use and partly in trust for others. Whether such was the effect of what was done is the question to be determined on this appeal. The findings and judgment were for the plaintiff, but subsequently a new trial was granted, and the plaintiff appeals from this order, claiming that the order cannot be sustained on any ground whatever.

It appears that Mrs. Cook had been a widow for about six years; that she was childless, and had an estate worth about \$25,000; of which about \$10,000 was personal property;

and that she lived in her own house in Oakland, alone, except that she had some lodgers to whom she rented rooms in her house. She died June 14, 1895, having been sick for some months. On the 29th of May, 1895, defendant called upon her at her request. She told him she was about to undergo a surgical operation, and was somewhat uncertain as to the result, and desired to see him about her business. He promised to call on the next day, and did so. She then told him that she did not like the will she had made, and had destroyed it, and wished to dispose of her property while living, and said, "I want to give all of it to you, or place all of it in your hands, and tell you those whom I want should have it." At the suggestion of defendant she sent for a lawyer, and on that day and the next her entire estate, both real and personal, was formally transferred to the defendant. The transfers were in writing, and in form were sales. The real estate was conveyed by deed which was then and there delivered; the furniture by a bill of sale, which recited a consideration of one dollar, and "other considerations to me moving, I do hereby sell and assign, transfer and deliver all my household furniture and wearing apparel, and all other personal property held or owned by me, in that certain house," etc. No delivery of the furniture was made, but the donor continued to occupy the house, and use all that she had any use for, as before. She had some promissory notes and corporate stock in a tin box which she kept in her desk. The desk was brought, the notes and stock indorsed, and by the defendant were replaced in the box and locked, the defendant retaining the key. The box was then replaced in the desk, which was also locked, the defendant retaining that key also. The desk remained in the house with the other furniture. She had some \$8,000 deposited in three different banks in Oakland. Mr. Tripp testified that she assigned the books and the money to him by written assignments on the books. The books were not produced, and we are not informed further as to what the written assignments contained. Mr. Tripp further testified: "I made a memorandum at the time of the disposition of the property. * * * It was made in the course of the conversation between Mrs. Cook and myself with regard to the disposition of the property. The deeds to the real estate, the bill of sale, and assignments of mortgages were not made until the 1st day of June,—the next morning." The memorandum read as follows: "Instructions of Mrs. E. L. Cook as to the disposal of her property in the event of her death. W. G. Tripp is to have the house and lot and contents of the house at 680 Tenth street, and all other real estate, and is to pay all debts and funeral expenses, for permanent care of the cemetery lot, and such monuments as he may choose for herself and husband; to pay A. E. Jenner of Belvedere \$2,000; Fred. B. Kimball, Webster City, Iowa, \$1,000; Fred. W. Cook, New York, \$1.

000; C. F. Nicklaus, Oakland, Cal., \$2,000; Mrs. Fannie Hilton, Oakland, \$500; Miss Grace Hilton, \$500; Miss Carrie Hilton, \$500; Mrs. Pierce, Oakland, \$1,000; Miss Maggie Gates, Oakland, \$200. Any property remaining after these instructions are carried out is to belong to W. G. Tripp. June 8, 1895. Trunk and contents in closet under the back stairs is to be delivered to Mrs. Hilton." The defendant contends that the transfer to him was absolute, in fact a gift inter vivos, and was not revocable by the donor, nor defeasible by her survival. He has not delivered any of the things to the ultimate donees, but he contends that he was authorized to do so at once, and in fact that whether he did or not was not material to the complete execution of the donation. The plaintiff denies that there was any executed gift either inter vivos or causa mortis, but contends that the whole transaction was testamentary in character; that the property was placed in the hands of the defendant to hold for the donor, and in case of her death was to be delivered to the donees named; that the defendant held it as agent of the donor, and the agency was revoked by the death of the principal. He also contends that there was no sufficient delivery for the vesting of the property in the donees, either as a gift mortis causa or inter vivos.

Section 1147 of the Civil Code reads as follows: "A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee." By verbal gift is meant an oral gift,—one which cannot be proven by any writing. Many different transfers are shown in this case, but all purport to be sales, or they are blank indorsements. Not one of them evidences a gift. That must be proven by oral evidence. The memorandum, though made in the presence of the alleged donor, was signed by no one. The means of getting possession and control must have been given; and, since the things were all capable of delivery, and there is no pretense of a symbolical delivery, it must appear that there was at the time an actual delivery of the gifts to the donees. I think it plain that the gift was not to vest absolutely except in the event of her death from the operation. She transferred all she had, but, though she knew she was in peril, she did not feel sure that her disease was mortal. She hoped to survive, but thought the issue uncertain. Had she survived, she would have been without the means of support, and, even though she had implicit confidence in the defendant, and may have felt sure that he would give her the use of the property, nearly all her money would have been parceled out to several donees. And then it appears that the defendant assured her that the transfers could easily be canceled, and says he would have returned everything to her had she recovered and requested it, and such was his intention. This is a complete surrender of his contention, for

he could not return the property in case of her survival if the gifts were absolute, but would have been compelled to deliver them to the ultimate donees, whose bailee he was. And then the instructions taken down by him at her dictation provide for a disposition of her property only in the event of her death. The memorandum has every resemblance to a will except its execution. It provides for a disposition of all the property of Mrs. Cook in the event of her death. It directs the payment of her debts and funeral expenses. It contains a devise of her real estate, many legacies, and names a residuary legatee. Evidently Mrs. Cook expected to remain in the house and have the use of the furniture so long as she might live. This is not provided for in the instructions, and, if the disposition was to take effect only at her death, it was not necessary. Of course, she was to have medical aid and nursing. She had several doctors and a nurse engaged. And she directed the defendant to furnish the nurse all the money the nurse should call for. She could not know how long she might need such attention, nor what it would cost. The personal property was of the value of \$10,802.10, as the defendant testified. The cash legacies were \$8,700. The defendant has paid out \$1,800 under the instructions, and has paid none of the cash legacies or gifts. He is to erect monuments to her and her husband, and to provide for the permanent care of the cemetery lot. All the real estate and the furniture was given to the defendant. It must have seemed quite possible, when these transactions were had, that the necessities of Mrs. Cook might be so great that all these legacies could not be paid. Suppose her necessities had been such that all the personal property had been required. Certainly, the defendant would have felt that she was entitled to it according to her understanding of the terms of her gift. Undoubtedly, a delivery may be made to a third person for an intended donee, but the delivery and the conditions must be such that such person will at once become the bailee of the donee. The gift will still be revocable, but the possession and present control and lawful dominion must pass from the donor to the donee. The gift may even be conditional, but one of those conditions must not be that the donor shall retain possession and the right to expend as much of it as he may require or choose to expend during life. Such a disposition is testamentary, and, unless made in accordance with the statute of wills, is void; and such, I think, was the disposition made in this case. See, on this subject, *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415; *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575.

There is no injurious error in any of the rulings at the trial against the defendant. In most cases the rulings were plainly correct, and those that may be questioned were of no consequence. There was no necessity for a demand before bringing the suit. The defendant held the goods under a claim of title, and

his intention to retain them as his own was clearly manifest, and in his answer he asserts his title and denies the right of the plaintiff. The answer itself shows that the possession of the defendant was adverse. The order granting a new trial is reversed.

We concur: **McFARLAND, J.; HENSHAW, J.**

(117 Cal. 669)

MARCHANT v. HAYES et al. (Sac. 183.)
(Supreme Court of California. Aug. 24, 1897.)

CONTRACT—ABANDONMENT—RECOVERY.

Plaintiff contracted to erect a building for defendant, to be completed by August 1, 1894, and he performed labor thereon until October 28, 1894, when he voluntarily abandoned work. All the services and materials were furnished in fulfillment of the contract, apart from which no agreement for service or materials was made. Plaintiff lost his right to a lien on the premises by failure to comply with the statutory requirements. *Held*, that plaintiff, by voluntary abandonment of the contract, lost his right to recover the value of his services and the material used.

Department 1. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by Samuel Marchant against John Hayes, Richard Chute, and others. Cross complaint by John Hayes against Richard Chute. From judgment for plaintiff in cross complaint, defendant therein appeals. Reversed.

Frank W. Sheet, for appellant. J. B. Curtiss, for respondents.

HARRISON, J. In this action, brought by the plaintiff Marchant for the foreclosure of a mechanic's lien upon a certain building in Tuolumne county, a cross complaint was filed by the defendant Hayes against his co-defendant Chute, in which he claimed a lien upon the same property for labor done and materials furnished by him in the construction of the building. The court found that on June 18, 1894, Hayes entered into a contract in writing with Chute for the construction of the building, for the sum of \$2,100, and agreed to complete the same according to certain plans and specifications, and have it ready for occupancy on or before August 1st; that Hayes thereupon commenced the construction of the building, and that work was performed thereon under his direction until October 28th, when he abandoned work thereon; that some of the men employed by him continued to work thereon until November 5th, when they, too, ceased to work, and at that time, and also at the commencement of this action, the building was unfinished and incomplete in various material and substantial particulars. The court also found that during this time Hayes performed labor as superintendent upon the building for four months, which was reasonably worth \$400, and also that he furnished certain materials of the value of \$125.50, which were used in the construction of the building under the terms of the contract;

but that he was never employed by Chute to construct said building, either as superintendent or otherwise, except by virtue of the aforesaid contract, and that all the labor performed by him, and all the materials which were furnished by him, in the construction of the building, were performed and furnished under and by virtue of his contract. The contract between Hayes and Chute was not filed for record with the county recorder, but after he abandoned work he filed a claim of mechanic's lien, which he sought to enforce in this action. A personal judgment was rendered in his favor against Chute for the sum of \$525.50, but the court did not adjudge the same to be a lien upon the property. From this judgment Chute has appealed upon the judgment roll alone without a bill of exceptions.

The omission to file the contract in the office of the county recorder deprived the contractor of any lien for his labor and materials (Code Civ. Proc. § 1183); but he did not, by such omission, acquire any greater right to a recovery for his labor and materials than he would have had if he had brought an action therefor, irrespective of his right to a lien. Under the finding of the court that Hayes was never employed to construct the building except by virtue of the contract of June 18th, and that all the labor performed and all the materials furnished by him were performed and furnished under and by virtue of this special contract, he had no right of recovery, unless he should show that he had completed the contract on his part, or that its completion had been in some way waived or excused. Civ. Code, § 1439; *Smith v. Brady*, 17 N. Y. 173; *Bonesteel v. Mayor*, 22 N. Y. 162; *Van Cleaf v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Barron v. Frink*, 30 Cal. 486; *Ernst v. Cummings*, 55 Cal. 179. See also, *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740. It has been sometimes held that where a contractor under a bona fide attempt to perform his contract has unintentionally omitted some trifling particular, he may recover upon the contract, making a reduction for the damage sustained by the omission, or, if the owner has derived a benefit from the work done, and has accepted and enjoyed the same, he may recover for the benefit thus received by the owner; but the finding in the present case that Hayes willfully abandoned his contract, and left the building unfinished and incomplete in many material respects, indicates a willful breach by him of his agreement, and is inconsistent with a bona fide attempt to perform his contract. There is no finding that the building was ever completed, or that Chute derived any benefit from the labor or materials furnished by Hayes. The court therefore erred in giving judgment in his favor.

The failure of the court to find that Chute had made any payment to Hayes, as alleged in the answer, cannot be considered as error, since it does not appear that any evidence was offered in support of this averment.

Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

It is further contended by the appellant that he is entitled to have set off against the demand of Hayes certain judgments which were entered herein against Hayes in favor of other lien claimants, and declared to be liens upon the property of the appellant. The record does not, however, disclose the basis of these judgments, or in what respect they were connected with the contract between Hayes and Chute. Moreover, it does not appear that any request of this nature was made to the court below, and, in the absence of the evidence and findings in reference thereto, we cannot assume that the court erred in its judgment. In *Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859, cited by appellant, it appeared that the claims which were allowed to be set off against the demand of the plaintiff were for a portion of his demand, and had been paid by the defendant. The only controversy between them was whether the defendant was entitled to have set off also the expenses of the suits upon these claims. In the present case the claim of Hayes is limited to the materials and labor furnished by himself.

The notice of appeal in the record includes also an appeal from the judgments in behalf of some of the other lien claimants, but, as no argument has been presented in support of this appeal, the judgment in their favor is affirmed. The judgment in favor of Hayes is reversed.

We concur: BEATTY, C. J.; VAN FLEET, J.

(117 Cal. 637)

PEOPLE v. WARNER. (Cr. 281.)

(Supreme Court of California. Aug. 19, 1897.)
STATUTES—CONSTRUCTION—CONFIDENTIAL COMMUNICATIONS.

Code Civ. Proc. § 1881, subd. 1, provides that neither husband nor wife can be examined, without the consent of the other, "as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." *Held*, that this rule of evidence applies to all criminal actions except those for crimes committed by either husband or wife against the other.

Department 1. Appeal from superior court, city and county of San Francisco; Carroll Cook, Judge.

Charles G. Warner was convicted of rape, and he appeals. Reversed.

Carson & Savage and E. M. Sweeney, for appellant. W. F. Fitzgerald, for the People.

VAN FLEET, J. Appeal by defendant from a judgment convicting him of rape, and an order denying him a new trial. Defendant took the witness stand in his own behalf, confining his testimony on his direct examination to a denial of the commission of the offense, a

statement of his version of the occurrences on the night of the alleged assault, which was claimed to have occurred in his own house, and as to certain other facts occurring before arrest. On cross-examination the prosecution was permitted, against defendant's repeated and strenuous objection that the matter was incompetent, and not in cross-examination, to interrogate and examine him at length as to certain communications by letter made by him to his wife after his arrest, relating to the charge against him, and which it is conceded bore materially on the question of guilt, but which communications had in no way been referred to by him on his direct examination. It is contended that this action of the court constituted material error tending to defendant's prejudice, which requires a reversal, and this contention must unquestionably be sustained. Conceding that the statements inquired into had a tendency to contradict defendant's denial of the commission of the offense, and that under the doctrine of *People v. Rozelle*, 78 Cal. 84, 91, 20 Pac. 36, the subject had been sufficiently opened by such denial to make the inquiry admissible as in cross-examination, its admission was nevertheless in direct contravention of the provision of the statute protecting communications between husband and wife as privileged. Subdivision 1 of section 1881 of the Code of Civil Procedure provides: "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." It is claimed that this provision prescribes a rule of evidence for civil, but not for criminal, actions. But this has been explicitly held otherwise in the quite recent case of *People v. Mullings*, 83 Cal. 138, 23 Pac. 229. Moreover, the terms of the provision itself negative any such limitation. The closing language of the subdivision that "this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other," shows by necessary implication that the protecting shield of the statute was intended to apply in all other cases than those excepted. The cases of *People v. Lane*, 101 Cal. 513, 36 Pac. 16, and *People v. West*, 106 Cal. 89, 39 Pac. 207, relied upon as overruling *People v. Mullings*, have not that effect. What is said in those cases refers to subdivision 4 of section 1881, relating to communications between physician and patient, and does not affect the construction or application of subdivision 1 of that section. Nor is there anything in the suggestion that the objection was insufficient in form to include the

ground now urged. *People v. Mullings*, 83 Cal. 144, 23 Pac. 229. Besides, the record discloses that the precise point now made, that the communications were privileged, was in fact expressly called to the attention of the court below. Since the case must go back for a new trial, it is unnecessary, and we deem it inexpedient, to discuss at this time the question as to the sufficiency of the evidence to warrant a conviction; and, as to the other errors relied upon, they may not again arise. Judgment and order reversed, and cause remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

(117 Cal. 647)

PEOPLE v. KRAMER. (Cr. 269.)

(Supreme Court of California. Aug. 23, 1897.)

MISCONDUCT OF JURY AND OF COUNSEL—REVIEW—EVIDENCE—HARMLESS ERROR.

1. Conversation between jurymen in the jury box is not of itself misconduct, and, unless it be shown to have improper reference to the evidence or merits of the case, and be prejudicial to defendant, it will not work a reversal.

2. When, upon motion for a new trial for misconduct of jury, the evidence is conflicting, the ruling of the court on the motion is conclusive on appeal.

3. Misconduct by counsel is not justified by like misconduct by opposing counsel.

4. Objection to improper remarks by counsel in his address to the jury cannot be urged for the first time on appeal.

5. The exclusion of testimony which the same witness is afterwards permitted to give is not prejudicial error.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

W. E. Kramer was convicted of forgery, and he appeals. Affirmed.

Byron L. Oliver and George A. Hough, for appellant. W. F. Fitzgerald, for the People.

VAN FLEET, J. Appeal by defendant from a judgment convicting him of forgery, from an order refusing to arrest the judgment, and from an order denying a new trial.

1. The first objection urged is misconduct of the jury, but the record does not clearly disclose that any such in fact occurred. It is stated in an affidavit by defendant's counsel, filed on the motion for a new trial, that during the taking of evidence, and while the jury were examining certain exhibits submitted for their inspection, affiants "saw a number of the jurors commenting upon and arguing about" the exhibits, and "pointing out to each other similarities in the handwriting," etc.; but these statements are positively denied in an affidavit by all the jurors, who state that they were not arguing nor discussing the exhibits, nor the similarity of the writing therein; and the statement of the facts of the incident by the judge is, in substance, that he saw the whole transaction; that he observed the jurors conversing, and at once stopped them, and admonished them against discussing the evidence

until they retired to the jury room; but that he could not tell what their conversation was about, and he saw nothing which induced him to think that anything prejudicial to defendant had occurred. The exact character and import of the acts complained of are thus left in doubt. No one pretends to state in express terms anything said by the jurors, or in fact that any part of their conversation was heard. Defendant's counsel do not state in their affidavit that they heard any of the conversation, but the statement is that they "saw a number of the jurors" pointing out features of the writings, and conversing about them, which leaves it to be inferred that the statement in the affidavit that the jurors were arguing about the evidence was a matter of inference and conclusion from their manner, rather than from anything that was overheard. In the face of the positive denial by the jurors that their conduct partook of the objectionable character imputed to it, and the implied finding by the judge in support of such denial, we cannot say that the acts complained of involve any actual, much less prejudicial, misconduct. For aught that really appears, the comments of the jury, if referring to the writings at all, may have been wholly trivial and innocent, and in no way relating to their character as evidence. It is, of course, improper for jurors to discuss the case, even among themselves, during its progress, and before its submission; but the mere fact of conversing in the jury box is not in itself such an impropriety as will necessarily imply misconduct. The law does not demand that the jury sit with the muteness of the sphinx, and when jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but, in order to predicate misconduct of the fact, it must be made to appear that the conversation had improper reference to the evidence or the merits of the case. Even then, unless it be shown to have been of a character calculated to prejudice the defendant, it is not sufficient to work a reversal. *People v. West*, 73 Cal. 345, 14 Pac. 848. The presumption is that the jury performed their duty with fidelity to their oath, and that they observed the admonitions of the judge as to their conduct, and this presumption can be overthrown only by showing some act of positive misconduct. *People v. Williams*, 24 Cal. 31. Here the evidence as to whether there was in fact any improper act was at least conflicting, and the ruling of the court is conclusive upon us against the defendant's contention. *People v. Merkle*, 89 Cal. 82, 28 Pac. 642.

2. Defendant complains of injury arising from misconduct of the district attorney in making use during his argument to the jury of certain alleged improper suggestions and statements not based upon the evidence in the case. The use of the language complained of, in substance, is admitted by the district attorney, but it is stated in his affidavit that it was in response to matters assumed by defendant's counsel in making a pathetic appeal to the jury. Assuming that the comments of the

district attorney were not warranted by the evidence, his act would not be justified by the fact that defendant's counsel had already committed a like impropriety. The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court, and have it stopped. But we are precluded from inquiring into the merits of the objection for the reason that it does not appear to have been taken at the trial, or that the matter was there called to the attention of the judge in any way. The affidavit on behalf of defendant states that objection was made thereto, but this is directly controverted in the affidavit for the people, which states that no objection whatsoever was made, and nothing said to call it to the attention of the court; and the ruling of the court below, by necessary implication, negatives the defendant's claim in that regard. It is an obviously just rule that such objection cannot be here made for the first time. While error arising from misconduct of an attorney, of the character complained of, may not always be avoided by such means, it is essential, in order to have it reviewed, that the act be at least called to the attention of the court below at the time, that that tribunal may have an opportunity to correct the abuse, and thus, if possible, avoid error and a mistrial. And it has been repeatedly held that this court will not entertain an objection of the kind first made here. *People v. Shem Ah Fook*, 64 Cal. 381, 1 Pac. 347; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Frigerio*, 107 Cal. 151, 40 Pac. 107; *People v. Louie Foo*, 112 Cal. 28, 44 Pac. 453. The defendant cannot remain silent, and take the chance of a favorable issue, and, losing, urge as ground for reversal an error which, but for his silence, might never have found its way into the case. His failure to object justly gives rise to the inference that at the time he saw no injury being done him, and he cannot complain on being met here by a barrier arising from his own omission.

3. There was no error in striking out the portion of the testimony of the witness Harms, objected to by the district attorney. It was very clearly hearsay. Moreover, the same matter, in substance, was testified to later by the witness, and permitted to rest with the jury, so that whatever benefit defendant could derive therefrom he had.

4. We find no error in the instructions, and we regard the evidence as quite sufficient to sustain the verdict. The judgment and orders are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

BROWNFIELD v. HOUSER et al.

(Supreme Court of Oregon. July 31, 1897.)

SHERIFFS—CHARGES AGAINST COUNTY—INJUNCTION BY TAXPAYER—PLEADING—ITEMIZED ACCOUNT.

1. A taxpayer, though entitled to maintain suit in his own name to enjoin misapplication of funds

of a municipal corporation, cannot likewise sue to recover its funds already misappropriated.

2. Complaint by a taxpayer of a county against the sheriff, clerk, and others, stating that the county court has audited a claim of the sheriff in which certain items were illegally allowed, and alleging that theretofore illegal claims of the sheriff had been allowed, and he had been permitted to draw from the county treasury a certain amount more than he was entitled to receive, with prayer that he be required to account for and pay into the treasury all moneys so illegally withdrawn, and that the clerk be enjoined from issuing to him an order for services claimed to have been performed by him, does not state the facts of the previous illegal withdrawal of funds, as an independent cause of suit, so as to render the complaint demurrable for misjoinder, but merely states them as a ground for offset to those items in the sheriff's account which are admitted to be proper charges; it being claimed by plaintiff that such items should not have been audited, because, as alleged, the sheriff had theretofore received other sums in excess thereof.

3. Though the county court has allowed a sheriff's claim, a taxpayer may maintain suit to enjoin the county clerk from issuing to him a county order for items alleged to have been illegally allowed.

4. In a suit by a taxpayer to enjoin the county clerk from issuing to the sheriff a county order for a claim allowed by the county court, payments theretofore made by the county to the sheriff cannot be inquired into, or offset against the portion of his account conceded to be valid.

5. Claims of a sheriff to be audited should be itemized to show that they are proper charges.

Appeal from district court, Umatilla county; Stephen A. Lowell, Judge.

Action by C. W. Brownfield against Zoeth Houser and others. Decree for defendants. Plaintiff appeals. Reversed.

This is a suit to restrain the county clerk of Umatilla county from issuing to Zoeth Houser a county order for services performed by him as sheriff. The plaintiff alleges: That he is a resident taxpayer of Umatilla county, and that Zoeth Houser is sheriff, William Martin, county judge, John H. Adams and T. P. Gilliland are county commissioners, and Benjamin S. Burroughs is county clerk of said county. That said sheriff is entitled by law to receive from said county an annual salary of \$2,500, and, in addition thereto, certain compensation for the board and keeping of persons imprisoned in the county jail, and also his actual and necessary expenses when required to travel in another county or state to make an arrest or receive a prisoner. That in May, 1896, the county court audited a claim of said sheriff for \$1,067.25, of which the following items were illegally allowed: Inland Telephone & Telegraph Company, \$23.50; Blue Mountain Telephone & Telegraph Company, \$1.25; mileage, \$221.60; expenses of Laura Stickler to Refuge Home, \$50; fare of Fred Loyd to Echo, \$2.25; Daniel McKeen, fare to reform school, \$14; fare and expenses of G. W. Hull to Roseburg, \$14.55; sundry bills, \$100.87. That the warrant therefor has not been issued, but the county clerk threatens to draw and deliver the same to the said Houser, and, unless restrained, will carry his menace into execution, thereby injuriously affecting plaintiff's pecuniary rights as a taxpayer, for which injury, if permitted, he has

no adequate remedy at law. That the county court at its regular terms from September, 1894, to March, 1896, illegally audited and allowed accounts presented to it by Houser for services claimed to have been performed, the items of which are set out, whereby he has been permitted to draw from the treasury of said county the sum of \$6,684.59 more than he was entitled to receive,—and prays that he may be required to account for and pay into the county treasury all moneys so illegally drawn therefrom, and that the county clerk may be enjoined from issuing to him any county orders for services claimed to have been performed by him. A demurrer to the complaint on the grounds that it did not state facts sufficient to constitute a cause of suit, that several causes were improperly joined, and that plaintiff had no legal capacity to sue, having been sustained for alleged misjoinder, the plaintiff declined to plead further, whereupon a decree was rendered dismissing the suit, from which he appeals.

J. J. Balleray, for appellant. L. B. Reeder and Jas. H. Raley, for respondents.

MOORE, C. J. (after stating the facts). The right of a taxpayer, in his own name, to have a municipal corporation and its officers restrained from illegally creating debts, thereby increasing the burden of taxation, has been recognized in this state. *Carman v. Woodruff*, 10 Or. 133; *Wormington v. Pierce*, 22 Or. 603, 30 Pac. 450; *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549; *State v. Pennoyer*, 26 Or. 205, 37 Pac. 906, and 41 Pac. 1104; *Dorothy v. Pierce*, 27 Or. 375, 41 Pac. 668. And hence the important questions raised by the demurrer are whether there is a misjoinder of causes of suit, and, if not, does the complaint state facts sufficient to entitle plaintiff to the relief demanded, or any part thereof? Assuming that the money alleged to have been drawn from the county treasury by Houser prior to May, 1896, was so drawn upon county orders illegally authorized by the county court, and that the county, in its corporate capacity, or upon the relation of a proper person, may maintain an action for its recovery, can the plaintiff, in his own name, assert a similar right, or compel the sheriff to account for or pay it over to the county treasurer? It would seem, upon principle, that the right of a taxpayer in his own name to restrain a municipal corporation and its officers from illegally creating a debt or disposing of the corporate property or funds must rest upon the doctrine of necessity for prompt action on the part of some one to prevent a threatened injury to the public; and since the taxpayer is one of the persons who will be injuriously affected by the misapplication of the funds of the corporation by the agents thereof, and must necessarily be compelled to bear an additional burden if the menace be carried into execution, equity considers him a real party in interest, and, as a trustee for the public, permits him to invoke injunctive relief. But, where the officers of a

municipality have already misapplied its funds, the mischief is accomplished and the injury completed, in which case the necessity for an extraordinary remedy does not exist. To allow a taxpayer in his own name to maintain an action to recover corporate property or funds after they had been diverted would be equivalent to opening wide the doors to an indefinite number of actions by persons similarly situated, thereby subjecting the officers and corporation to interminable litigation. 2 Dill. Mun. Corp. § 921. When the injury is complete the unlawful diversion of public funds falls directly upon the municipal corporation and remotely upon each taxpayer; and, since the corporation is the actual party sustaining the direct result of the injury, so should it also be the real party in interest, either in its own corporate name, or upon the relation of a proper person to prosecute an action for the redress of the injury after its consummation. The complaint having alleged that Houser unlawfully obtained from Umatilla county the sum of \$6,684.59, which it prayed he might be required to account for and repay, if the facts thus stated were relied upon as constituting an independent cause of suit, the demurrer for misjoinder was, no doubt, properly sustained; but we think a fair interpretation of the pleading leads to the conclusion that the facts so stated were relied upon only as furnishing an offset to the sheriff's account of May, 1896, for board of prisoners, \$222.57, and salary for two months, \$416.66, which it is admitted were proper charges against the county. The plaintiff claims that the county court ought not to have audited these two items of the sheriff's account, for the reason, as he alleges, that Houser had theretofore received other sums in excess thereof to which he was not entitled, and which the county court had no legal authority to award. We think this allegation explains the preceding averment, and shows the intent of the pleader, in view of which a motion to strike out would probably have corrected the pleading, and hence the court erred in sustaining the demurrer.

We come now to an examination of the sufficiency of the complaint to state a cause of suit for injunctive relief. Counsel for defendants contend that the general demurrer should have been sustained, for the reason that the salary law, upon which the plaintiff relies, contravenes subdivision 10 of section 23, art. 4, of the state constitution, which inhibits the passage of special or local laws for the assessment and collection of taxes for state, county, township, and road purposes. In *Investment Trust v. Sears* (Or.) 41 Pac. 931, Mr. Justice Wolverton has so completely and lucidly met and answered this objection as to render any further examination of the question unnecessary. It is also contended that the county court, having audited Houser's claim, thereby exercised a judicial discretion, in determining the amount due him, and, if a mistake were made in the conclusion reached, it was, in the absence of any allegation of

fraud, one of law, and not of fact, which precludes the county, even, from maintaining an action thereon. There is seemingly quite a conflict of decisions upon this question, some courts holding that the same reasons which would prevent an individual from recovering back money thus paid should prevail, in the absence of fraud, against a municipal corporation (*Advertiser & Tribune Co. v. Detroit*, 43 Mich. 116, 5 N. W. 72; *Wayne Co. v. Randall*, 43 Mich. 137, 5 N. W. 75; *Cox v. Mayor, etc., of New York*, 103 N. Y. 519, 9 N. E. 48), while others hold that a county may offset against the salary of a county official moneys received by him from its treasury to which he is not entitled by law. *Cook Co. v. Wren*, 43 Ill. App. 388. We will refrain from passing upon the effect of the county court's unwarrantable exercise of judicial discretion in allowing Houser's claim, and shall predicate the plaintiff's right upon the allegation that the money has not been paid under such allowances. This right is based upon the plaintiff's threatened injury, and his remedy, if any, consists in restraining the county clerk from issuing to Houser a county order for expenses which it is alleged were illegally allowed. If the money had been paid by the county, the injury would be complete, in which case it must be admitted that the right of a taxpayer in his own name to invoke injunctive relief, or maintain an action against an officer for money had and received, should be denied. But here, although the claim has been allowed, no warrant evidencing the amount thereof has been issued, without which no payment can be made thereon out of the county funds, and until this has been done the right of a taxpayer to invoke the aid of equity to prevent the threatened injury should be recognized.

The unpaid bill of May, 1896, contains, among others, the following charge: "Mileage, \$221.60." The statute, having prescribed an annual salary for the sheriff, precludes any charge for expenses incurred on account of travel necessitated by the performance of his official duties in Umatilla county. Nor is he entitled to compensation for mileage, as such, when compelled to travel in another county or state to make an arrest or receive a prisoner. The county court having audited and allowed this item, it, no doubt, considered that the charge was a valid claim against the county for expenses incurred by the sheriff in being compelled to travel in another county or state; but, before he can claim to be reimbursed therefor, he must file with the county clerk an account of his actual and necessary expenses. Laws 1895, p. 77, § 6. The actual expense incurred may not have been necessary, for the sheriff might possibly hire a team and carriage with which to make a long journey or to transport a prisoner, when he could be better accommodated by traveling on the cars, and thereby lessen the expense, also, in which case the county court might find that the expense incurred was unnecessary, and refuse

to audit or allow the bill for more than the necessary outlay. The "expense account" demanded by the statute must mean a detailed statement of the several items constituting the charge, and not a lumping sum; otherwise the county court could not intelligently act upon or audit the bill. If this charge represents the actual expenses of the sheriff incurred while traveling in another county or state in the performance of official duty, he is entitled to be reimbursed for the outlay; but if mileage, as such,—which was intended by the legislative assembly to be abolished,—is sought to be recovered, the county court had no authority to audit the claim therefor. In all claims of this character we think the ends of justice would be subserved by requiring the sheriff to make proof of the bona fides thereof. As to the other items of the sheriff's bill of May, 1896, they are, no doubt, proper charges against the county, and such as the county court ought to allow. It is evident that the business pertaining to the sheriff's office can be more expeditiously transacted by permitting the sheriff to make use of the telephone and telegraph in the performance of his official duties. Deprived of these means for the rapid transmission of information, he would be unable to cope with expert criminals, and Umatilla county would become a paradise to lawbreakers who were not caught in the act of violating the law. The item, "Sundry bills, \$100.87," having been audited and allowed, is, no doubt, a proper charge against the county; but a memorandum of the items thereof should have been attached to the bill, in the absence of which it is vulnerable to the objection urged against it. The other items of the account speak for themselves, but the plaintiff having alleged that they also are illegal renders it necessary that an issue should be framed, and this illegality established, if he would enjoin their payment; but he has no right in this suit to inquire into or offset any payments heretofore made by the county against that portion of the sheriff's account which he concedes to be valid. It follows that the decree is reversed and the cause remanded, with directions to overrule the demurrer, and for such further proceedings as may be necessary, not inconsistent with this opinion.

KOSHLAND v. NATIONAL FIRE INS. CO. OF HARTFORD.

(Supreme Court of Oregon. July 31, 1897.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—CORPORATIONS—RESIDENCE—PLEADING.

1. Where neither party resides in the state where suit is brought, and the sum in dispute exceeds \$2,000, defendant may have the suit removed to the circuit court of the United States in a district where neither party resides, under Act March 3, 1887 (24 Stat. 552) §§ 1, 2, as amended and corrected by Act Aug. 13, 1888 (25 Stat. 433), providing that where the sum in dispute exceeds \$2,000 a nonresident defendant may have the suit removed to the circuit court of the United

States, if the parties are citizens of different states, notwithstanding the further provision of section 1 that such suit shall be brought only in the district of the residence of either plaintiff or defendant, since such further provision was enacted solely for the benefit of defendant, who may waive it.

2. Where a petition by a corporation created by the laws of Connecticut, praying the removal of a cause from an Oregon court to the circuit court of the United States, alleges that it is a citizen of Connecticut, and of no other state, and has its principal office and place of business there, it need not aver that the corporation is not a resident of Oregon.

3. A company incorporated in one state only, and doing business in another state in compliance with conditions imposed upon foreign corporations as prerequisites to their doing business therein, is a nonresident of the latter state, within Act March 3, 1887 (24 Stat. 552) § 2, as amended and corrected by Act Aug. 13, 1888 (25 Stat. 433), providing for the removal of causes on the ground of nonresidence.

Appeal from circuit court, Umatilla county; Robert Eakin, Judge.

Action by Marcus S. Koshland against the National Fire Insurance Company of Hartford. From a judgment for plaintiff, defendant appeals. Reversed. *

Geo. E. Chamberlain, for appellant. John J. Balleray and Chas. H. Carter, for respondent.

BEAN, J. This action was commenced in the circuit court for Umatilla county by Koshland, a citizen and resident of California, against a fire insurance corporation organized and existing under the laws of the state of Connecticut, doing business in Oregon, to recover the sum of \$4,885 for the loss by fire of certain property covered by policy of insurance issued by the defendant. After service of process, and within the time required to answer, the defendant appeared and filed a petition and bond for the removal of the cause to the circuit court of the United States for the district of Oregon on the ground of diversity of citizenship; but the court denied the petition and proceeded with the trial, resulting in a judgment for plaintiff. The defendant appeals, assigning as error, among other things, the refusal of the trial court to allow the petition for removal. The consideration of this question naturally takes precedence over the other assignments of error, because if when the petition and bond had been filed a sufficient cause for removal to the federal court was shown on the face of the record the jurisdiction of the state court was at an end, and all subsequent proceedings therein were coram non iudice and void; and the defendant lost none of its rights by remaining in that court and contesting the case on its merits. *Railroad Co. v. Kooztz*, 104 U. S. 5. The question of removal is a federal one, and the courts of the United States have repeatedly held that while a state court is not bound to surrender its jurisdiction on a petition for removal until a case is made out which on its face shows that the petitioner is entitled thereto, when the fact does appear its

jurisdiction absolutely ceases, and that of the circuit court of the United States immediately attaches, and that all issues of fact made upon the petition for removal must be tried in the federal court. All the state court has a right to determine for itself is whether, on the face of the record, as a matter of law, the petitioner is entitled to a transfer; and an adverse determination involves the risk of having all its subsequent proceedings rendered of no avail if, on appeal or writ of error, it shall be determined that the record on its face shows that when the petition was filed it should have given up its jurisdiction. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 790. The petition for removal in the case in hand avers that the plaintiff was at the time of the commencement of the action, and still is, a citizen of the state of Oregon; and while, as we have said, it was not open to the plaintiff to raise an issue on the question for trial in the state court, it was nevertheless admitted on the hearing that the averment in the petition to that effect was not true, but that in fact the plaintiff was and is a resident and citizen of the state of California, and such admission was made a part of the record in the case; so that the question for decision is whether an action pending in the state court between citizens of different states can be removed by the defendant to the circuit court of the United States for the district in which the state court is held, when neither of the parties to the action are residents or inhabitants of such district. By section 1 of the act of congress of March 3, 1887, to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts (24 Stat. 552), as amended and corrected by the act of August 13, 1888 (25 Stat. 433), the circuit courts of the United States are given original cognizance, concurrent with the state courts, of suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, in the following cases: (1) Those arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority; (2) those in which the United States are plaintiffs or petitioners; (3) those in which there is a controversy between citizens of different states; (4) those in which there is a controversy between citizens of the same state claiming under grants of different states; and (5) those in which there is a controversy between citizens of a state and foreign states, citizens or subjects. The section then provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." Section 2 of the act, after declaring that any suit

of a civil nature arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the courts of the United States are given original jurisdiction by the first section, may be removed by the defendant to the circuit court of the United States for the proper district, further provides that "any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

It is familiar law that under the federal decisions a corporation is, for jurisdictional purposes, a citizen of the state in which it is organized, and therefore, as the plaintiff is a citizen and resident of the state of California, and the defendant of the state of Connecticut, the present action is admittedly a controversy between citizens of different states, and within the provisions of section 2, just quoted, if it be one "of which the circuit courts of the United States are given jurisdiction by the preceding section." The contention for the plaintiff is that it is not a controversy of that character, because neither of the parties to the action are citizens or residents of the district of Oregon. But this contention confuses the question of jurisdiction with the place of bringing the suit. The first section of the act of 1887 not only defines the class of cases of which the federal courts are given jurisdiction, but also provides the district in which such suit shall be brought by original process. The clause restricting the place of trial does not affect the question of federal cognizance in any way, and in interpreting the statute it is important not to confuse these two provisions. The one is the personal privilege of the defendant, and for his benefit, and therefore may be waived by him; but the other affects the jurisdiction of the court, and, of course, cannot be waived. By the act in question the jurisdiction of the federal courts depends upon the subject-matter of the controversy, or the citizenship of the parties, and not upon the place of trial. When the facts exist upon which the jurisdiction is grounded, any circuit court of the United States may, by consent of the parties, hear and determine the controversy between them. The defendant, however, has a right to insist that the action shall be brought only in the district in which he is an inhabitant when it is not founded upon diverse citizenship, and in a district of the residence of either himself or the plaintiff when it is. But this provision is for his benefit, and does not limit the general jurisdiction of the courts of the United States over the subject-matter of the controversy, but only of the person. From the summary already given of the first section of the act, it clearly appears that the circuit courts of the United

States are given jurisdiction of suits of a civil nature, "in which there shall be a controversy between citizens of different states," in which the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000, and this jurisdiction is conferred without any other limitation or restriction whatever. Under this provision it is of no consequence, so far as the mere jurisdiction over the matter in dispute is concerned, whether either of the parties reside in the particular district where the suit is pending or not. It is sufficient for that purpose if they are citizens of different states. The jurisdiction depends upon the fact of diverse citizenship, and not the place of trial. If in fact the parties are citizens of different states, any circuit court of the United States has the right to hear and determine the controversy, if it can obtain jurisdiction of the person. It is argued, however, that because the section provides, when jurisdiction is founded on the fact of diverse citizenship, that "suits shall be brought only in the district of the residence of either the plaintiff or defendant," no other circuit court of the United States can acquire or exercise jurisdiction of the controversy, even by consent of the defendant. But this provision as to the place of trial is not alone peculiar to the removal act of 1887, but is to be found, in substance, in nearly if not quite all the former acts of congress upon the subject; and it has never been regarded as affecting the jurisdiction, in any such sense that it could not be waived by the defendant. It has always been considered as a personal privilege of the defendant, which he could insist upon or not as he might choose. If an action within the general jurisdiction of the federal courts was brought against him in any of such courts, and he chose voluntarily to appear, it has repeatedly been held that the court has jurisdiction to proceed to judgment against him. In *Ex parte Schollenberger*, 96 U. S. 309, Mr. Chief Justice Waite, in referring to the question, says: "The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of courts. It is rather in the nature of a personal exemption in favor of the defendant, and is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented." Indeed, such is the construction given the statutory provision now under consideration by the supreme court of the United States. The question was before that court in *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982; and Mr. Justice Brewer, after commenting upon the previous decisions of the court, concludes his opinion by saying: "Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong dis-

trict." This case was cited with approval in the later case of *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563. We take it, therefore, that the provisions of the act of 1887, requiring the suit to be brought in the district where either the plaintiff or defendant resides, when the jurisdiction depends upon diverse citizenship alone, is merely a restriction with regard to the court in which the suit must be brought, and not upon the general jurisdiction of the federal courts over such controversies; and hence a suit in which there is a controversy between citizens of different states, where the matter in dispute exceeds the limit prescribed, is a suit "of which the circuit courts of the United States are given original jurisdiction" by the first section of the removal act of March 3, 1887, and, if brought in a state court, may be removed by the defendant (being a nonresident of the state) to the circuit court of the United States of the district in which the state court is held, although neither of the parties to the action are residents or inhabitants of such district. The great majority, and, indeed, all of the later decisions of the federal courts upon this question, support this view: *Fales v. Railway Co.*, 32 Fed. 673; *Vinal v. Improvement Co.*, 34 Fed. 228; *Tiffany v. Wilce*, 34 Fed. 230; *Wilson v. Telegraph Co.*, 34 Fed. 561; *Gavin v. Vance*, 33 Fed. 84; *Short v. Railway*, 33 Fed. 114; *Loomis v. Coal Co.*, 33 Fed. 353; *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. 3; *First Nat. Bank v. Merchants' Bank*, 37 Fed. 657; *Burck v. Taylor*, 39 Fed. 581; *Amsinck v. Balderston*, 41 Fed. 641. It is true, a different construction was given the act by the circuit court of the United States for the Northern district of California in *Yuba Co. v. Pioneer Gold Min. Co.*, 32 Fed. 183, Judges Field, Sawyer, and Sabin sitting; but this case was expressly overruled by Mr. Justice Field in *Wilson v. Telegraph Co.*, *supra*, both Judges Sawyer and Sabin concurring in the opinion. So, too, the case of *Harold v. Mining Co.*, 33 Fed. 520, was subsequently overruled in *Kansas City & T. R. Co. v. Interstate Lumber Co.*, *supra*, in which it was distinctly held that an action pending in a state court between citizens of different states may be removed by the defendant to the federal court, although neither party is a resident of the district. In the opinion in that case Mr. Justice Brewer says that: "Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts does not destroy the general jurisdiction of federal courts, or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction

of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court?" The same construction has been given the removal act of 1887 by the supreme courts of Massachusetts and Maine. *Finance Co. v. Bostwick*, 151 Mass. 19, 23 N. E. 656; *Craven v. Turner*, 82 Me. 383, 19 Atl. 864.

The case of *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, upon which the court below seems to have based its ruling, was an action brought in a state court of New York by a citizen of that state against a Colorado corporation upon a chose in action assigned to the plaintiff by another citizen of the state of Colorado, and subsequently removed into the federal court by the defendant, and is clearly not in point. The court simply held that the action was not removable because the federal court did not have jurisdiction of the subject-matter, and consent could not confer such jurisdiction. The act of 1887, in the latter clause of section 1, provides that no circuit or district court of the United States shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of * * * any chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court * * * if no assignment or transfer had been made." By this provision of the statute the federal courts are expressly prohibited from exercising jurisdiction in an action to recover on a chose in action, except foreign bills of exchange, by an assignee thereof, unless the suit could have been so maintained by the original holder; and hence the case referred to, being of this class, was not one of which the circuit courts of the United States are given original jurisdiction by the first section of the act in question, and of course they could not acquire such jurisdiction by removal from the state court. But in the case at hand the jurisdiction of the federal court is founded upon diversity of citizenship alone, and not upon the subject-matter of the controversy; and in such case Mr. Chief Justice Fuller says, in his opinion in *Railroad Co. v. Davidson*, *supra*, that the provision of section 1 of the act of 1887, requiring such an action to be brought only in the district of the residence of the plaintiff or defendant, is a personal privilege of the defendant, and may be waived by him, and that section 2, providing for the removal of causes from the state to the federal court, "refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought." In view of these remarks, the portion of the opinion relied upon by the court below, that the jurisdiction of the circuit courts on removal by the defendant is limited to such suits as might have been brought in that court by the plaintiff under the first section of the act of 1887, must evidently refer to the portion of the first section dealing with jurisdiction, and not to

the provision thereof in reference to the place of trial. In other words, unless the plaintiff could have brought the action in a federal court in the first instance, jurisdiction could not be conferred upon a circuit court of the United States by removal from a state court. We conclude, therefore, that the case is one properly removable to the federal court.

But it is claimed on behalf of plaintiff that the petition for removal is insufficient, because it does not allege that the defendant is a nonresident of the state. The complaint avers that the defendant is a corporation created and existing under and by virtue of the laws of the state of Connecticut; and the petition alleges that it "was at the time of the commencement of this action, and still is, a citizen of the state of Connecticut, and of no other state, and has its principal office and place of business in the city of Hartford, in said state of Connecticut." This has been held sufficient by the federal courts. *Shattuck v. Insurance Co.*, 7 C. C. A. 386, 58 Fed. 609; *Wilcox & G. Guano Co. v. Phoenix Ins. Co.*, 60 Fed. 929. "A corporation created by the laws of a foreign country," says Mr. Justice Caldwell in *Shattuck v. Insurance Co.*, supra, "does not become a citizen or resident of a state of this Union by merely opening an office in the state and transacting business there; and a petition for removal which shows that the defendant is a corporation chartered by the laws of another state or a foreign country does not have to allege negatively that it is not a citizen or resident of the state in which suit is brought against it, because, in legal contemplation, its residence and citizenship can only be in the state or country by the laws of which it was created, although it may have an office and do business in other states whose laws permit it." Under the decisions of the United States courts a corporation is, for the purpose of jurisdiction, conclusively presumed to be a citizen and resident of the state of its creation, and cannot migrate to or become a resident or inhabitant of another state, although it may by its agents engage in business therein, and, as a condition precedent to its right to do so, be required to comply with certain terms and conditions. 6 *Thomp. Corp.* § 7449, et seq.; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Co. v. Koontz*, 104 U. S. 11; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 441; *In re Hohorst*, 150 U. S. 662, 14 Sup. Ct. 221; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533. In *Southern Pac. Co. v. Denton*, supra, it was held that a corporation organized and existing under the laws of the state of Kentucky was not a resident of the Western district of Texas, within the provision of the act of congress of March 3, 1887, requiring a suit founded on diverse citizenship alone to be brought in the district of the residence of either the plaintiff or the defendant, although it was doing business there, and that its right to appear and contest the jurisdiction of the

federal court over it was not affected by a state statute requiring a foreign corporation, before doing business in the state, to file with the secretary of state a copy of its charter, with a resolution authorizing service of process to be made on any officer or agent engaged in business within the state, and agreeing to be subject to all provisions of the statute, one of which is that a corporation shall not remove any suit from a court of the state to the circuit court of the United States. Referring to this provision of the statute, and the argument that by doing business and appointing an agent in the state of Texas the railroad company had consented to be sued in the federal courts there, Mr. Justice Gray says: "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931; *Mortgage Co. v. Worsham*, 76 Tex. 556, 13 S. W. 384. Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the state. It did not undertake to declare the corporation to be a citizen of the state, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the state. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the state, so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. But such an agreement could not, since congress (as held in *Shaw v. Mining Co.*, above cited) has made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up noncompliance with that test when sued in a circuit court of the United States." And in *Re Hohorst*, supra, it is said by the same learned justice "that, within the meaning of the judiciary acts, a corporation cannot be considered a citizen and inhabitant or a resident of a state in which it has not been incorporated, and that under the act of 1888 (March 3, 1887) a corporation incorporated in one of the United States, and in that state only, cannot be compelled to answer in another state, in which it has a usual place of business, and of which the plaintiff is not a citizen." In *Martin's Adm'r v. Railroad Co.*, supra, the right of a corporation organized in one state, and doing business in another by the express license and authority of the legislative power thereof, to remove an action

brought against it in the latter state by a citizen thereof, on the ground that it was a non-resident of the state, within the meaning of the act of March 3, 1887, was involved; and the court held that under the provisions of that act a defendant corporation must be created by the laws of another state only in order to entitle it to remove an action brought against it by a citizen of the state in which it was doing business, but that if it is such a corporation, and has not been also created a corporation by the laws of the state in which the action is brought, it may remove the action to a federal court, even if it has been licensed by the laws of the state to act within its territory, and is therefore subject to be sued in its courts. And this case we regard as conclusive upon the question made by the plaintiff, that the defendant insurance company, by complying with the laws of this state in reference to such companies doing business here, became a resident of the state, and therefore not entitled to remove an action brought against it in one of the state courts to the federal court. It follows that the court below was in error in refusing to surrender jurisdiction of the cause, and that its judgment must be reversed and the case remanded, with directions to proceed no further in the matter unless its jurisdiction shall hereafter be restored.

KOSHLAND v. NATIONAL FIRE INS. CO. OF HARTFORD.

(Supreme Court of Oregon. July 31, 1897.)

REMOVAL OF CAUSES

In a suit in Oregon by a citizen of California to recover \$4,110, against a resident of Connecticut, defendant may have the case removed to the circuit court of the United States for the district of Oregon.

Appeal from circuit court, Umatilla county; Robert Eakin, Judge.

Action by Marcus S. Koshland against the National Fire Insurance Company of Hartford. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. E. Chamberlain, for appellant. John J. Balleray and Chas. H. Carter, for respondent.

BEAN, J. The plaintiff, Koshland, a citizen of the state of California, brought this action in the circuit court of Umatilla county to recover the sum of \$4,110 on a fire insurance policy issued by the defendant company. Within the proper time the defendant filed a petition and bond for removal of the cause to the circuit court of the United States for the district of Oregon, on the ground that it is a resident of the state of Connecticut. The court below refused to surrender its jurisdiction, and proceeded with the trial, which resulting in a judgment in favor of plaintiff, the defendant appeals, assigning as error, among other things, the refusal of the court to allow the petition for removal. The questions involved on this point

are the same as in the other case between the same parties (just decided) 49 Pac. 845, and the opinion in that case will control in this. The judgment is therefore reversed, and the cause remanded, with directions to the trial court to proceed no further in the matter unless its jurisdiction shall hereafter in some manner be restored.

SMYTH v. NEAL.

(Supreme Court of Oregon. July 31, 1897.)

WATER RIGHTS—APPROPRIATION—NOTICE—ESTOPPEL.

1. One who has several years heretofore filed notice that he claimed an appropriation of a certain amount of water for agricultural purposes, but has made no additional or other use of the water than he had prior to that time, can claim no additional rights by reason thereof.

2. Plaintiff, by making favorable representations to defendant of the desirability of his neighborhood for settlement, and by discussing methods for irrigation, and stating that he thought the supply of water from the creek was sufficient for them both, and making no objection to his use of water therefrom, is not estopped to claim a superior right to so much of the water as prior to and during all such time he had been using for beneficial purposes to the knowledge of defendant.

Appeal from circuit court, Harney county; Morton D. Clifford, Judge.

Suit by Darius H. Smyth against John H. Neal. Decree for defendant. Plaintiff appeals. Reversed.

C. A. Sweek and L. B. Cox, for appellant. Thornton Williams, for respondent.

WOLVERTON, J. This suit was commenced in May, 1895, to restrain the defendant from diverting water from Smyth creek, in Harney county, Or. The plaintiff claims a prior appropriation of all the water of the creek, and seeks to have his claim established by decree, and the defendant permanently enjoined from interfering in any manner with his use thereof. The defendant concedes that plaintiff is entitled to some use thereof, but claims by his answer an appropriation of 150 inches prior in time and superior in right to that of plaintiff. The questions presented by the briefs and at the argument are: (1) What is the amount of plaintiff's appropriation? And (2) is he estopped to question any appropriation that defendant may have acquired?

In May, 1873, the plaintiff settled upon a pre-emption claim consisting of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 1, the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2, township 20 S. of range 33 E., situate in Harney county, Or., and subsequently acquired title thereto from the general government. In August, 1882, he settled upon a homestead consisting of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 11, and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, in the same township, and received a patent therefor in August, 1888. Smyth creek is a perennial stream, flowing in its natural channel in a northerly direction through the

N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12 and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 1. In 1876 the plaintiff constructed a dam in the creek, a short distance north of said N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, upon the premises of G. C. Smyth, his father, and diverted a portion of the water by means of a small ditch, carrying it upon the north end of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 11, thence upon and through his pre-emption claim. In 1883 or 1884 the head of this ditch was changed to a point a little higher up on the stream, but the amount of the diversion was not increased. It is impossible to determine from the evidence the quantity of water diverted by means of this ditch, but it is probable that not more than half the stream was ever so diverted. The plaintiff utilized water from Smyth creek for irrigating wild grasses, which grow in sufficient abundance to be cut and cured for hay, ever since the construction of said dam and ditch,—some through the ditch and laterals thereto, and some by damming the main stream and turning it into old channels, and damming these again and conducting it upon the meadows then covered by his pre-emption and by the homestead subsequently acquired, by means of plow furrows and shallow lateral ditches so constructed that the mower could be run over them without great inconvenience. There is some conflict in the testimony touching the extent of these meadow lands. The plaintiff says they contain from 130 to 140 acres; the defendant, 110; while other witnesses estimate the area thereof at not more than 80 or 90 acres. From the whole, it is quite probable that 120 acres is a fair estimate. Besides these meadow lands, plaintiff early began the cultivation and irrigation of grain and garden lands which theretofore were arid and covered with sagebrush, and reduced to cultivation and continuously irrigated for a number of years last past, according to his statement, about 18 acres,—15 of grain and 3 of garden. Other witnesses vary in their estimates, some being higher and some others lower than the plaintiff's, but his statement we believe to be substantially correct. From plaintiff's case in chief, it is impossible to gather any definite idea touching the quantity of water needed or required for the irrigation of these lands. The defendant has, however, cured this defect, and from his testimony we are able to arrive at a fairly satisfactory conclusion. The witness Whiteside testifies to having had experience in the use of water for the irrigation of wild meadow lands, and says, in effect, that one-half inch to the acre, if handled economically, would be sufficient for the purpose. This evidence is uncontradicted and unimpeached, and, from the intelligence of the witness, must be taken as a fair estimate. For the 18 acres of grain and garden 1 inch to the acre is ample. The parties practically agree that wild grass irrigation ends about the middle of June. The defendant so testifies, and the plaintiff fixes that time in a proposition contained in the record for a decree to

be entered in his favor, but grain and garden lands require irrigation for a much longer period. It seems to have been a conceded proposition that the use of water for the irrigation of these wild meadow lands was for a useful purpose, and that such irrigation was necessary for the production of grass in sufficient quantities to be gathered and cured as feed for stock. The plaintiff has other lands capable of cultivation and irrigation from Smyth creek, but during all the time since his settlement upon his pre-emption and homestead claims he has not utilized any water for the irrigation thereof; nor do we understand that he has ever made any attempt at such additional use, unless the construction of his new dam still higher up on the stream in 1895, and the partial construction of a ditch from that point, may be construed into such a purpose. But by his testimony he expressly disclaims any purpose of the kind, or that he intended thereby to increase his previous appropriations. We understand that where a party has made an actual diversion of a specific quantity of water, and perhaps where he has given notice of an intended appropriation of a specific amount, he is entitled to a reasonable time within which to make an actual application of the whole of his intended appropriation to the contemplated useful purpose, using reasonable diligence, under the circumstances, for the accomplishment of such purpose, but that where he falls in such diligence he loses his initiative or inchoate appropriation, or so much thereof as he fails to put to a useful or needful purpose. *Ditch Co. v. Bennett* (Or.) 45 Pac. 472, and cases there cited. Plaintiff produced a notice at the trial, which appears to have been filed in the county clerk's office in 1882, whereby he claimed an appropriation of 200 inches of the water of this stream for agricultural purposes, but has made no additional or other use of the water than he had made prior to that date, and can now claim nothing by reason of such notice. Under the conditions here ascertained and determined, and the law applicable thereto, we conclude that plaintiff has acquired a completed prior appropriation of 75 inches of water from Smyth creek for and during the spring months, and until June 15th, and 18 inches thereafter.

But it is contended that he is estopped to assert this right by his acts and demeanor towards the defendant while he was reducing his lands to cultivation, and using water from the same stream for the purpose of their irrigation. The defendant's lands are located above those of plaintiff, as it respects Smyth creek. He settled upon a pre-emption in 1885, and acquired title shortly after, and then settled upon a homestead which adjoined the plaintiff's lands, and in due course acquired title to that. Subsequently he acquired title to a timber-culture claim and other lands. He began the use of water in 1888, and continued such use for irrigation until 1895, when he had in cultivation and utilized, for the production of timothy, alfalfa, grain, and vege-

tables, approximately, 100 acres. He also utilized water for the production of wild grass on other land, the acreage of which is not definitely fixed. Suffice it to say that the defendant has made some appropriation of the water of Smyth creek, the quantity whereof we will not now undertake to determine, as it is not insisted upon by him, unless it be found that his right to the use of such water is superior to that of the plaintiff. Several years before the defendant settled upon Smyth creek, the plaintiff attracted his attention to the locality by a favorable representation of the surroundings, grass, water supply, etc.; and in September, 1895, at the time he settled there, the plaintiff accompanied him upon the lands, showed him the lines and section corners, and discussed to some extent the water supply, and was present or had direct knowledge touching the purchase by defendant of a prior pre-emption right, or of its relinquishment from the lands upon which the defendant then located his pre-emption, and upon which he began the diversion and use of water. Plaintiff also at the time discussed somewhat with the defendant the better method to be adopted, by which irrigation would be advantageously employed. Thereafter plaintiff had full and complete knowledge of the valuable and extensive improvements the defendant was making upon his lands,—that he was inclosing and breaking portions of them up, reducing them to cultivation, seeding them to alfalfa and timothy, and planting to grain and garden, and was constantly employing the waters of Smyth creek for their irrigation, as well as for the irrigation of wild grasses for hay, through a system of ditches designed especially for advantageous and economic use. During all this time, and up to the spring of 1895, the plaintiff made no objections to the defendant's use or employment of the water, and upon one or two occasions told the defendant that he thought the supply by means of the creek was ample for both. In 1895, however, the supply in large part failed, so that there was not sufficient water for the needs of both parties. This was an unusual condition, and precipitated this suit. Is there enough in all this, however, to constitute an estoppel in defendant's favor? It must be remembered that the plaintiff was also, during the same period of time, in the full enjoyment of his completed prior appropriation, of which the defendant was all the while fully cognizant. In *Boggs v. Mining Co.*, 14 Cal. 368, it was said, "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title; the effect of the estoppel being to forfeit his property and transfer its enjoyment to another." These elements must concur, to constitute the estoppel for which defendant contends, viz.: He must have been destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. The plaintiff must have made some ad-

mission or done some act with the intention of influencing the conduct of the defendant, or which he had reason to believe or the necessary tendency of which would be to so influence him, inconsistent with the assertion of title in himself; that the defendant has acted upon or been influenced by such demeanor; and that he will now be prejudiced by allowing the effect of such acts or admissions to be controverted. *Lux v. Haggin*, 69 Cal. 255, 266, 10 Pac. 674; *Anahelm Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 194, 195, 30 Pac. 623. The admissions, if they may be so termed, and conduct of the plaintiff, by which defendant claims to have been influenced to settle upon Smyth creek, and his admissions, conduct, and demeanor during all the time between 1885 and 1895, were not calculated to delude or mislead the defendant, who had not only full cognizance of his own rights, but also had knowledge that plaintiff had been, anterior to his settlement, and was during all of said time, employing a portion of the water of the stream for beneficial purposes. Plaintiff's demeanor was not inconsistent with truth and fair dealing, and there is no estoppel in the premises upon which defendant may depend. When the shortage in water occurred, in 1895, it is probable that defendant interfered somewhat with plaintiff's prior appropriation; but it is not altogether clear that plaintiff is without fault in the matter, and for this reason the costs of the suit ought to be divided. The decree will therefore be that plaintiff's prior appropriation be established in accordance with this opinion, that he recover his costs in this court upon the appeal, and that the defendant recover his costs in the court below.

STATE ex rel. THOMPSON v. LAVERY et al.
(Supreme Court of Oregon. July 31, 1897.)

INJUNCTION—VIOLATION—CONTEMPT—AFFIDAVIT—SCIENTER—AMENDMENTS—PRESUMPTIONS.

1. If a decree is rendered enjoining the party from using either the waters of a creek or the tributaries thereof, and the amended complaint upon which the decree was based is lost, it will be presumed, in a contempt proceeding for having diverted the waters of the tributaries,—unless the contrary appears in the pleadings,—that the rights of the parties to the waters of the tributaries were in issue.

2. One who is a party to a decree enjoining him from diverting certain water is guilty of contempt if his tenant, by his direction, perform acts of diversion.

3. An affidavit being necessary as the basis of proceedings for contempt for acts not committed in *facie curiæ* (Hill's Ann. Laws, § 653), an amendment of such affidavit must be accompanied by a verification thereof.

4. Although a decree enjoins not only defendant, but also all "persons acting under, by, or through him," from committing certain acts, yet one who, acting under his instructions, disobeys the injunction, is not guilty of contempt, if he had no knowledge of the decree.

Appeal from circuit court, Malheur county;
Morton D. Clifford, Judge.

Special proceeding by the state, on the re-

lation of Jesse Thompson, against Daniel Lavery and John Lavery, for contempt of court. Defendants were both found guilty, and they appeal. Affirmed as to Daniel Lavery and reversed as to John Lavery.

This is a special proceeding for the punishment of an alleged contempt. The material facts are that, a suit having been commenced in the circuit court of Malheur county by the relator and others to enjoin the defendant Daniel Lavery from diverting the waters of Warm Spring creek, in said county, issue was joined and testimony taken from which the court on October 10, 1891, found, in substance, that the plaintiffs were the owners of certain premises through which said creek flowed, and that in 1883 they diverted all the waters thereof, and appropriated the same, in irrigating their lands; that in May, 1891, the defendant erected a dam in the channel of said creek, and constructed a ditch therefrom, by means of which he diverted said waters, and deprived plaintiffs of the use thereof, to their damage in the sum of \$25. As a conclusion of law the court also found that plaintiffs were entitled to a decree perpetually enjoining the defendant from interfering with the waters of said creek, and thereupon decreed "that defendant Daniel Lavery, his agents, servants, and employes, and all persons claiming by, through, or under him, be, and they are hereby, perpetually restrained and enjoined from in any manner interfering with the waters of said creek, or the tributaries thereof, above the lands of the plaintiff." The relator in November, 1896, filed in said court his affidavit wherein he charges the defendants, Daniel and John Lavery, with violating the provisions of said decree by appropriating to their own use during the months of April, May, June, and July, 1896, a portion of the waters of Warm Spring and Jerry creeks, and all of the waters of Bendler creek,—the two latter being tributaries of Warm Spring creek, situate above the head of affiant's ditch, and an attachment was issued thereon, in pursuance of which the defendants were apprehended; and, upon being brought before the court, they entered pleas of not guilty, whereupon a trial was had, resulting in their conviction, and, being sentenced to pay a fine of \$25 each, they appeal from the judgment thus rendered.

C. H. Finn, for appellants. Will R. King, for respondent.

MOORE, C. J. (after stating the facts). It is contended that the issues upon which the decree is predicated involved the right to appropriate the waters of Warm Spring creek only, that the right to apply the waters of its tributaries to a beneficial purpose was not litigated, and that the decree, in so far as it pretends to restrain the defendants from appropriating any of the waters of Jerry or Bendler creeks, is void, and hence they are not in contempt, as charged by the relator. Dis-

obedience of any lawful judgment, decree, order, or process of the court is deemed to be a contempt of the authority of the court. Hill's Ann. Laws Or. § 650, subd. 5. Under this statutory definition, it is apparent that two important questions are presented for consideration: Is the decree rendered by the circuit court of Malheur county lawful? And, if so, have the defendants knowingly violated its provisions? The original complaint made no mention of any of the tributaries of Warm Spring creek, and the amended complaint was lost prior to the trial of this proceeding. While it is a principle of law that a prior appropriation of the waters of a stream flowing through public lands of the United States embraces, when necessary to supply the demands of such appropriator, all the waters of springs and tributaries above the ditch by which the stream is supplied (*Low v. Schaffer*, 24 Or. 239, 33 Pac. 678), yet it must be conceded that an appropriation from a tributary may be prior in time, and hence superior in right, to an appropriation from the main stream, so that an adjudication that a proprietor has no right to appropriate the waters of the main stream does not necessarily determine that he has no right to any of the waters of the tributaries thereof. The court having enjoined the defendant Daniel Lavery from diverting the waters of any of the tributaries of Warm Spring creek above plaintiff's premises, and the amended complaint upon which the decree is based having been lost, the question is presented whether it will be presumed from a mere inspection of the decree, when uncontradicted by the pleadings, that it was warranted by the allegations and prayer of the bill. It does not follow from the absence of a denial in the answer that plaintiffs had made a prior appropriation of the waters of Bendler and Jerry creeks that the amended complaint did not contain averments to that effect; for it may be that the defendant, being unable to controvert such an allegation, for that reason failed to deny it, thereby admitting its truth. Hill's Ann. Laws Or. § 94. A decree in a suit before a court of this state having jurisdiction to pronounce the same is conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the suit. Id. § 733. Mr. Justice Woods, in *U. S. v. Debs*, 64 Fed. 724, in discussing the liability of a party to an injunction, for violating its provisions, says: "If the injunction was for any reason totally invalid, no violation or disregard of it could constitute a punishable contempt; but if the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ." See, also, *In re Cohen*, 5 Cal. 494; *Moat v. Holbein*, 2 Edw. Ch. 188; *Sullivan v. Judah*, 4 Paige, 444; *People v. Bergen*, 53 N. Y. 404; *Stimpson v. Putnam*, 41 Vt. 238. The court having jurisdiction of the subject-

matter and of the person of the defendants in the case at bar, it was authorized to pronounce the decree; and, no appeal therefrom having been taken, it must be presumed, as against Daniel Lavery, in the absence of the amended complaint, that the decree followed the allegations and prayer thereof. *Treat v. Maxwell*, 82 Me. 76, 19 Atl. 98. In *Neale v. Osborne*, 15 How. Prac. 81, having become the owner of a store building under lease to plaintiff, the defendant commenced to tear it down, whereupon an injunction was issued restraining the demolition, after the service of which the defendant's partner, one Bissell, with the knowledge and consent of its owner, continued the destruction of the building. The defendant, having been attached for contempt, sought to avoid liability by showing that, notwithstanding he was daily present and saw the work of removal as it progressed, hired some of the hands, and confessedly paid half of the expense, had his teams at the scene of demolition removing the material, half of which belonged to him, he was merely passive, while his partner, who was not a party to the injunction, violated its terms. The court, reviewing these facts, say: "It is the veriest of trifling to say, under these circumstances, that Bissell did the wrong, and the defendant is not responsible. He was present, aiding, abetting, advising, assisting, and directing. The work was not done by Bissell without his active concurrence and participation. It may be, if the defendant had been away, and was in no way privy to the work of tearing down the building, that he might not be responsible in this proceeding for the acts of Bissell. But to allow the defendant to escape responsibility in this case by throwing the blame upon Bissell, and making him the scapegrace for violating this injunction, would be to connive, on the part of the court, at a most palpable disregard of its process,—at the complete and perfect evasion of an injunction deliberately granted." See, also, *Wheeler v. Gilsey*, 35 How. Prac. 139; *Stimpson v. Putnam*, 41 Vt. 238; *Poertner v. Russel*, 33 Wis. 193; *Blood v. Martin*, 21 Ga. 127. A proceeding for the punishment of contempt is quasi criminal in character (4 Enc. Pl. & Prac. p. 700, and notes); and, such being the case, a plea of not guilty must necessarily put in issue all the material allegations of the affidavit charging the offense complained of; and a finding by the court that the defendant is either guilty or not guilty must be responsive to, and a finding upon, all the issues made by the pleadings. In this case, the court having found Daniel Lavery guilty, the judgment must be affirmed, if there be any evidence tending to support the finding. An examination of the record shows that he leased his farm to his mother, and that his brother John managed the property for her; and it also tends to show that Daniel directed John as to the manner of irrigating it; that a small tract had been sublet to one Frank Burrell,

who, desiring to irrigate the same, applied to Daniel for the use of water for that purpose, and the latter directed his brother John to haul material and build a dam in Warm Spring creek, which was done, and the water thereupon diverted from that stream. Daniel was a party to and bound by the final decree perpetually enjoining him from diverting the waters of Warm Spring creek and the tributaries thereof above the head of relator's ditch, of which decree and its terms he had actual knowledge, but claims to have been informed that, in so far as it purported to adjudicate the right to the use of the waters of Jerry or Bender creek, it was invalid, because not embraced within the issues made by the pleadings. Without attempting in any manner to obtain a correction or modification of the decree, he seeks to avoid its provisions by this circuitous method, apparently adopted for that particular purpose; but, his brother John and the tenant being in fact his agents, the maxim, "*Qui facit per alium facit per se*," should be invoked, thereby rendering him guilty of the contempt as found by the court.

2. It is contended that the court erred in permitting, over the defendants' objection and exception, the relator's affidavit to be amended by adding thereto the following words, to wit: "And during all the time of the commission of the acts aforesaid said John Lavery was acting under the instructions and in the employ of the said Daniel Lavery,"—which amendment was not sworn to. Unless the contempt is committed in *facie curiæ*, before any proceedings can be taken therein the facts constituting the contempt must be shown by affidavit presented to the court. *Hill's Ann. Laws Or.* § 633. In *State v. Kaiser*, 20 Or. 50, 23 Pac. 964, *Thayer, C. J.*, in commenting upon this section of the statute, says: "In proceedings to punish that class of contempts, it is necessary that a proper information should be filed before the court is authorized to act in the matter. Section 653 of the Code, above set out, makes it imperative that the facts constituting the contempt in such cases must be shown by an affidavit presented to the court, etc., before the proceeding can be taken." It is evident that the court erred in thus allowing the amendment without a verification, but, if it be conceded that the court possessed the power to add these words, they are not sufficient to charge John Lavery, who was not a party to nor bound by the decree, with violating its provisions, without alleging that he had knowledge of its terms and conditions. *Rap. Contempt*, par. 20, and cases cited; 4 Enc. Pl. & Prac. p. 778, subd. 4, and notes. It is true, the decree restrains the "defendant Daniel Lavery, his agents, attorneys, and employes, and all persons acting under, by, or through him," etc. But without serving a copy thereof upon the defendant John Lavery, or alleging or proving that he had knowledge of its provisions, he can-

not be in contempt for violating its terms. While there is some conflict of authority upon the question of the liability of a person for violating the process of a court, the weight and better reason seem to support the rule that a stranger to an injunction, who has notice or knowledge of its terms, is bound thereby, and may be punished for contempt by violating its provisions. *Rap. Contempt*, par. 46; *Ewing v. Johnson*, 34 How. Prac. 202; *Waffle v. Vanderheyden*, 8 Paige, 45; *U. S. v. Debs*, *supra*. It follows that the judgment rendered against the defendant Daniel Lavery is affirmed, but in so far as it applies to the defendant John Lavery it is reversed, and the cause remanded to the lower court with directions to discharge the latter.

STATE ex rel. SCRIBER v. GRANT, City Treasurer.

(Supreme Court of Oregon. July 31, 1897.)

CITY TREASURER — PARTIAL PAYMENT ON WARRANTS.

Under charter provisions requiring the city treasurer to receive and safely keep all moneys of the city coming into his hands, and pay the same out on warrants and orders signed by the mayor and recorder, it is not his duty, and he therefore cannot be compelled, to make a partial payment on a warrant, though he is directed to do so by the city council.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Application by J. W. Scriber for mandamus to William Grant, treasurer of the city of Lagrande. Peremptory writ denied. Relator appeals. Affirmed.

W. W. Hindman and J. D. Slater, for appellant. C. H. Flinn, for respondent.

BEAN, J. This is a proceeding by mandamus to compel the defendant, as treasurer of the city of Lagrande, to apply, in part payment of a city warrant belonging to the relator, certain funds in the city treasury applicable to the payment of such warrant, but which are insufficient to pay it in full. Prior to the commencement of this proceeding the common council of the city, by resolution, instructed the treasurer, "as fast as funds accumulated on hand to the amount of one hundred dollars, to apply the same on this warrant, and to take a receipt, as well as to indorse the same on the back thereof," which he refused to do, or to make any payments whatever on the warrant, for the reason that he did not have sufficient funds on hand with which to pay it in full. The question to be determined on this appeal, therefore, is whether, under the rules of law, or the resolution of the council referred to, the city treasurer can be compelled by mandamus to make a partial payment on an outstanding city warrant without its delivery to him, or being furnished with other evidence of or voucher for such payment than the receipt of the holder of the warrant. That mandamus will lie to compel a public disbursing officer to pay a

warrant lawfully issued upon accounts which have been regularly allowed by the proper officer or tribunal, when there is money in the treasury for that purpose, is unquestioned. *Merrill, Mand.* § 135. But in our opinion the fact that there were not sufficient funds on hand at the time the application for the writ in this case was made to pay the warrant in full affords an insuperable objection to granting the relief demanded. By the charter of the city of Lagrande, the treasurer is required to receive and safely keep all moneys that shall come into his hands, belonging to the city, and pay the same out upon warrants or orders signed by the mayor and recorder. *Laws 1885*, p. 374. Under this provision of the charter, he is authorized to pay out the public funds belonging to the city only on an order or warrant signed in the manner provided. In other words, such warrants or orders are made by the city charter the evidence to him of the allowance of the claim by the proper tribunal, and his voucher for its payment. This being so, it seems to us clear that he cannot be compelled to pay a warrant, or any part of it, unless it is delivered to him as an evidence of such payment. He is only entitled to credit for payments made upon orders or warrants properly signed, and the evidence of such payment is the warrant itself, and therefore he is entitled to its possession when paid. If we are right in this view of the treasurer's duty under the charter, it is manifest that this proceeding will not lie. Mandamus lies only to give effect to a clear legal right, and will not be awarded to compel a public officer to do any act which he is not authorized to do by law. Its office is to compel the discharge of a duty already devolved upon him, and not to create new ones. When, therefore, it appears in a proceeding against a city treasurer to compel him to pay a warrant that there is not sufficient money in his hands out of which to satisfy it in full, the writ will be denied, because he is not derelict in his duty. *Mechem, Pub. Off.* § 950; *Merrill, Mand.* § 135; *High, Extr. Rem.* § 352. Nor did the resolution of the city council instructing defendant in this case to make partial payments on the warrant in question in any way change the rule or affect the remedy. His duty in the matter of disbursing the public funds is prescribed by the charter, and he cannot be compelled by order of the council to pay them out in any other manner. It follows that the judgment of the court below must be affirmed, and it is so ordered.

WYATT v. WYATT et al.

(Supreme Court of Oregon. July 31, 1897.)

APPEALS IN EQUITY—REVIEW—PLEADING—HARMLESS DEFECTS—CREDITORS' BILL—SUFFICIENCY—HUSBAND AND WIFE.

1. Under Hill's Ann. Laws, § 543, providing that "upon an appeal from a decree * * * the suit shall be tried anew upon the transcript and evidence accompanying it," the supreme court cannot modify findings of fact or correct conclusions of law, where the evidence does not accom-

pany the transcript, and hence, on appeal from a decree for plaintiff without such evidence, the sufficiency of the complaint alone will be considered.

2. In view of Hill's Ann. Laws, § 84, providing that the allegations of a pleading "shall be liberally construed, with a view of substantial justice between the parties," the inadvertent omission of the word "not" in a complaint will be evidentially cured by a decree for plaintiff.

3. A creditors' bill that alleges the issuance of an execution and its return nulla bona, need not allege that the judgment debtor has no property out of which the judgment can be satisfied.

4. Under the married woman's act, the possession of a wife is not that of her husband, so that property that he has transferred to her can be levied upon as belonging to him.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Suit by M. F. Wyatt against C. G. Wyatt and another. From a decree for plaintiff, defendants appeal. Affirmed.

This is a suit to set aside a conveyance, and to subject the real property therein described to the satisfaction of plaintiff's judgment. It is alleged in the complaint that at all times therein mentioned the defendants, C. G. Wyatt and Sadie M. Wyatt were and are husband and wife; that about November, 1890, C. G. Wyatt became indebted to the plaintiff in the sum of \$206.66 on account of money paid him at his request, and for his use and benefit; that he was then the owner of certain real property, particularly describing it, "and a large amount of personal property, the description of which is not known to the plaintiff"; that on September 28, 1895, plaintiff, having commenced an action in the circuit court of Union county against C. G. Wyatt to recover the amount so due, caused a summons to be issued therein and served on the said defendant, who, on October 2d of that year, for the pretended consideration of \$1,500, and with intent to defraud plaintiff and his other creditors, conveyed said real property to the said defendant Sadie M. Wyatt, and also sold and transferred to her, for a pretended consideration, all of his personal property not exempt from execution, and that she still holds and claims all of said property; that on November 4, 1895, by consideration of the circuit court, plaintiff obtained a judgment in said action against Wyatt for the sum of \$206.66 and his costs and disbursements, taxed at \$100, and the same was duly entered in the judgment lien docket of Union county; that an execution issued on this judgment was delivered to the sheriff of said county for service, who, on December 4, 1895, returned the same wholly unsatisfied, and recited thereon that after diligent search and inquiry he had been and was unable to find any property belonging to C. G. Wyatt upon which to levy; "that said C. G. Wyatt had, at the time above mentioned, nor has now, any other property than the real and personal property before mentioned and described, and that he is insolvent"; that said conveyance was voluntary, and made and accepted by the parties thereto with the fraudulent intent of placing the property out of the reach of this plaintiff and the other creditors of

C. G. Wyatt. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit against either of the defendants having been overruled, an answer was filed which, after denying the material allegations of the complaint, alleged certain facts by way of affirmative defense. A reply having put in issue the allegations of new matter contained in the answer, a trial was had before the court, which, after making findings of fact and law from the evidence taken, gave a decree for plaintiff, from which the defendants appeal, but the evidence so taken was not brought up with the transcript.

T. H. Crawford, for appellants. N. C. McLeod and J. F. Baker, for respondent.

MOORE, C. J. (after stating the facts). It is contended by counsel for the defendants that, in the absence of the evidence, the case is before us on appeal from the pleadings, findings of fact, and conclusions of law. The statute provides that upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it. Hill's Ann. Laws Or. § 543. In *Howe v. Patterson*, 5 Or. 353, an appeal from a decree having been taken, and the transcripts filed without the evidence, it was contended by counsel for the appellant that the findings of fact set forth in the decree were conclusive upon the parties to the appeal; but it was held that the proposition insisted upon was untenable, the court saying: "An appeal from a judgment in an action at law, as provided for in our Code, is in the nature of a writ of error at common law, because it expressly provides that a judgment can only be reviewed as to questions of law appearing upon the transcript. Thus it will be seen that on appeals in actions at law issues of fact cannot be reviewed by this court. But, as it is provided that on an appeal from a decree in a suit in equity, 'the same shall be tried anew upon the transcript and evidence,' it is obvious that, where testimony was taken in the court below, it must be brought here, so this court may try the cause anew, as well upon the facts as upon the law." It would be impossible to modify the findings of fact without having before us the evidence upon which they are predicated, or to correct conclusions of law not properly deducible therefrom. Yet it is quite clear that the modification of such findings and conclusions must, of necessity, be involved where a trial anew is had upon the "transcript and evidence." It follows that the cause cannot be tried anew in the absence of the evidence, and, this being so, the only question before us for consideration is, does the complaint state facts sufficient to support the decree? Upon this question it is insisted that the complaint is fatally defective, because it fails to allege that the defendant C. G. Wyatt, at the time the suit was instituted, had no property out of which the debt might have been collected. In some jurisdictions this averment has been held to be essential, notably so in In-

diana, where in *Brumbough v. Richcreek*, 22 Am. St. Rep. 649, McBride, J., in discussing the subject, says: "In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment that at the time the suit was brought the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal." The reason upon which this rule is founded is that in a suit in the nature of a creditors' bill the right to uncover property alleged to have been fraudulently conveyed, and to subject it to the payment of the grantor's antecedent debts, rests upon the doctrine of necessity; but, if the debtor have other property, however, applicable to and out of which the creditor's demand may be satisfied, there is no necessity for a resort to this remedy, in which case a court of equity is powerless to set aside a voluntary conveyance; for so long as a person possesses reason, and owes no duty to another, he may make such disposition of his property as best pleases his fancy, and such court will not assume to act as his guardian; but when he is indebted to another his property, or sufficient thereof to satisfy his creditor's demands, is morally pledged as security therefor, in which case, if the debtor, with intent to hinder, delay, or defraud his creditors, transfer all his property to a party who accepts the title with knowledge of his grantor's intention, a court of equity, upon an allegation of the necessity therefor, will uncover the fraud, and set aside the conveyance; and hence, in those jurisdictions where the rule prevails, the importance of alleging that at the time the suit was instituted the debtor had no property out of which his creditor's demands could be satisfied, or words of equivalent import. Examining the complaint in the light of this rule, it will be observed from the quoted paragraph that plaintiff inadvertently omitted the word "not" after the word "had," supplying which it would read as follows: "That said C. G. Wyatt had [not] at the times above mentioned, nor has now, any other property than the real and personal property before mentioned and described, and that he is insolvent." It is contended that this last clause, "that he is insolvent," is a legal conclusion not deducible from the facts averred. In the strict grammatical sense, this is no doubt true, but, reading the allegation in the light of the legal conclusion, it is manifest that the word "not" has been omitted from the sentence. The decree cannot supply any material fact omitted from the complaint, but it establishes every reasonable inference that is deducible therefrom. *Weiner v. Lee Shing*, 12 Or. 276, 7 Pac. 111. The statute provides that in the construction of a pleading for the purpose of determining its effect, its allegation shall be liberally construed, with a view of substantial justice between the parties. *Hill's Ann. Laws Or.* § 84. Reading the quoted paragraph of the complaint as a whole, in the light of the statute, it would appear to be reasonably inferable therefrom that

the defendant C. G. Wyatt, at the time the suit was instituted, had no property except such as he had conveyed to his wife, out of which the plaintiff's judgment could have been satisfied, and any error in this respect is evidentially cured by the decree. But, however this may be, in *Page v. Grant*, 9 Or. 116, the same contention was made, in answering which the court say: "We do not think this proposition can be sustained. Courts of equity entertain jurisdiction in such cases, for the reason that the remedy at law has failed or proved ineffectual. The sheriff's return of the execution unsatisfied is the best evidence of such failure of the remedy at law, and cannot be controverted. *Jones v. Green*, 1 Wall. 330; *McElwain v. Willis*, 9 Wend. 559. When a judgment creditor has issued an execution, and the sheriff has returned it unsatisfied, he has exhausted his legal remedy. See, also, *Bump, Fraud. Conv.* (2d Ed.) 525. The plaintiff having alleged the issuance of a writ of execution, and its return nulla bona, if he had entirely omitted to aver that the defendant C. G. Wyatt had no property out of which the judgment could have been satisfied, the facts stated were nevertheless sufficient to entitle him to the relief granted. It is also insisted by counsel for the defendants that the complaint shows that at the time this suit was commenced there was a large amount of personal property in the possession of and claimed by Sadie M. Wyatt which had been transferred to her for a pretended consideration, after plaintiff had instituted his action at law against her husband; that the wife's possession of such property is that of her husband; and, since he had a large quantity of personal property, it was sufficient to satisfy plaintiff's judgment and costs, without resorting to a suit in equity to set aside the deed. The proposition contended for assumes that the allegation of a large amount of personal property is equivalent to an averment that it was of the value of \$307.16, the amount of the judgment and costs and disbursements. What might be considered by some as a large amount of property might not be so regarded by others; but, however this may be, it would be difficult indeed to say with any degree of certainty that the quantity of property alleged was of the value stated; but, assuming that it was of this price, it does not follow, under the very liberal married woman's act of this state, that the possession of the wife is that of her husband, so that this property could have been levied upon as that of the defendant C. G. Wyatt. The transfer of this property, as between the husband and wife, was valid (*Bradtfield v. Cooke*, 27 Or. 194, 40 Pac. 1); and if Sadie M. Wyatt took possession of it under the transfer, and exercised acts of ownership over it, the presumption of fraud arising from the failure to obtain possession of property capable of immediate delivery is dispelled. *Hill's Ann. Laws Or.* § 776, subd. 40; *Rule v. Bolles*, 27 Or. 368, 41 Pac. 691. The court, having granted the relief demanded, must necessarily have found that Sadie M. Wyatt

was in possession of the personal property at the time this suit was instituted; and, the complaint having stated facts sufficient to constitute a cause of suit, it follows that the decree must be affirmed, and it is so ordered.

CROSSEN v. MURPHY et al.
(Supreme Court of Oregon. July 31, 1897.)

SALES—RESCISSION FOR FRAUD—TENDER OF PRICE—AFFIRMANCE OF CONTRACT—EQUITY JURISDICTION.

1. A seller who received notes of third parties as part of the price cannot, on the ground that the notes are worthless, excuse his failure to return or tender them before rescission of the sale.

2. A seller seeking rescission in equity for fraud need not allege or prove the return or tender of notes of third persons that formed part of the price, provided the notes are deposited in court to await the trial of the cause.

3. The erasure by the seller of the words "without recourse" from the indorsement of the vendees upon notes given in part payment of the price, and the protesting of the notes for non-payment, was not such an election to affirm the contract as will bar a rescission thereof for fraud, where the rescission was prayed for before the protest was made, and it does not appear that the fraud had been discovered when the erasure was made.

4. When a seller of goods institutes a suit for rescission of the contract for fraud within 20 days from the discovery of the fraud, there is no such unreasonable delay as would warrant the inference of an affirmance of the contract by him.

5. Plaintiff was in the retail business with a partner, in whose name the lease of the building was made out. The partner, by collusion with members of a mercantile company, sold them his interest and transferred to them the lease. They thereupon gave plaintiff four days' notice to vacate the premises, and offered to buy his interest in the business, giving in part payment certain notes, representing them as first-class paper, and also offered to employ him as clerk. Plaintiff accepted, and the contract was executed, but he was afterwards discharged, and discovered the notes to be worthless. *Held*, that the circumstances justified a rescission of contract for fraud.

6. When a court of equity obtains jurisdiction of a suit for rescission of contract of sale for fraud, but prior to decree the subject-matter of the sale is disposed of by defendant, so that rescission is impossible, the court will grant plaintiff a decree for the amount of worthless notes taken in payment of the price.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Suit by Edward E. Crossen against William Murphy and others. From a decree in plaintiff's favor, defendants appeal. Affirmed.

This is a suit to rescind a contract for the sale and delivery of a quantity of merchandise. The facts are: That on December 24, 1895, plaintiff and defendant Murphy entered into an agreement by the terms of which they became equal partners in conducting a clothing and furnishing store at Baker City, Or.; but, the business not proving profitable, they on April 28, 1896, entered into separate contracts with the defendant the Harrisburg Mercantile Company, a corporation, for the sale and delivery of their respective interests in the merchandise then on hand, the memorandum executed by the plaintiff stipulating

that he was to transfer an undivided one-half of the stock at 90 per cent. of the cost thereof, and in consideration therefor the purchase was agreed to deliver to him the promissory notes of L. R. Green, O. Green, and F. E. Green for \$200, of J. R. Cartwright for \$677, and of W. W. Briggs for \$77, to pay one half of the firm debts, and the remainder of the purchase price in cash within 60 days, and also to employ plaintiff as long as there should be work for him to do, or until the balance due him was paid. That an invoice of plaintiff's interest in the stock of goods having been made, on the basis agreed upon, the value thereof, including his interest in the store fixtures, was ascertained to be \$1,930.57; insurance policy, \$12.47; miscellaneous items, \$6.80; cash paid by the firm of Murphy & Crossen, \$15; and services rendered by the plaintiff as clerk, \$44.24; making a total credit of \$2,000.08. That the promissory notes mentioned in the agreement having been indorsed "without recourse," and delivered to the plaintiff, he was charged on the book of the corporation with the amount of the notes, including interest, \$934; one-half of the firm debts, \$933.28; and cash and goods from the store, \$92.55; making the total amount so charged \$1,980.83, and leaving a balance due the plaintiff of \$19.25, which was paid to him on June 2, 1896, and he was thereupon discharged, the corporation taking the following receipt as evidence of settlement: "Baker City, June 2, 1896. Received from H. & S. Trading Co., in full for all accounts, nineteen and ²⁵/₁₀₀ dollars, \$19.25. Edward E. Crossen." That plaintiff, without the knowledge or consent of the Harrisburg Mercantile Company, erased from each of said notes the words "without recourse," and on September and October 1, 1896, upon the maturity of the Cartwright and Green notes, respectively, he caused them to be protested for nonpayment. It is alleged in the complaint: That Murphy and the defendants Stuchell and Henderson, as president and secretary, respectively, and acting as agents, of the Harrisburg Mercantile Company, entered into a conspiracy to compel plaintiff to dispose of his interest in the merchandise at a sacrifice, and to defraud the creditors of the firm of Murphy & Crossen, in pursuance of which Murphy, without plaintiff's knowledge or consent, transferred his interest in the stock of goods, and, the lease of the building occupied by them having been taken in his name, transferred that also, to the Harrisburg Mercantile Company, on obtaining which the agents thereof notified plaintiff to vacate the said building within four days; and, being unable to procure another building, he was compelled to sell, and did sell and transfer his interest in the stock of goods at a loss. That Murphy, being acquainted with Stuchell and Henderson, assured plaintiff that any statements made by them could be relied upon, and that they falsely represented to plaintiff that each of

said notes was first-class bankable paper, and the makers thereof solvent and able to pay the same; and being ignorant of their financial condition, and relying upon these representations, he was induced to and did accept an assignment of these notes as security for the payment of the amount so due on the purchase of the merchandise. That such representations were false. That the said notes are wholly worthless and of no value whatever, and that the makers are, and each of them is, insolvent, which facts were well known by the said defendants. That the Harrisburg Mercantile Company, notwithstanding its agreement to that effect, had failed, neglected, and refused to pay any of the firm debts, and plaintiff was being pressed by the creditors for a settlement of the same. Issue having been joined, the cause was referred, and, upon the evidence being reported, the court found therefrom that said representations were false, that the plaintiff relied thereon, and that he accepted said notes as payment in ignorance of the fact that they had been indorsed "without recourse." And the court, having further found that they were to be indorsed in such manner as to render the mercantile company liable in case the makers thereof made default in their payment, rendered a decree awarding plaintiff \$964, the amount of said notes, from which the defendants appeal.

M. L. Olmstead, for appellants. T. H. Crawford, for respondent.

MOORE, C. J. (after stating the facts). It is contended by counsel for defendants that they should be placed *in statu quo*, as a condition precedent to the right to maintain a suit to rescind the contract, and that the complaint is fatally defective because it fails to allege a return or tender of the notes in question. A party to a contract, defrauded by the other party thereto, may avoid the terms of, and rescind, the agreement; but, if he elects to do so, he must annul it as a whole, for he cannot be permitted to treat it as valid in part and bad in some particulars. *Perley v. Balch*, 23 Pick. 283; *Hoffman v. King*, 70 Wis. 372, 36 N. W. 25; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255; *Coolidge v. Brigham*, 1 Metc. (Mass.) 547; *Bohall v. Diller*, 41 Cal. 532; *Purdy v. Bullard*, Id. 444. "It is a general rule," says Bean, J., in *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, "that in order to disaffirm a contract, and entitle a party to the rights resulting therefrom, the rescinding party must put the other *in statu quo*. He must account to the other for any money paid in part performance of the contract." The rule is universal that to entitle a party of lawful age, who is mentally responsible, to rescind a contract which he has been induced to enter into by the false or fraudulent representations or evil devices of the other party to the agreement, he must, if possible, place the defrauding party *in statu quo*, by restoring everything of value he may have received as a considera-

tion for the contract, and that a negotiable promissory note executed by a stranger, though insolvent, furnishes no exception; nor can the party seeking the rescission excuse his neglect in failing to return it by showing that it was worthless, by reason of the maker's insolvency, for such an instrument may possess some value to the party who put it into circulation. *Spencer v. St. Clair*, 57 N. H. 9; *Evans v. Gale*, 21 N. H. 240; *Whitcomb v. Denlo*, 52 Vt. 382. It has been held, however, that, if the defrauded party has accepted the vendee's own notes in consideration of the execution of a voidable contract, he is under no legal obligation to return them, as a condition precedent to the right of rescinding the agreement, but may maintain trover for the goods and chattels, the possession of which he has surrendered, without any previous demand therefor, and also defer the delivery of the notes until the trial, when they may be given up to be canceled upon the rendition of the judgment. *Thurston v. Blanchard*, 33 Am. Dec. 700; *Ryan v. Brant*, 42 Ill. 78; *Nichols v. Michael*, 23 N. Y. 264. The reason usually assigned for the existence of this rule is that the moment the injured party elects to rescind the contract the promissory notes in his possession, which have been given by the defrauding party, *ipso facto* become entirely worthless, and, having been rendered valueless by a failure of the title to the property upon the faith of which they were executed, there is no necessity for returning them; but this principle can have no application to the notes of a third person which may have been accepted as the consideration of the contract, for they are not tainted with the fraud, nor affected by the election of the defrauded party to avoid the agreement, but might be enforced against the maker, or the defrauding party may consider them of some value notwithstanding the rescission. In *Slisson v. Hill* (R. I.) 26 Atl. 106, *Matteson, C. J.*, in discussing the right of a vendor to withhold the consideration of a contract until an action at law to rescind it had been terminated in his favor, says: "It has been held that in cases in which the vendor has received from the fraudulent vendee money as a part of the consideration, and in which he sues in trover for the recovery of pecuniary damages for the conversion of the goods obtained by the fraud, he may retain the money, and allow it to go in reduction of the damages to be recovered. *Warner v. Vallily*, 13 R. I. 483; *Ladd v. Moore*, 3 Sandf. 589. So, too, it has been held in numerous cases in which the plaintiffs have sued in trover that when the fraudulent vendee has given his note, or even the note or other obligation of a third person, as the consideration, in whole or in part, for the goods obtained, it is not necessary for the vendor to return, or offer to return, such note or obligation before suit, but that it is enough if he bring it into court to be impounded at the trial for the benefit or protection of the vendee. *Duval v. Mowry*, 6 R. I. 479; *Thurston v. Blanchard*, 22 Pick. 18;

Frost v. Lowry, 15 Ohio, 200; *Nellis v. Bradley*, 1 Sandf. 560; *Ladd v. Moore*, supra; *Coghill v. Boring*, 15 Cal. 213." Mr. Chief Justice Ames, in *Duval v. Mowry*, supra, commenting upon the same principle, says: "Such a condition to a remedy in such a case is wholly unknown in courts of equity, where cases of rescission or cancellation of contracts on the ground of fraud usually come; the court deeming it quite sufficient to provide that justice be done to the injurious as well as to the injured party by its own action. *Adams*, Eq. 71, and cases cited. No good reason can be given why, when courts of law deal with the rescission of contracts on the ground of fraud, they should not do so, so far as the nature of their remedies will permit, upon the same footing with courts of equity." The principle promulgated in *Sisson v. Hill*, supra, may well be questioned when applied to an action at law in which the plaintiff deems the contract rescinded; and no doubt the correct rule is announced in a note to the case of *Bryant v. Isburgh*, 74 Am. Dec. 661, in which the compiler says: "In legal actions, brought as though the contract had been rescinded, a complaint which does not allege restoration, or an offer to restore, does not state a cause of action. *Van Liew v. Johnson*, 6 Thomp. & C. 644; *Anthony v. Day*, 52 How. Prac. 35. * * * In a suit in equity for a decree of rescission, the complaint need not allege a tender or offer to perform. *Bloomer v. Waldron*, 3 Hill, 366; *Hoyt v. Jaques*, 129 Mass. 286." The maxim that "he who seeks equity must do equity" is evidently not violated by the failure of the plaintiff in a suit to rescind a contract for fraud to allege a restoration of, or an offer to return, the consideration, or a willingness even to do so; for by his application to the court for equitable redress he concedes that before it will be awarded he must do equity, which will compel him to account for everything of value he may have received, thereby tacitly inviting the court to protect the rights of the defendant by decreeing a restoration in consideration of the rescission. This method would permit a vendor who had been defrauded, but who was unable to restore the consideration, to institute a suit to rescind a contract voidable for fraud; for the court could do equity by all parties by decreeing that the amount so received should be a lien upon the property in favor of the vendee. In the case at bar the plaintiff, having deposited in court the notes in question, did all that was required of him in an equitable proceeding.

2. It is contended that plaintiff, by erasing the words "without recourse" from the notes, and causing them to be protested for nonpayment, conclusively shows that he elected to affirm the contract after his discovery of the alleged fraud. It will, no doubt, be admitted that the commencement of the suit manifests an intention to rescind the contract; and, as the notes were not protested until after the complaint was filed, it is evident that the plaintiff elected to avoid the terms of the agreement

prior to the protest of the notes. The evidence fails to show when the plaintiff discovered the alleged fraud, or when he erased the qualifying words of the indorsement from the notes. If this erasure were made after the suit was instituted, it could not affect the election to rescind, while, if it were done before discovering the alleged fraud, no inference could be deduced therefrom that plaintiff intended to affirm the agreement. The fraud relied upon as a basis for the relief demanded consists in part in the alleged false representations concerning the solvency of the makers of these notes. The erasure made by the plaintiff did not increase the ability of the makers to meet the payment of their respective obligations, and, this being so, we fail to see how the alteration of the indorsements evidences an intention to affirm an agreement. The plaintiff was discharged from the defendants' employ on June 2, 1896, about which time he claims to have discovered that their representations were false; and, having commenced this suit on the 23d of that month, it cannot be said that there was such an unreasonable delay as to warrant an inference of an affirmation of the agreement.

3. It would be impossible to reconcile the testimony given upon the merits of the principal question, and hence no effort will be made in that direction. Crossen testifies that Murphy, without his knowledge or consent, sold and transferred his interest in the stock of merchandise, and assigned to the Harrisburg Mercantile Company the lease of the building occupied by them, and that Stuchell thereupon notified him to vacate the premises. Murphy, Stuchell, and Henderson contradict this witness as to his statement of want of knowledge of the sale of Murphy's interest, but neither of them denies that he was notified to surrender the building. The term of the lease to Murphy expired prior to the sale of his interest in the merchandise, but he had an option to renew it, which he exercised, and again took the lease in his own name, whereupon he assigned the same and transferred his interest in the goods. This method was, no doubt, designed and operated to compel plaintiff to dispose of his interest in the merchandise; but, having been offered employment by the Harrisburg Mercantile Company upon acquiring such interest, he seems to have had confidence in its agents, notwithstanding their notice to him to vacate the premises. While plaintiff might possibly have been obliged to vacate the building therefore occupied by the firm of Murphy & Crossen, he nevertheless had the right to retain the assets for the purpose of winding up the affairs of the co-partnership. *Marx v. Goodnough*, 23 Or. 545, 32 Pac. 511; *Miller v. Brigham*, 50 Cal. 615. "Wherever undue advantage," says Sherwood, J., in *Bell v. Campbell* (Mo. Sup.) 25 S. W. 362, "is taken of a party, 'under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the vic-

tim of the artful, the importunate, and the cunning; where proper time is not allowed to the party and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn in to act; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition.—In these and many like cases if there has been great inequality in the bargain courts of equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage.' It is, no doubt, true that plaintiff was offered a valuable consideration for his stock of merchandise; and, if he had received the price agreed to be paid therefor, there could not have been any inequality in the bargain, and a court of equity would not relieve him upon the ground of unconscionable advantage, notwithstanding the method adopted to obtain the title. The plaintiff testifies that Murphy was acquainted with Stuchell and Henderson, and that he assured him that any statements made by them could be relied upon, and that the latter represented to him that the makers of the notes in question were solvent, that these instruments were valuable, and that they could be cashed at any bank where the makers were known, and relying upon these representations, and being ignorant of the financial condition of the makers, and not having time to make any inquiry concerning the same, he was induced to and did accept an assignment of the notes under an agreement that the Harrisburg Mercantile Company would become liable thereon as an indorser thereof. All this is denied by Stuchell and Henderson, but they admit saying to him that they had dealt a great deal with Cartwright; that he owned considerable property, was engaged in raising hops, and they considered him responsible for his obligations; that they did not know the Greens, but relied upon Cartwright's indorsement of their note; that Briggs had no property, but that he had always paid his debts, and they believed he would discharge this obligation. Crossen further testifies that the notes were assigned to him in the evening, after the invoice of the goods was completed, and that he did not notice that they had been indorsed without recourse. Stuchell, Murphy, and Henderson each testifies that the indorsements were made in the presence of Crossen, and that Stuchell thereupon, in his hearing, read aloud the memorandum on the notes. Crossen denies this, and he is indirectly corroborated by the testimony of J. W. Rowland, a disinterested witness, who assisted in making the invoice, and was also a witness to the contract entered into between plaintiff and the Harrisburg Mercantile Company, who says that he did not see the indorsement made nor hear it read, and, if it had been read, he would have heard it. The only evidence of the insolvency of the makers of the notes in question is the testimony of the plaintiff to that effect, and the

inference thereof deducible from the protest of these instruments for nonpayment. One thing is evident, however: that plaintiff parted with the title to his interest in the merchandise expecting to receive the value thereof, but in this he has been disappointed. Nor do we think plaintiff is estopped by the receipt given by him in settlement, for at the time it was executed it does not appear that he was aware of the defendants' conduct of which he complains. It appears that Murphy obtained in cash only 60 per cent. of the invoice price for his interest, while Crossen was to receive 90 per cent. for his share, and this fact is relied upon as tending to show that a price would never have been offered Crossen for his interest unless the notes would have been received in payment thereof. This is probably true; but, even if that be so, the fact remains that plaintiffs' action in accepting the offer was no doubt precipitated by the notice to vacate the premises within four days, and by the offer of the defendants to furnish him employment in the store, and that the action thus brought about resulted in the consummation of an agreement by which plaintiff parted with the possession of his goods for an inadequate consideration. As hereinbefore stated, a party cannot, as a rule, be permitted to rescind a contract in part, and treat the rest of it as valid. In this case, however, the plaintiff sought relief by a suit to rescind the entire contract, in which a receiver was appointed, who took possession of the merchandise in question; but the defendants, having executed an undertaking to satisfy any decree that might be rendered against them, obtained the discharge of that officer and the restoration of the goods, which they proceeded to sell, and thereupon paid the debts of Murphy & Crossen in accordance with their agreement so to do. Most of the goods having been disposed of, a decree rescinding the contract of sale became impracticable, in view of which the court below very properly adjusted the controversy by decreeing that the Harrisburg Mercantile Company pay to plaintiff the sum evidenced by said notes then on deposit in court, leaving the executed part of the contract undisturbed. It is evident that a court of equity, having jurisdiction of a cause at its inception, does not lose it because prior to the decree the situation is so changed by the acts of the defendants as to render it possible for a court of law to grant the same relief. The conclusion we reach on the facts is not free from doubt, but we believe the plaintiff has shown such a course of conduct on the part of the defendants as to entitle him to an affirmation of the decree, and it is so ordered.

PERKINS v. McCULLOUGH et al.

(Supreme Court of Oregon. July 31, 1897.)

HUSBAND AND WIFE—TRANSFERS—FRAUD—RIGHTS OF SELLER—ESTOPPEL—CLOTHING WITH TITLE—BONA FIDE PURCHASERS.

1. The wife of the owner of real and personal property valued at several thousand dollars tes-

tified that she had helped to earn the property, which was in her husband's name, and that in the spring or fall of 1892 they entered into an agreement to divide the property; she to take the personality, and he the land. No written transfer was made, nor was there any delivery of possession; and the husband continued to manage the personality, paying taxes thereon, and disposing of portions of it, without accounting to the wife. *Held*, the husband having testified flatly to the contrary, that the wife's testimony was insufficient to show a sale or transfer.

2. Where an owner of property made a lease thereof in the name of his wife to defraud creditors, she did not thereby acquire title; and hence the rule that equity will not lend its aid to a seller of personal property transferred in fraud of creditors, when he seeks to recover it back, did not apply in an action wherein the husband asserted his title.

3. Plaintiff bought cattle from his daughter, but paid no cash therefor; the agreement being that sums already advanced to her, and the expense of her board, should be considered as part payment, the rest to be paid upon the disposal of the cattle. *Held*, that the father was not a bona fide purchaser.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Suit by R. S. Perkins against B. F. McCullough, W. H. Babb, and others for rescission of a contract and for an accounting. From a decree for defendants, plaintiff appeals. *Affirmed*.

Cause of suit stated herein is briefly and in substance as follows: That on May 1, 1893, McCullough, one of the defendants, and Mrs. Hannah N. Babb were joint owners of some 300 head of cattle and 200 head of horses, then upon the range on the Big Bend country, in the state of Washington, and that upon the date named they entered into an agreement, by the terms of which Mrs. Babb let and leased to McCullough all of said cattle and horses for a term of five years, and, among other things, agreed that each should be entitled to one-half of the proceeds of sales thereof made during the term of the lease; that McCullough received and took possession of the cattle and horses in accord with the agreement, and sold and disposed of many of them, but has refused, and still refuses, to account to Mrs. Babb or her successor in interest for any of the property so sold and disposed of, and is now threatening to dispose of the entire property and appropriate the proceeds to his own use; that on January 31, 1895, the plaintiff purchased of Mrs. Babb all her interest in the stock, and all claims and demands against the said McCullough arising out of said agreement, but that plaintiff is unable to obtain a settlement with McCullough, who refuses to recognize his ownership or right to demand a settlement; and that about 200 head of cattle have been brought into Umatilla county, Or. W. H. Babb and W. F. Matlock are made parties, who, it is alleged, are conspiring with McCullough to deprive plaintiff of his rights in and to the property. Zoeth Houser, who is the sheriff of Umatilla county, is also made a party. The prayer is that the agreement of leasing be rescinded, and for an accounting and a division of the property and proceeds arising from any sales thereof thereto-

fore made. Babb and McCullough claim to be the owners of the cattle, Matlock claims the right to subject them to sale under an execution against the property of Babb, and Houser justifies under the writ. The court below dismissed the complaint, and the plaintiff appeals.

J. C. Leasure, for appellant. Jas. H. Raley and J. J. Balleray, for respondents.

WOLVERTON, J. (after stating the facts). The following facts have been proven: On December 16, 1893, W. H. Babb and McCullough were, and had been since prior to May 1st of that year, joint owners of the cattle in question. McCullough had formerly held a lease of them from Babb, which had expired on the date last named. On the said 16th day of December Babb procured Hannah N. Babb, who was then his wife, to enter into a contract of leasing with McCullough, by the terms of which the said Hannah N. Babb, in purport, let and leased the cattle to McCullough for a period of five years, commencing with May 1, 1893. The lease contained the following stipulation, among others, viz.: "In fulfillment hereof, and consideration of the proper observance of the covenants and agreements herein contained, and by the said second party (McCullough) to be kept and performed, that she, the first party (Hannah N. Babb), will on the 1st day of May, 1893, deliver over to said second party, as his individual and exclusive property, by instrument or otherwise as he may direct, one-half of all said original cattle * * * then surviving, and one-half of all increase, * * * retaining the other one-half as her own individual and exclusive property." At the time this lease was executed, W. H. Babb was heavily involved, he then owing the defendant Matlock about \$1,700, the Pendleton Savings Bank \$4,000, and diverse sums to other persons; and it was for the purpose of misleading and deceiving these creditors, and hindering and delaying them in the collection of their just demands, that he procured the lease to be made in the name of his wife. Mrs. Babb was fully cognizant of his purpose, and lent her name to the scheme with a view of furthering the purpose and promoting the scheme. On the 31st day of January, 1895, Mrs. Babb gave the plaintiff herein, who is her father, a bill of sale of the cattle, which purports on its face to be in consideration of \$7,000, and on the same date, by indorsement, assigned, transferred, and set over to him all her right, title, and interest in and to the lease; and on July 6th, following, he, by employment of the same language, reassigned the lease to her. In so far as there is any written evidence, these several instruments constitute the sum and substance of plaintiff's title. Now it is claimed by plaintiff that within a few days after the last assignment there was a verbal agreement or understanding between him and his daughter to treat it as not having been made, and that such assignment was thereby rescinded and the plaintiff reinvested with the lease; and, in further establishment of the plaintiff's

title, it is claimed that prior to all these transactions, in the spring or fall of the year 1892, Mrs. Babb and her husband had a division of their property, and that in such division these cattle fell to Mrs. Babb, and that Babb thereupon transferred and delivered them to her, and that she owned them ever since, up to the time of their transfer by said bill of sale, and that the plaintiff is a bona fide purchaser from her for value. Let us see if these claims are well founded, as measured by the proofs. Prior to the year 1892 Babb had accumulated considerable property, consisting of a couple of tracts of land situate in Umatilla county, Or., of the probable value of \$17,500, and a band of cattle and horses then upon the ranges in Umatilla and in Douglas county, in the state of Washington, worth perhaps \$7,000 or \$8,000. Mrs. Babb testifies that, as the wife of Babb, she had helped to earn this property, and thereby acquired an interest therein, although it was all in her husband's name; that in the spring or fall of the year 1892—she could not be definite—she and her husband talked over the matter, and it was understood and agreed between them that Babb should take the land, and she the stock. There was no bill of sale or other written transfer of the stock, nor was there any delivery of possession. When asked what she did to take possession, she answered, "I simply said they were mine." Subsequent to the alleged transaction the stock were managed by Babb, the same as before; he paying the taxes upon them, disposing of portions of them from time to time, and purchasing other stock and adding to the herd, all without accounting to Mrs. Babb for a single transaction. Mrs. Babb further testifies that the land was deeded to her by Babb at the same time that she made the lease to McCullough of the cattle. On February 22, 1895, she wrote her son Willie: "I have put all the cattle, horses, and land in pa's name, so, if I can't raise the money by June, they can take nothing but the land." On July 6th, the same date that the plaintiff reassigned and transferred the lease to Mrs. Babb, he also redeeded to her the land; and on July 18th Mrs. Babb, in turn, deeded the land back to Babb, with a letter written by her to Babb of that date, and directed to him at Chicago, and inclosed the two deeds and the lease containing the indorsement of herself and plaintiff, all of which he received in due course of the mails. She and plaintiff both testified that the consideration for the sale of the stock by her to plaintiff was \$7,000, but further examination disclosed the fact to be that no money was paid at the time, but that she and her child had been living with the plaintiff about a year and a half prior thereto, and that he had been furnishing her money from time to time as she needed it for clothing and incidental expenses; it being estimated that she owed him for these accommodations in the neighborhood of \$1,200. This was to be turned in as part payment, and he was to continue to board and clothe her and her child, and the final payment was to be made "when the horses and cattle were rounded up

and sold." Perkins says he bought the property in good faith, believing it to belong to Mrs. Babb. Touching the retransfer of the lease by plaintiff to Mrs. Babb, she testified as follows in answer to the interrogatories propounded to her: "Q. Didn't he transfer the horses and cattle back to you at the same time he transferred the land? A. He did. Q. Signed the lease as appears therein on the back of it? A. He did. Then afterwards we talked it over, and I said, 'Father, hold the bill of sale, and run the stock just the same as if it was sold.' Q. Why did you have Mr. Perkins make that indorsement on the lease and turn this property back to you? A. After I deeded the farm back to Mr. Babb, he thought he would deed the stuff back to me; and, after I considered the matter, I said: 'No; you keep the stuff, and run it for me, as I cannot run it myself.'" W. H. Babb flatly contradicts his wife touching a division of the property and a sale or transfer of the stock to her,—either of the title or possession; and, from the inherent weakness of her own testimony, we conclude that Mrs. Babb never at any time obtained or held the title to any of the cattle in controversy, or any interest therein. The fact that she entered into a scheme with Babb to defraud his creditors, and permitted the use of her name, whereby she apparently leased them, or an interest therein, to McCullough, did or could not, under any principle that we are aware of, have the effect to transfer or convey title from Babb to her. We do not understand that it was seriously contended at the argument that the leasing, in the manner which it was intended to be accomplished, had that effect, but the main reliance was placed upon the alleged prior division of property and transfer of the stock. The proof, however, does not support the contention, as we have seen. It was sought, as against Babb, to invoke the familiar doctrine that a court of equity will not lend its aid to a vendor of personal property to recover it back when it has been transferred in fraud of creditors, but will leave the parties where it finds them. The result of the authorities is concisely stated in Bennett's American Notes to Benjamin on Sales (6th Ed. p. 456) as follows: "The vendor cannot rescind and retake the property, nor can the vendee refuse to pay, or recover back what he has paid." This rule, as it pertains to real property, received the sanction of the court in *Bradtfeldt v. Cooke*, 27 Or. 194, 40 Pac. 1. But the rule can have no application here; for, as between Babb and his wife, she never was the owner of the property which Perkins is now seeking to recover, and Babb's defense of his title is not an attempt to reinvest himself with a title transferred in fraud of creditors.

The plaintiff invokes another principle, and that is that Babb having clothed his wife with the apparent title or power of disposition of the property, whereby other parties were induced to deal with her upon the supposition that she was the real owner, and Perkins having purchased from her, bona fide and for value, without notice, Babb is now precluded and estopped

to dispute the title, as against him. Such is the doctrine of *Velsian v. Lewis*, 15 Or. 549, 16 Pac. 631. It is there said, in substance, that the rights of such a purchaser do not depend upon the actual title or authority of the person with whom he deals, but are derived from that act of the real owner which precludes or estops him from disputing, as against such purchaser, the existence of the title or power which he caused or allowed to appear vested in the party making the sale. But Mr. Perkins is not an innocent purchaser for value. In the first place, he knew perfectly where the title to the cattle was vested, and the purpose for which they were leased to McCullough in the name of his daughter, then the wife of Babb; and, in the second place, he parted with no value at the time of the pretended purchase from his daughter; and, furthermore, his subsequent dealings with the property would not indicate that he ever seriously considered that he at any time possessed any real interest in it. All the conditions of acquiring title by estoppel, as against Babb, are entirely wanting, so that the principle invoked cannot avail the plaintiff. This consideration disposes of the case, as it leaves Perkins without any sort of title upon which to maintain his suit. The question touching the reassignment of the lease, and the subsequent consideration of the parties respecting such assignment, and other questions made in the briefs and at the argument will therefore not be passed upon. Let the decree of the court below be affirmed.

KOSHLAND v. HOME MUT. INS. CO.

(Supreme Court of Oregon. July 31, 1897.)

APPEAL—AMENDMENTS—INSURANCE—INCUMBRANCES.

1. When defendant's petition for removal of the cause contains a false allegation, and the admission of its falsity by defendant upon trial is incorporated in the record, the petition will be treated as if amended accordingly.

2. Although a fire insurance policy contains a clause avoiding the policy if the subject of the insurance be or become incumbered by mortgage, yet, if it is issued with knowledge by the company of an existing incumbrance on the property, a new incumbrance, made for the purpose of discharging the existing one, will not avoid the policy.

Appeal from circuit court, Umatilla county; Robert Eakin, Judge.

Action by Marcus S. Koshland against the Home Mutual Insurance Company upon a fire insurance policy. From judgment for plaintiff, defendant appeals. Affirmed.

On the nights of the 9th and 10th of June, 1895, one Charles Cunningham lost by fire a large amount of property in Umatilla and Morrow counties, which was insured in several different companies, the defendant being among the number. Its policy was for \$11,825 on three frame buildings and a quantity of hay therein; also, \$4,680 on sheep, while contained in a building described in the policy. After the fire, Cunningham assigned the policy and

all his rights thereunder to the plaintiff; and, the defendant having denied liability, this action was brought to recover on the policy. Within the time required to answer, the defendant appeared and filed a petition and bond for the removal of the cause to the circuit court of the United States for the district of Oregon, on the ground that the controversy is between citizens of different states, and that it is a non-resident of this state. This petition was denied, and defendant answered, setting up, among other things, as a defense to the action, the violation of a condition of the policy of insurance which provides that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of the insurance be or become incumbered by mortgage, trust deed, judgment, or otherwise," by the assured executing, without the knowledge or consent of the defendant company, a mortgage upon the property covered by the policy, for the sum of \$28,000. The reply admits the execution of the mortgage as charged, but avers that at the time of the issuance of the policy of insurance the real property upon which said buildings were situate was incumbered by three certain mortgages, amounting in the aggregate to the sum of \$25,000, which sum was also secured by a chattel mortgage on the sheep covered by the policy, and that the risk was accepted and the policy issued by the defendant company with full knowledge of the existence of these incumbrances; that after the issuance and delivery of the policy the sum secured by the mortgages referred to became due, and, the holders thereof demanding payment, Cunningham paid them with money borrowed of the plaintiff, to secure the payment of which he made, executed, and delivered the mortgage referred to in the answer, which covered not only the property included in the prior mortgages, but a large amount of other property, of the alleged value of \$28,000. Trial was had, resulting in a verdict and judgment in favor of plaintiff for the sum of \$6,375, and defendant appeals.

Geo. E. Chamberlin, for appellant. John J. Balleray and Chas. H. Carter, for respondent.

BEAN, J. (after stating the facts). The record contains numerous assignments of error, but the only ones relied upon at the argument or discussed in appellant's brief arise out of the refusal of the trial court to surrender its jurisdiction on the filing of the petition and bond by the defendant for removal to the federal court, and in refusing to rule that the mortgage of \$28,000 to the plaintiff, referred to in the pleadings, was a violation of the condition of the policy against incumbrances, and rendered it void.

Upon the first question but little need be said. While the petition for removal avers that the plaintiff was at the time of the commencement of the action, and still is, a citizen of the state of Oregon, and that the defendant was and is a citizen of the state of California, it was never-

theless admitted in open court by the defendant at the hearing, and made a part of the record, that the allegations of the petition on that subject are not true, but that plaintiff is, and was at the time of the commencement of the action, a citizen and resident of the state of California. The petition was treated in the court below as if it had been amended accordingly, and will be so considered here. This being so, the case is clearly not one of which the federal courts are given jurisdiction by the first section of the act of congress of March 3, 1887, on the ground of diversity of citizenship, because both parties are residents of the same state, and the jurisdiction of such courts on removal by the defendant is limited by that section to such cases as might have been commenced therein by original process. *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563. Hence the trial court properly refused to surrender its jurisdiction, upon the facts appearing of record in that court.

Upon the other point the record shows that, at the time the policy of insurance in suit was issued, Cunningham, the assured, was the owner of about 12,000 acres of land in Umatilla and Morrow counties, with the buildings and appurtenances thereon, and was also the owner of about 18,000 or 20,000 head of sheep ranging on said land; that the real estate was incumbered by three separate mortgages to secure the sum of \$26,415.38 in the aggregate, which sum was likewise secured by a chattel mortgage on the sheep referred to, and the contract of insurance was made and the policy issued, covering some of the buildings on the mortgaged property and their contents, and \$4,650 on the sheep, with knowledge that the property was so incumbered. After the policy had been issued and delivered, and before the fire, Cunningham borrowed of plaintiff the money with which to pay off and discharge these incumbrances, and gave as security therefor a mortgage not only on the property included in the prior mortgages, but on a large amount of other property, and this is the mortgage referred to in the pleadings. There is no contention that the policy is void on account of the incumbrances on the property at the time the insurance was effected, but the question presented for decision is whether, after the issuance and delivery of a policy of insurance, the giving of a mortgage by the assured on the property covered thereby, without the consent of the company, to secure the funds with which to pay and discharge an incumbrance existing thereon, is a violation of a provision that it shall be void "if the subject of the insurance be or become incumbered by mortgage" without the consent of the company indorsed thereon in writing. Now, if this clause in the policy is to be given a strict and literal interpretation, it would seem that any incumbrance given by an assured after the policy has been issued and delivered is a violation thereof, whatever may have been the purpose for which it was given. But courts are always reluctant to enforce forfeitures; and when one mortgage is given prac-

tically as a substitute for another, as in this case, there is no reason, in our opinion, for doing so. The rule that an incumbrance in violation of the terms of a policy of insurance works a forfeiture is based on the theory that it increases the risk; for, if a man may insure his property to its full value, and then incumber it to its full value, it may easily be seen how it may be turned into a source of profit. *Brown v. Insurance Co.*, 41 Pa. St. 187. But, where the policy is issued with knowledge by the company of an existing incumbrance, a subsequent renewal thereof, or a new incumbrance given for the purpose of discharging the old one, does not increase the risk, because the incumbrance practically remains the same. By issuing the policy the company contracts to accept the risk, incumbered as the property then is; and a subsequent change in the form of the incumbrance, or the substitution of one creditor for another, is not a violation of the spirit or intent of the contract, and therefore ought not to work a forfeiture of the insurance. If the assured cannot use the property covered by the policy as security for the money with which to pay off an incumbrance existing at the time it is issued, he is either at the mercy of the company, or else must suffer the risk of having his property sold under a decree of foreclosure. There is neither reason nor justice in a doctrine which requires him to suffer in that way, when no possible harm can be done to the insurer by substituting one creditor for another, or one security for another. The risk remains the same, for the interest of the assured in the property is unchanged. There is some diversity of opinion in the adjudged cases as to whether, after an existing mortgage has been paid and discharged, the assured can give another for the same or a less amount without violating the condition of the policy against incumbrances; but, where the new mortgage is given merely in lieu of an existing incumbrance, reason as well as authority favors the doctrine that it does not increase the risk, and therefore is no violation of the conditions of the policy against incumbrances. *Bowlus v. Insurance Co.* (Ind. Sup.) 32 N. E. 319; *Klister v. Insurance Co.* (Pa. Sup.) 18 Atl. 447; *Insurance Co. v. Gould* (Pa. Sup.) 19 Atl. 793; *Weiss v. Insurance Co.*, 148 Pa. St. 349, 23 Atl. 991; *Insurance Co. v. Salndon* (Kan. Sup.) 35 Pac. 15; *Insurance Co. v. Stein* (Miss.) 18 South. 414; *Russell v. Insurance Co.*, 71 Iowa, 69, 32 N. W. 95. It follows that the judgment must be affirmed, and it is so ordered.

KOSHLAND v. FIRE ASS'N OF PHILADELPHIA.

(Supreme Court of Oregon. July 31, 1897.)

INSURANCE—INCUMBRANCES—INTEREST OF INSURED
—PLEADING—AMENDMENTS.

1. A condition rendering an insurance policy void by an increase of the hazard is not violated by giving a mortgage in order to discharge incumbrances on the property of which the insurer had knowledge when the insurance was effected.

2. After a motion for a nonsuit on an insurance policy for the lack of an allegation that the insured had an insurable interest in the property at the time of the loss, the court may permit an amendment supplying this defect, under Code, § 101, providing that in the furtherance of justice the court may allow an amendment at any time before the cause is submitted, where it does not substantially change the cause of action.

Appeal from circuit court, Umatilla county; Robert Eakin, Judge.

Action by Marcus S. Koshland against the Fire Association of Philadelphia. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. E. Chamberlain, for appellant. John J. Balleray and Chas. H. Carter, for respondent.

BEAN, J. This is an action to recover \$1,000 on an insurance policy issued by the defendant to one Charles Cunningham, covering certain buildings and personal property which were destroyed by the fire referred to in the case of *Koshland v. Insurance Co.* (just decided) 49 Pac. 864, and by Cunningham assigned to the plaintiff after loss. So far as necessary to a correct understanding of the principal question to be determined on the appeal in this case, it is sufficient to say that the defense interposed is that the insured violated a condition in the policy which provides that it shall be void, unless otherwise provided by agreement indorsed thereon or added thereto, "if the hazard be increased by any means within the control or knowledge of the insured, or if the subject of the insurance be personal property, and be and become incumbered by chattel mortgage, or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance, whether by legal process of judgment, or by voluntary act of the insured, or otherwise." The particular violation of this condition relied upon and alleged as a defense to this action is that on June 4, 1895, Cunningham, without the knowledge or consent of the defendant company, executed to the plaintiff a mortgage on the real estate upon which the buildings destroyed by fire and covered by the policy were situated, to secure the payment of \$28,000; and the defendant claims that the court erred in refusing to submit to the jury, as a question of fact, whether the hazard was increased by reason of this mortgage. There is very respectable authority for holding that the creation of incumbrances, whether voluntary, as in case of mortgages, or involuntary, as in case of tax liens, is not to be considered a violation of a condition in an insurance policy like the one quoted. See *Rich. Ins.* §§ 141, 145, 147, and authorities there cited. But, however this may be, it appears in this case that the mortgage in question was given in lieu of, and for the purpose of discharging, incumbrances on the property of which defendant had full knowledge at the time the insurance was effected; and the question presented therefore bears so close a resemblance to the one before us in *Koshland v. Insurance Co.*, supra, that it is not necessary to do more than refer to the opinion in that case

as authority for the ruling here. If a mortgage of the character indicated is not a violation of a condition in an insurance policy against incumbrances, because it does not increase the risk, as was held in the case referred to, it clearly does not violate the terms of the policy now in hand on the ground that it increased the hazard, and the court committed no error in ruling that its execution was no defense to this action.

The only other assignment of error discussed in the brief is based on the ruling of the court in permitting the plaintiff to amend his complaint by alleging an insurable interest in Cunningham at the time of the loss, and to call witnesses to prove such interest after the defendant had moved for nonsuit for want of the allegation so permitted. But this amendment was not only manifestly in the furtherance of justice, but was one which the trial court had the undoubted power to grant, under section 101 of the Code. It did not change the cause of action attempted to be set up in the complaint, nor did it affect any substantial right of the defendant, but simply supplied an omission which, through inadvertence, had been overlooked until attention was called thereto by the defendant's motion for nonsuit. It follows that the judgment of the court below must be affirmed, and it is so ordered.

KOSHLAND v. HARTFORD FIRE INS. CO.

(Supreme Court of Oregon. July 31, 1897.)

INSURANCE—MISREPRESENTATION AND CONCEALMENT—INCUMBRANCES—CONDITIONS—EVIDENCE—HARMLESS ERROR.

1. Although evidence of a denial by an adjuster of an insurance company of liability on the part of the company under the policy sued on was erroneously admitted to excuse the failure to prove loss, yet where the company admitted that proof of loss was waived the error was harmless.

2. The failure of insured to disclose in his application the existence of incumbrances on the property, if not asked as to incumbrances by the agent of the company who filled out the application, will not avoid the policy, although it provides that concealment or misrepresentation of any material fact will avoid the policy, and also that, if the interest of insured in the property is not truly stated therein, the policy shall be void.

3. A subsequent mortgage on property covered by a policy of insurance is not violative of a provision therein that it shall be void "if any change, other than the death of the insured, take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process of judgment, or by voluntary act of the insured, or otherwise."

Appeal from circuit court, Umatilla county; Robert Eakin, Judge.

Action by Marcus S. Koshland against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. E. Chamberlain, for appellant. John J. Balleray and Chas. H. Carter, for respondent.

BEAN, J. This is an action against the Hartford Fire Insurance Company to recover \$1,000 on a policy issued by it to one Charles Cunning-

ham, and by him assigned to the plaintiff after loss. In many of its features the case is similar to the actions brought by the plaintiff against the Home Mutual Insurance Company and the Fire Association of Philadelphia (just decided) 49 Pac. 864, 885, to recover under policies issued by them, and covering property destroyed by the same fire which caused the loss under the policy now in suit; and therefore the questions presented on this appeal, so far as they have been considered in those cases, need not be further considered here.

It is claimed in this case that the court erred in admitting in evidence a writing, purporting to be a denial by the defendant of liability under the policy in suit, signed, "William Reid, Adjuster for the Hartford Fire Insurance Company," and certain telegrams offered for the purpose of showing Reid's authority to bind the company. Considerable space in counsel's brief is devoted to the discussion of this question, and there would be much merit in his contention if the evidence was material to any issue in this case. The only object of its introduction was to show a denial of liability under the policy by the defendant, as an excuse for the failure of the plaintiff to make proof of loss as provided in the policy; but the complaint having alleged that, after the loss, plaintiff offered to make due proof thereof, but the defendant "refused to accept said proof, and denied all liability under said policy, in writing, and waived all proof of loss under said policy," and this allegation of a denial of liability and waiver of proof of loss being admitted by the answer, because not denied, there was no issue before the trial court upon the question of the denial of liability by the defendant, or of Reid's authority to bind it; and hence all evidence tendered upon that subject, and the errors, if any, committed by the court in its admission, were wholly immaterial, and could not have prejudiced the defendant.

It is also claimed that the court erred in withdrawing from the consideration of the jury the evidence offered by the defendant in support of the first separate defense set up in the answer, and instructing them not to consider such defense. By this defense it is averred, in substance, that the policy provides that it shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, and that in violation of this condition the assured falsely and fraudulently concealed from the defendant, its officers and agents, the existence of the mortgage then on the property, and represented to it that the property was unincumbered. The only evidence offered in support of this defense was the application for the insurance, signed by Cunningham, in which it was stated that the property was unincumbered. But the testimony of the local agent of defendant who took the application and issued the policy was to the effect that he filled out the application himself, and could not say whether

Cunningham read it or not; that he did not remember whether he knew of the mortgages at the time, or whether he made any inquiry of Cunningham on that subject, or in regard to the property, and could not say where he got the statements which appear in the application. This evidence falls far short of showing that the assured concealed or misrepresented any facts or circumstances concerning the mortgage. A failure to disclose the existence of the mortgages on the property at the time the application was made was no violation of this provision of the policy, nor of the clause that it shall be void "if the interest of the insured in the property be not truly stated therein," unless he was particularly interrogated upon that subject. Rich. Ins. § 136; *Dolliver v. Insurance Co.*, 123 Mass. 315. It follows, therefore, that the court did not err in instructing the jury to disregard the first defense because there was no evidence to support it.

Nor was there error in charging the jury that they need not consider the second defense, for the reason that a subsequent mortgage on property covered by a policy of insurance is not violative of a provision therein that it shall be void "if any change other than the death of the assured take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process of judgment, or by voluntary act of the insured, or otherwise." *Insurance Co. v. Walsh*, 54 Ill. 164; *Judge v. Insurance Co.*, 132 Mass. 521; *Walradt v. Insurance Co.*, 136 N. Y. 375, 32 N. E. 1063. These are all the questions presented in this case which have not already been considered, and, finding no error in the record, the judgment is affirmed.

HOUSER v. UMATILLA COUNTY.

(Supreme Court of Oregon. July 31, 1897.)

SHERIFFS—EXPENSES OF TRAVEL WITHIN THE COUNTY.

A sheriff is not entitled to recover of the county for expenses of travel within the county in connection with criminal matters; Act Feb. 25, 1895 (Laws 1895, p. 77), which fixes his salary, providing that he shall be entitled to no fees or other compensation for his services except as therein provided, there being no express provision therefor, and it being provided that, when required to travel in another county and state to make an arrest or receive a prisoner, he shall receive his actual and necessary expenses incurred therein.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Special proceeding by Zoeth Houser to review the action of the county court disallowing his claim against Umatilla county. From the judgment of the trial court reversing the action of the county court, the county appeals. Reversed.

H. J. Bean, Dist. Atty., for appellant. Jas. H. Raley, for respondent.

MOORE, C. J. This is a special proceeding by Zoeth Houser to review the action of the

county court of Umatilla county in the matter of its refusal to allow his claim, amounting to the sum of \$35.75, for money expended on account of railway fares, livery hire, and hotel bills while in the performance of his official duties within said county, as the sheriff thereof. The trial court, having found from the return to the writ that the claim was a just charge against the county, reversed the action of the county court, and remanded the proceeding, with directions to audit and allow the said claim, from which judgment the defendant appeals to this court.

Counsel for the defendant contend that, the legislative assembly having provided an annual salary for the sheriff, the expenses constituting his claim are covered thereby, while counsel for the plaintiff insist that such salary is intended to compensate him for personal services only, and that it is the duty of the county court to repay the expenses incurred while serving criminal process and similar writs within said county. It is admitted that the claim presented correctly represents the amount paid out by the sheriff while in the performance of his official duties in behalf of and within Umatilla county, and the question presented for consideration is whether the county court has authority to audit and allow the demand. If such authority exists, it must be deducible from a construction of the act of the legislative assembly approved February 25, 1895 (Laws 1895, p. 77). Section 4 thereof provides that: "The sheriffs of the several counties in this state shall receive an annual salary as follows: * * * Umatilla, \$2,500.00." Section 5 is as follows: "The salaries herein provided for in favor of the said county clerks, recorders of conveyances, clerks of the circuit and county courts and sheriffs, shall be audited and paid by the several counties to the respective parties entitled thereto, in monthly payments, and in the same manner that other county charges are paid, and no one of such officials shall be entitled to receive any fees or other compensation for his services than as above provided, and except as hereinafter provided, except for furnishing to private parties copies of the records and files in his office for their benefit and convenience, in which case he shall be entitled to charge such private parties therefor at the rate of ten cents a folio, but shall not be entitled to anything for authenticating such copies, beyond including the number of words contained in the certificate of authentication in his computation of the number of folios." So much of section 6 as is applicable to the case at bar is as follows: "The sheriffs of the several counties in the state shall be entitled to receive the same compensation now allowed by law for the board and keeping of prisoners confined in the county jail of his county; he shall also be entitled to demand and receive to his own use any reward offered in pursuance of law for the apprehension of any person charged with or suspected of crime, when he has earned the same by a compliance with such offer; and to receive from the state the fees now allowed

by law for transporting and conveying convicts to the state penitentiary and insane or idiotic persons to the state asylum, when conveyed by him in pursuance of the adjudication of an authorized tribunal of the state. Sheriffs shall also be entitled to claim from the plaintiff or moving party in any account, action or proceeding such reasonable sums of money as they may have been compelled to pay or incur on the account of the care of property in their custody under attachment, execution or proceedings for the claim and delivery of personal property. When sheriffs are required to travel in another county and state, to make an arrest or receive a prisoner already in custody, he shall receive, upon filing with the county clerk an expense account duly rendered, his actual and necessary expense incurred in making such arrest and in returning such prisoner, to be audited in like manner as other claims against the county." The point contended for by counsel for the plaintiff is that the language of section 5, supra, to the effect that no sheriff shall be entitled to receive any fees or other compensation for his services, etc., is a declaration that such officer is to be paid the sum awarded by the act in question for his time and personal services in the discharge of his official duties, but that it is susceptible of the construction that, when he is obliged to travel from the county seat in the service of process on behalf of and within his county, the expenses thereby incurred are to be charged to and paid by the county, and, the statutes not having made provision for the payment of these expenses, it is incumbent upon the county court to reimburse him therefor. Hill's Ann. Laws Or. § 2356. It must be admitted that the legislative assembly possesses plenary authority to prescribe the compensation of the various county officers of the state, and to regulate the time, mode, and manner of its payment; but the rule is inflexible that the right of an officer to demand expenses incurred by him in the performance of official duty must be found in the statute conferring it, either directly or by necessary inference. *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85, 23 Pac. 827. "The word 'salary,' as used in the statute," says Scholfield, J., in defining the term under an act similar to the one in question, "clearly applies to the personal compensation provided to be paid to the sheriff for his own services." *Marion Co. v. Lear*, 108 Ill. 343. To the same effect, see *Briscoe v. Clark Co.*, 95 Ill. 309. The word "salary," as used in the statute under consideration, doubtless means the compensation prescribed to be paid to a public officer for the personal discharge of the duty enjoined upon him by law. If this definition be correct, it might seem to follow that an incumbent of a public office, whose salary is prescribed by the statute, is under no legal obligation to pay the expenses incident to the performance of his official duty, but, having done so, the claim would be a charge against the county, which the county court should audit and allow; but, if we assume this to be the rule of interpretation, is not its application modi-

fied and limited by the other provisions of the statute, which must be construed in pari materia? It is claimed, however, by counsel for the defendant, that the provision contained in section 6, that, "when sheriffs are required to travel in another county or state, to make an arrest or receive a prisoner already in custody, he shall receive, upon filing with the county clerk an expense account duly rendered, his actual and necessary expense incurred in making such arrest and in returning such prisoner, to be audited in like manner as other claims against the county," is an implied prohibition against the allowance of any expense incurred in consequence of travel imposed upon the sheriff in the performance of any official duty in his own county, and that, construing this provision with the other portions of the statute, it is very evident that the legislative assembly never intended that the sheriff should receive any compensation for his personal expenses except when necessarily compelled to travel in territory outside his own county. "Exceptions," says Judge Sutherland in his valuable work on Statutory Construction (section 328), "strengthen the force of a general law, and enumeration weakens it, as to things not expressed." In *Parsons v. Waukesha Co.* (Wis.) 53 N. W. 507, the county board of said county prior to plaintiff's election as sheriff, but pursuant to the provisions of the statute of Wisconsin, changed the compensation of that officer from a fee-bill system to a salary of \$2,500 per annum in lieu of all fees and compensation which might have been charged under the former method. The plaintiff having presented to the board of supervisors a bill for livery expenses incurred in serving subpoenas upon witnesses for the state in criminal cases in said county, and similar services, the claim was rejected, whereupon an action was instituted for the recovery of the amount demanded; and, judgment having been rendered against the plaintiff, upon appeal therefrom Pinney, J., in rendering the decision of the court, says: "The object of the statute, and of the action of the county board under it, was to give a gross sum in lieu of specific fees, but not to open the door for the sheriff to make charges against the county not theretofore authorized or allowed by law. This construction is strengthened by the exception from the effect of the law and resolution under it of 'compensation for keeping and maintaining prisoners in the common jail.' The law having made no other exception, the court can make none. * * * The salary provided, of \$2,500, is in lieu of such fees or charges, as well as all others, with the exception mentioned in chapter 53, Laws 1881, and no other exception can be allowed. The appellant, having taken office while the resolution was in force, must be content to bear the burdens while receiving the benefits arising under it. It is plain that he had no claim against the county for any of the items demanded." It is true that the statute referred to in that case (Laws Wis. 1881, p. 55) provides that the salary, when fixed by the board of supervisors, should be in

lieu of all fees and compensation for the sheriff, etc., for which service the county was then liable, "except compensation for keeping and maintaining prisoners in the common jail"; and it is very properly held that, as the county, prior to the change in the system, was not liable for the expenses of the sheriff incurred in the service of process, so, under the language of the act, it would not be subject to such charges after the change; and the case is here cited only to illustrate the rule that "enumerations weaken the force of the general law, as to things not expressed."

It is nowhere provided in the act of February 25, 1895, that a sheriff shall be allowed, in addition to his salary, any expense incurred for traveling in his own county; and, unless this liability is necessarily inferred from the language of the statute, the county court is without authority to reimburse him for such outlay. It is claimed, however, that, if the plaintiff is obliged to defray his necessary traveling expenses while in the performance of his official duties, it will exhaust the amount awarded him as salary, and, as it must be presumed that the legislative assembly intended that county officers should receive a fair compensation for their services, the statute should receive such a construction as would carry into effect the legislative intention. It may be assumed that the legislative assembly intended by the act in question to award reasonable compensation to the county officers for the discharge of their respective duties; but it must be admitted that there are some inequalities in the amount appropriated as salary to the sheriffs of the several counties, some not being adequately compensated, and the amount prescribed for this officer in Umatilla county doubtless comes within this latter class. Such being the case, if the statute receive the construction invoked, while it would fairly compensate a few officers for their services, in all other cases it would greatly augment the fair compensation the sheriffs of all other counties are now receiving; and, in view of the consequences which must necessarily follow such an interpretation of the statute, it would seem that the remedy for the correction of the error complained of was to be found by application to the legislative assembly for an increase in the salary prescribed. Counsel for plaintiff, in support of the construction sought, rely upon the rule announced by the supreme court of Illinois, from which it appears that the constitution of that state authorizes county boards to fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel, "and other expenses," and, in all cases where fees are provided for, said compensation shall be paid only out of, and shall in no instance exceed, the fees actually collected. Salaries only having been prescribed under this provision of the constitution, a sheriff whose compensation had been thus fixed by a county board presented his claim for expenses incurred in the performance of official duties; and in *Wheelock v. People*, 84 Ill. 555, the court, in

discussing the question, say: "Should the construction insisted upon be adopted, that the \$1,500 appropriated to the sheriff as 'compensation' also included allowances for necessary expenses of the office, then, according to averments in the seventh plea, admitted by the demurrer to be true, the sheriff would not only receive no compensation for his personal services, but would be a heavy loser by having accepted and performed the duties of the office. That, certainly, was not the intention of the county board; and we are unwilling to give any such unreasonable construction to the order of December 5, 1872, in relation to the sheriff's compensation, as would work such palpable injustice." It will be observed that the constitution provided that county boards might make provision for "other expenses," and, such being the case, the court very properly held that where salary only had been prescribed the officer was entitled to his expenses in addition thereto; but it will be seen that our statute contains no such provisions, in the absence of which we conclude the salary prescribed was intended to cover all expenses except such as are enumerated in the act in question. It follows that the judgment is reversed and the writ dismissed.

SABIN v. ANDERSON et al.

(Supreme Court of Oregon. July 31, 1897.)

FRAUDULENT CONVEYANCES—EVIDENCE—RIGHTS OF GRANTEE—CREDITORS' SUITS—EQUITY JURISDICTION.

1. An insolvent, for the purpose of putting notes due him beyond the reach of his creditors, delivered them to two bankers, who gave negotiable cash certificates of deposit for \$6,479.23, the amount of the notes. It was agreed that the bankers were to receive 5 per cent. for collecting, and to account to him for the proceeds, and that he was not to negotiate the certificates without explaining the conditions of their issuance. Subsequently the bankers tried, but failed, to give in the place of said certificates another certificate providing that unpaid notes were to be turned in as cash when the certificate was presented for collection; and so, fearing the insolvent would transfer the certificates to a bona fide holder, they procured an agent to buy them for \$2,800, paid for with their money. *Held*, that they were particeps criminis with the insolvent, and, as fraudulent grantees, were personally liable to his creditors for the amount of the notes, which were all collected.

2. As the \$2,800 was paid to protect themselves, and not to restore the property held by them in fraud of creditors, they were entitled to no credit therefor.

3. The right to prosecute in a court of equity a creditors' bill, to uncover assets fraudulently conveyed, and to compel an accounting, was not superseded by the garnishment and attachment laws, since a legislative intention that it should be so superseded does not appear, and in the absence of such intent the jurisdiction of equity is not abrogated by the creation of a new legal remedy.

4. Garnishment and attachment laws do not afford an adequate and complete remedy to uncover assets fraudulently conveyed and to compel an accounting.

5. The institution of garnishment proceedings which do not come to trial on their merits is no bar to the prosecution of a creditors' bill.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Suit by R. L. Sabin against William Anderson and others. From a decree for plaintiff, defendants appeal. Affirmed.

R. J. Slater, for appellants. W. F. Butcher, for respondent.

WOLVERTON, J. In February, 1889, the defendants, William Anderson and D. B. Watson, were partners, and engaged in the mercantile business at Adams in Umatilla county, Or. About that time Watson sold his interest in the business, including the accounts, to Anderson, who assumed the payment of the firm's indebtedness, and continued the business until the early part of June, and in the meantime contracted other indebtedness. On July 5th the plaintiff, to whom had been assigned the claims of creditors of Anderson & Watson and of Anderson individually, began action against them, in which writs of attachment were issued, and notices of garnishment served upon L. D. Lively and J. H. Bently, two of the defendants herein, who were doing a banking business as partners under the firm name of the Umatilla County Bank. Proceedings under the garnishment were three times set in operation to require them to answer touching any property of Anderson and Anderson & Watson in their hands subject to garnishment, but were as many times dismissed upon their motion, and in neither instance did they come to trial upon the merits. The final dismissal was effected June 10, 1893, and four days thereafter judgments were given and entered against defendants in said actions, upon which executions were duly issued, and returned nulla bona, and it is alleged that all defendants are insolvent except Lively, who has property consisting of real estate and bank stock acquired largely with the proceeds of certain promissory notes transferred by Anderson to the Umatilla County Bank in fraud of plaintiff's assignors. This suit was instituted January 15, 1894, and the court below found that Lively & Bently had collected the notes, and were trustees of the funds derived therefrom, and entered a personal decree against them for the amount thereof, with accrued interest from the date of the collection. From this decree the defendants appeal.

The proof clearly discloses and establishes the following facts: Prior to June 18 and 24, 1889, Anderson was the owner of a large number of accounts, including those purchased from the firm of Anderson & Watson, for many of which he procured from the debtors their negotiable promissory notes. On June 18th Anderson went with a number of these notes, aggregating \$5,280.02, to the Umatilla County Bank, and it was then and there agreed between him and the proprietors of the bank that the bank should collect the notes, and account to Anderson for the proceeds thereof on November 20, 1889, or for the notes, if any remained uncollected, for which services it was to receive a commission of 5 per cent. upon the amount collected

The bank, however, by its cashier, J. H. Bently, gave Anderson the ordinary cash certificate of deposit for a sum equivalent to said amount, negotiable in form, and made payable to the order of himself on the date last named. It was further agreed that this certificate should not be negotiated by Anderson, or, if he should negotiate it, that he should explain to the purchaser the real transaction and agreement between him and the bank touching the deposit and collection of the notes, and the manner in which the certificate should be redeemed by the bank. On the 24th day of June, Anderson deposited with the bank another lot of notes aggregating \$1,190.20, upon like conditions, and for which a like certificate was issued. Subsequently, but prior to the maturity of the certificates, the bank, becoming alarmed lest Anderson should transfer them to a bona fide holder, sent an agent to purchase them apparently for one E. De Peat, but in reality for itself, for which purpose the funds of the bank were used. The first certificate was secured November 16th, for which the bank paid Anderson \$2,150, and the second December 5th, for \$650. The testimony shows beyond peradventure that Anderson, at the time of the deposit of these notes with the bank, placed them there under the conditions above delineated for the purpose of concealing them and putting them beyond the reach of his creditors. It was stoutly contended, however, that the bank, or its proprietors, Lively & Bently, did not share with Anderson in such purpose, and that the transaction upon their part was bona fide, and without knowledge of the insolvency of Anderson & Watson, or of the purpose or intent of the said Anderson in seeking and entering into such an arrangement or agreement with the bank. But we think Lively & Bently were particeps criminis with Anderson in the scheme to defraud his creditors. They allege in their answer that Anderson sold the notes to the bank, and that the bank gave the cash certificates of deposit as a consideration for their purchase. Mr. Lively, however, virtually admits by his testimony that the certificates did not express the real nature of the transaction. Soon after their issuance he endeavored to have them replaced by another, which he testified contained these words: "All unpaid notes indorsed by Anderson to be turned in as cash on this certificate when presented for payment," and assigned as a reason for his solicitude in securing the exchange that he, since the transaction, learned that Anderson had become insolvent, and hence that his indorsements upon the notes sold to the bank were of no value; and further explained that, "as all the unpaid notes should be turned in as cash, and they—the certificates of deposit—being transferable, and he not being responsible, we thought it better." He claims that the bank relied upon Anderson's indorsement to make it whole for any notes that should prove to be uncollectible, but the fact is that none of the notes, although many of them fell due prior to the maturity of the certificates, were ever protested for nonpayment, so as to hold Anderson,

and no attempt of the kind was ever made, so far as the testimony discloses. These transactions are not altogether in harmony with the idea of a direct purchase of the notes by the bank. But beyond this the plaintiff produced and put in evidence a copy of the certificate with which Mr. Lively endeavored to replace those first issued. Omitting date and signature, it is as follows, to wit: "William Anderson has deposited in this bank sixty-four hundred and seventy-nine & ²³/₁₀₀ dollars in notes for collection, payable to the order of himself on return of this certificate, properly indorsed, Nov. 20th, '89; all unpaid notes to be turned in as cash on this certificate when it is presented for collection. Not subject to check." And this is in accord with the real transaction as it was evidently understood between the parties, and as Bently admitted it to be prior to his severance of his relations with the firm of Lively & Bently. So we take it that the transfer of these notes to the bank was made by Anderson for the purpose of concealing and placing them beyond the reach of his creditors, and thereby to defraud them, and that Messrs. Lively & Bently were cognizant of his purpose, and participated in the scheme with intent to aid and assist him in its full accomplishment.

Two defenses are interposed. The first is that Lively & Bently were bona fide purchasers of the notes for value, without notice of Anderson's intended fraud, and this we have disposed of upon the evidence; and the second is that plaintiff has an adequate remedy at law by way of attachment, and hence that he cannot maintain the suit. It was, however, also contended that the complaint does not state facts sufficient to constitute a cause of suit. The record shows that a demurrer for that cause was interposed, but was overruled by consent of parties. The defendants thereupon answered, and no further objection was made to the sufficiency of the complaint until the trial in this court. Under these circumstances, if the complaint will support a verdict, it should stand; and we have no doubt of its sufficiency for that purpose. It is urged that a creditors' bill will not lie to reach to the negotiable promissory notes of a debtor in the hands of a third person for the purpose of subjecting them to the payment of their claims and demands, but that question is not here for solution. The notes which were transferred by Anderson to the bank were all paid prior to the commencement of this suit, and the money collected thereon is all that Lively & Bently now have in their hands. Was the plaintiff's remedy at law by attachment adequate? It may be premised that the defendants Lively & Bently claimed the ownership of these notes by purchase from Anderson, and that the latter had no interest in the proceeds thereof. It was not known to the plaintiff what amount of these funds Lively & Bently had in their hands, and an accounting was necessary, so that the jurisdiction of a court of equity to entertain a creditors' bill as it existed at common law was clear upon two grounds: First, to determine the nature of

the transaction,—whether it was intended as a fraud upon the creditors; and, second, to compel an accounting, and, unless this remedy is superseded by the one by attachment provided for by the statute, plaintiff is still entitled to invoke it. It is a rule of law well established that, where a new power is conferred upon the law courts, that unless that statute conferring it contains negative words, or other language expressly taking away the pre-existing equitable jurisdiction, or unless the legislative intent to abolish the jurisdiction is clearly manifest from a consideration of the whole scope of the enactment, its reasonable construction, and its operation, the former jurisdiction of equity will continue unabridged. 1 Pom. Eq. Jur. § 279; *Sprinkle v. Wallace*, 28 Or. 201, 42 Pac. 487; *Union Pass. Ry. Co. v. Mayor, etc.* (Md.) 17 Atl. 933; *Latham v. McGinnis*, 29 Ill. App. 152; *McNab v. Heald*, 41 Ill. 326; *Monroe v. Reid*. (Neb.) 64 N. W. 983; *Ludes v. Hood*, 29 Kan. 49. In such case the statutory remedy is regarded as cumulative, and the equitable dominion will continue as affording a concurrent remedy. *Sprinkle v. Wallace*, *supra*; *Heroy v. Gibson*, 10 Bosw. 591; *High, Rec.* § 401; *Feldenheimer v. Tressel*, 6 Dak. 265, 43 N. W. 94. Without further elaboration, it is clear that the legislature did not intend, in providing for attachment and garnishment at law, to supersede the jurisdiction to uncover assets when transferred in fraud of creditors, and to compel an accounting. Further than this, the remedy at law which will in any event preclude the equitable jurisdiction must be plain, adequate, and complete. It must be adapted to the particular exigency, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *McKinney v. Curtiss*, 60 Mich. 611, 27 N. W. 691; *Gullickson v. Madsen*, 87 Wis. 19, 57 N. W. 965; *Hodges v. Kowling*, 58 Conn. 12, 18 Atl. 979; *Fitzmaurice v. Mosier*, 116 Ind. 363, 16 N. E. 175, and 19 N. E. 180; *Gormley v. Clark*, 134 U. S. 338, 349, 10 Sup. Ct. 554; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594; *Warner v. McMullin*, 131 Pa. St. 370, 382, 18 Atl. 1056; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

But the remedy by attachment is not as efficient as by suit in the nature of a creditors' bill. In pursuing it in this case under the garnishment proceedings the plaintiff was confronted with the alleged sale of these notes, which was fraudulent as to him, and their collection, thus rendering an account necessary to determine what amount of the funds still remained in the hands of the garnishees. In such proceedings a personal judgment may be entered against the garnishee for the value of property of the debtor found in his possession, but the remedy against his disposal thereof in the meantime is not efficient as in equity, where it may be taken into custody, especially after judgment and issue of execution and return nulla bona. *Had-den v. Spader*, 20 Johns. 554. In further illustration of the proposition, see *Pierstoff v. Jor-ges*, 86 Wis. 128, 56 N. W. 735, *Gullickson v. Madsen*, *supra*, and *Feldenheimer v. Tressel*,

supra. True, in the present case the defendant had entered upon the prosecution of garnishee proceedings against *Lively & Bently* upon three different occasions, and had proceeded in one, and perhaps two, instances far enough to obtain their written answers to the petition for a citation requiring their appearance, and to interrogatories subsequently served; but in neither instance did the matter come to trial upon its merits, and, in the view we have taken of the law, plaintiff was not precluded from pursuing his remedy in equity. Where the fraudulent grantee or donee has sold the property conveyed to him, or mingled it with his own, a decree will be rendered charging him personally with the value thereof, and he may be called upon to account for just what property has come into his hands. 5 Enc. Pl. & Prac. 601; *Dilworth v. Curtis*, 139 Ill. 508, 29 N. E. 861. But *Lively & Bently* contend that, in any event, they ought to have credit in the account for the \$2,900 which they paid to *Anderson* for the recovery of the outstanding certificates issued by the bank. The functions of a creditors' bill are to pursue a fund, or to restore a right lost by law, and not to visit the fraudulent grantee with damages. If a person had property of which he has obtained possession with a purpose to defraud the creditors of another, he is under no legal obligation to turn it over to such creditors; but, if he is honest, he will restore it to him to whom it belongs, that it may be applied in satisfaction of their demands, if wanted. Now, we presume that if such a person had honestly parted with what he fraudulently received, before the rights of the creditors are fixed by judgment and the filing of the bill, he ought to be exonerated from further liability. *Swift v. Holdridge*, 10 Ohio, 23. But that is not what *Lively & Bently* have done in this instance. What they did was the result of their solicitude to protect themselves against the acts of *Anderson*, and not to restore property held by them in fraud of creditors. *How v. Camp*, Walk. Ch. 427, is a case similar in principle, where lands had been conveyed in fraud of creditors, and the fraudulent grantee had disposed of a portion of them to bona fide purchasers, and paid a portion of the purchase money over to the fraudulent grantor. In taking the account the court refused to allow credit for the money thus paid over, and, discussing the case, the chancellor says: "This is not a case of constructive, but positive, fraud against creditors, in which the grantee is particeps criminis. When that is the case, the rule is not to allow the grantee, in taking the account, for any advances made to the grantor, as it would, to the extent of such allowance, be giving effect to the fraud, and remove the chief obstacle to third persons assisting debtors in defrauding their creditors, by indemnifying them against pecuniary loss in case of detection." *Spencer, J.*, in *Sands v. Codwise*, 4 Johns. 599, says: "It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. No right can be deduced

from an act founded in actual fraud." So it is here. This court, in the exercise of equitable jurisdiction, cannot take an account between the parties to the fraud for the purpose of reimbursing the fraudulent assignees for any money they may have expended for the sole protection of themselves without regard to the right of the creditors. The decree of the court below will be affirmed.

MATLOCK v. BAEB et al.

(Supreme Court of Oregon. July 31, 1897.)

CREDITORS' BILL.—LIEN OF GARNISHMENT.

1. The remedy by creditors' bill is not superseded by garnishee process and proceedings supplementary to judgment.

2. Garnishment of a person to whom a fraudulent conveyance has been made gives a sufficient lien on the property to support a creditors' bill, and return of execution nulla bona is not necessary.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Suit by W. F. Matlock against W. H. Babb and others. Decree for plaintiff. Defendants appeal. Affirmed.

On or about the 17th day of April, 1896, the plaintiff recovered a judgment in the circuit court of the state of Oregon for Umatilla county against the defendant W. H. Babb upon an indebtedness that had accrued prior to January 1, 1892, for the sum of \$1,870.53 and \$25 costs and disbursements, and on December 19, 1896, recovered a second judgment in the same court against him for the sum of \$2,304 and \$26.40 costs and disbursements. Writs of execution were duly issued thereon, and under the one issued upon the first judgment the sheriff levied upon 68 head of cattle by taking them into his possession, and upon some 32 head additional by the process of garnishment served upon the defendants R. S. Perkins, G. W. Hunt, and G. W. Ingalls, in whose possession they were at the time of the levy, all as the property of Babb. The sheriff, by virtue of the other writ, subsequently levied upon the same property in like manner. Concerning these cattle the plaintiff alleges, in substance, that about January 1, 1892, W. H. Babb was, ever since has been, and now is the owner thereof; that about December, 1893, he leased them to one Peter Schwab, but that in reducing the agreement to writing he used the name of his wife, Hannah N. Babb, one of the defendants herein, as lessor, and caused the same to be signed by her as such; that Babb caused said lease to be so executed for the purpose of deceiving his creditors, and particularly the plaintiff, and to hinder and delay the collection of their just demands; that thereafter the said Hannah N. Babb, for the purpose of hindering, delaying, and defrauding said creditors, and for the further purpose of cheating and defrauding the said W. H. Babb, made a pretended transfer of the cattle to said Perkins, and that he accepted the said transfer with like intent and

purpose; that said pretended transfer was without any good or valuable consideration, and was accepted by Perkins with full knowledge that said property belonged to Babb. It is further alleged that the defendants Hunt and Ingalls claim some interest, right, or title in and to said cattle, but that such right or interest, whatever it might be, is inferior and subordinate to the rights of plaintiff; that all of the defendants are insolvent, and that Babb has no property other than the cattle out of which to make the amount of the executions; and that Perkins, Hunt, and Ingalls threaten to sell and dispose of the cattle now in their possession, and appropriate the proceeds to their own use, to the irreparable injury of plaintiff. A demurrer was interposed to the complaint in behalf of Perkins, Hunt, and Ingalls and Hannah N. Babb, which being overruled by the court, and a decree given and entered in favor of plaintiff, these defendants appeal.

A. D. Stillman and J. C. Leasure, for appellants. J. J. Balleray and Jas. H. Raley, for respondent.

WOLVERTON, J. (after stating the facts). The appellants insist that the complaint is insufficient for two reasons: First, that it shows plaintiff has an adequate remedy at law under the process of garnishment; and, second, that the facts stated do not entitle plaintiff to maintain a creditors' suit in aid of an execution at law, and, incidentally, that it fails to show the plaintiff had exhausted his remedy at law, or that he had procured a return nulla bona upon his executions. In support of the affirmative of the first question it is argued that the remedy by creditors' bill in equity is superseded by the garnishee process and by the proceedings supplementary to execution. In so far as it pertains to such process under a writ of attachment, we have just decided, in *Sabin v. Anderson*, 49 Pac. 870, that the equitable jurisdiction ordinarily asserted by means of the creditors' bill is not superseded thereby, and that, where garnishee proceedings have not been invoked to the extent of obtaining a trial upon the merits, a creditors' bill will lie to uncover property transferred for the purpose of defrauding creditors and for an accounting. It is therefore unnecessary to discuss the question further here. But this case involves the further question as to whether the proceedings supplementary to execution have superseded the equitable jurisdiction, and to this the same answer must be given. The statute provides, in effect, that after the issuance of an execution, and upon proof to the satisfaction of the court or judge thereof that the judgment debtor has property liable to execution which he refuses to apply towards the satisfaction of the judgment, he may be required to appear and answer under oath concerning his property; and, if it appear that he has any property subject to execution, the court or judge may make an order directing him to apply

the same in satisfaction of the judgment, or the property may be levied upon and sold as provided by law. The court or judge may also make an order restraining the debtor from in any manner disposing of his property in the meantime, and for disobedience thereof he may be punished for contempt. Hill's Ann. Laws Or. §§ 308-310. Section 311 provides another means for procuring the attendance of the judgment debtor for examination, and section 312 gives the remedy by garnishment, and this is all there is of the proceeding supplementary to execution. Aside from the provision for the garnishee process, none of these sections provide a way to reach third persons who may be holding the debtor's property, and in league with him, to deprive the creditor of the benefit of his execution; and, indeed, they seem to have been intended to uncover assets or property which are within the possession or under the control of the debtor only, and in this respect the provisions therein for supplementary proceedings can in no sense take the place of a creditors' bill. The case of *Feldenheimer v. Tressel*, 6 Dak. 265, 43 N. W. 94, is much in point. Spencer, J., speaking for the court, says: "We cannot assume that the legislature intended to take from the creditors any of the remedies that they enjoyed under the court of chancery for the enforcement of their judgment after having exhausted their remedy at law, and turn them over to the often inadequate and imperfect remedy provided by the statute in regard to proceedings supplementary to execution. Upon reason and authority the remedy by creditors' suit exists now as it formerly did under the Code of Chancery." In support of this view, see *Bennett v. McGuire*, 58 Barb. 625, *Burt v. Hoettinger*, 28 Ind. 217, and *Monroe v. Reid* (Neb.) 64 N. W. 983. There is an additional reason beyond those assigned in *Sabin v. Anderson*, supra, why the garnishee proceeding is not as effectual, when applied to the case at bar, as the creditors' bill. It is disclosed by the complaint that Perkins, Hunt, and Ingalls are all claiming a portion of this property, or an interest therein, not jointly, but severally, so that one proceeding would probably not settle all dispute touching the title, whereas by the creditors' bill this end may be accomplished. See, in this connection, *Pierstoff v. Borges*, 86 Wis. 128, 56 N. W. 735, and *Gullickson v. Madsen*, 87 Wis. 10, 57 N. W. 965.

In support of the contention that the facts stated do not entitle the plaintiff to maintain a creditors' suit in aid of the executions, it is urged that as a foundation of such a suit there must exist an actual lien upon the property which is the subject of the contest, and that an attachment which is acquired by the garnishment of third persons having the possession thereof does not fill the requirements necessary to constitute such a lien. That the suit will lie to set aside an incumbrance or a transfer of property made to defraud creditors in aid of an execution

at law, there can be no controversy. 2 Beach, Mod. Eq. Jur. § 924. If, after securing his lien by the issue of an execution and a levy thereunder, the creditor is compelled to come into a court of equity for the purpose of removing the obstruction fraudulently interposed to prevent the ample execution of the writ, he may do so immediately after he has obtained his lien by such levy, and, the obstruction being removed, he may proceed to sell the property under the execution, and subject the proceeds thereof to the payment of his judgment. Neither is he required, in such a case, to exhaust his remedy at law, or to have an execution returned *nulla bona*, before he can resort to equity. The lien itself gives the equitable right to have the fraudulent transfers and incumbrances swept away, that the execution may operate effectively to transfer the better title, and produce the larger returns for the judgment creditor. *Vanderpool v. Notley*, 71 Mich. 422, 39 N. W. 574. The rule is distinctly stated in *Tappan v. Evans*, 11 N. H. 327, as follows: "Where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. But, if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted by an actual return upon his execution that no goods or estate can be found (which is pursuing his remedy at law to every available extent), before he can file a bill to reach the equitable property of the debtor." This rule was approved by Judge Deady in *Hahn v. Salmon*, 20 Fed. 806. And it has been held by this court that an attachment lien before judgment is a sufficient foundation upon which to invoke the equitable jurisdiction to remove fraudulent impediments which may stand in the way of laying hold of the property, and applying it to the payment of the demands of attaching creditors. *Dawson v. Sims*, 14 Or. 561, 13 Pac. 506. Now, the property of a debtor in the hands of a third party is levied upon by execution in like manner as the same may be attached (subdivision 4, § 283, Hill's Ann. Laws Or.); and where property is levied upon or attached in the hands of a third person, and he has given a certificate as required, the officer may, in the further execution of the writ, take the property wherever he can find it, and sell and apply it in satisfaction of such writ. Id. §§ 284, 285. Such a levy, it would seem, places the property in *custodia legis*. Mr. Wade, in his work on Attachments (section 331), says: "Supposing the property in the hands of the garnishee to be attachable, and the property attached by the proceeding taken for that purpose, he thereafter holds it subject to the judgment. Thenceforward the property is in the custody of the law,

and the garnishee becomes its legal custodian." To the same effect, see, also, *Drake, Attachm. § 453; Renneker v. Davis*, 10 Rich. Eq. 289. The very purpose of the levy by garnishment, as well as by actual seizure, is to create a lien, and thereby charge the property with the payment of the debt. The priority of levy gives a superior right, as it respects other attaching creditors and all subsequent purchasers and incumbrancers, and upon principle there is no sufficient reason why such a lien should not support a creditors' bill in aid of an execution at law. The case of *Sabin v. Michell*, 27 Or. 66, 39 Pac. 635, was supported and the suit maintained upon a like lien, although the question raised here was not directly decided. We think the lien is sufficient to support the equitable remedy sought to be invoked. It follows that there was no error in overruling the demurrer, and the decree of the court below will therefore be affirmed.

EATON v. McNEILL.

(Supreme Court of Oregon. July 31, 1897.)

RAILROADS—FENCES—DEPOT GROUNDS—INJURIES TO STOCK.

1. Plaintiff's evidence showed that his horses were seen at 3 p. m. before the day of their injury a mile east of cattle guards which were marked with blood and hair, traces of which were seen along the track to where the injured horses were found at a place some distance west of said cattle guards, and within the right of way, inclosed by a fence which was down not far from the horses. *Held*, that no recovery predicated on the absence of fence required by statute could be had, as the evidence showed that the horses entered at a place which the railroad company was not bound to fence.

2. If stock injured by a railroad company enter the right of way at a place where the company is not bound to fence, there can be no recovery without proving negligence.

3. Where stock entered a railroad right of way on the depot grounds at a point within the lawful limits of such grounds, the fact that such grounds were larger than the law allows is immaterial, in a suit to recover for injuries the stock received while on the right of way.

Appeal from circuit court, Union county; Stephen A. Lowell, Judge.

Action by A. E. Eaton against E. McNeill, receiver of the Oregon Railway & Navigation Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action against the receiver of the Oregon Railway & Navigation Company to recover damages for loss of stock killed and injured by moving trains of the defendant, and for other injuries to property. The complaint contains seven counts, but, as the assignments of error relate to the second cause of action alone, no further reference need be made to the others. After alleging the incorporation of the railroad company, the appointment of the defendant as receiver, the ownership by plaintiff of certain horses and mares, the complaint, for a second cause of action, avers that the animals in question, without the fault of

the plaintiff, strayed upon the track of the railroad operated by the defendant at a point about one-fourth of a mile northwest of the Union depot in Union county, and were killed and injured through the negligence and carelessness of defendant's agents and servants in the operation and management of his locomotives and cars, to plaintiff's damage in the sum of \$210 in aggregate, and that the track and grounds of the railroad at the point where the animals were killed and injured were not fenced as required by law. A demurrer to this cause of action on the ground that it did not state facts sufficient to constitute a cause of action being overruled, the defendant answered, denying the allegations thereof, and alleging affirmatively that the animals in question entered upon the track and grounds of the railroad at the depot or stations grounds of Union station. A reply being filed, a trial was had, resulting in a verdict in favor of plaintiff for the sum of \$85 upon this cause of action, and defendant appeals.

J. M. Long and T. M. Crawford, for appellant. J. M. Carroll and T. H. Marsh, for respondent.

BEAN, J. (after stating the facts). The record contains numerous assignments of error, but the only question we deem it necessary to consider is as to whether the evidence is sufficient to support the verdict. This question arises out of defendant's motion for nonsuit, as well as his motion for a verdict by direction of the court. The facts, as disclosed by the testimony, are that the track of the railroad operated by defendant runs east and west at Union station, and that there is a fence and cattle guard along the west line of the depot grounds. West of this line the track passes through the farm of Shaw, and is fenced on both sides as required by law. On the morning of the 21 of May, 1895, some horses belonging to the plaintiff were found within the inclosed right of way a short distance west of the cattle guard, with their legs broken and otherwise badly injured; but there was no evidence whatever upon the part of the plaintiff as to how they got there, unless it is to be inferred from the testimony of the witness Shaw, who says that the fence inclosing the track was down near where the injured animals were found. But the failure to keep the fence in repair is not charged as a ground of negligence in the complaint; nor is there any evidence tending to show that the stock entered at that point, or that the condition of the fence was due to the negligence of the defendant, or was the proximate cause of the injury. On the contrary, the evidence for the plaintiff is to the effect that, about 8 o'clock of the day before the injury, the animals in question were driven by the witness Shaw from near his place to a point about one mile east of the depot, on the public highway leading from the town of Union to the station, and, in returning from that point to the place

where they were found injured, they would necessarily be compelled to pass the station; that blood and hair were found on the cattle guard west of the depot, and along the track to the place where the injured animals were found, thus clearly indicating that, on their return from the place where Shaw left them, they had probably become frightened at an approaching train, and ran down the track from the depot grounds across the cattle guard, and into a bridge, and in so doing had been injured. There can be no other reasonable inference drawn from the plaintiff's testimony. It is conclusively shown to have been the fact by the uncontradicted and unimpeached testimony of the trainmen called by the defendant, who testified that at 2 o'clock in the morning, as the train approached Union station from the east, they discovered a band of horses on the track a short distance from the station building, and between it and the switch west thereof; that the animals became frightened at the approach of the train, and ran west along the track, scrambling through the cattle guard, and passed out of sight; that they stopped the train, and, upon again moving forward, proceeded cautiously, keeping a sharp lookout; that a short distance west of the cattle guard they found four of the animals in a bridge; and that they again stopped the train, and helped them out. This is all the evidence given by either party showing how the animals came to be injured, and upon these facts the question of liability depends. No right of recovery is claimed on account of the negligence of the agents or servants of defendant in the operation and management of trains, but it is predicated wholly on the absence of a fence as required by statute; and we are clearly of the opinion that no recovery can be had on that account, because it appears that the animals went upon the track at a point where the defendant was not required to fence. The rule is unquestioned that if the stock enter upon a railway at a point where the statute requires the road to be fenced, and are injured or killed by a moving train, the railroad company will be liable in damages, whether it occurred through the negligence of the company or not; but, if they enter at a place where the law does not require the company to fence, a different rule prevails, and before a recovery can be had the plaintiff must prove that the killing was caused by the negligence of the defendant. *Moses v. Railroad Co.*, 18 Or. 385, 23 Pac. 498; *Railroad Co. v. Bull*, 72 Ill. 537; *Railway Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, and 3 N. E. 162; *Bremmer v. Railroad Co.*, 61 Wis. 114, 20 N. W. 687; *Peters v. Stewart*, 72 Wis. 133, 39 N. W. 380; *Baldwin v. Railway Co.*, 63 Iowa, 210, 18 N. W. 884; 3 Wood. Rly. Law, par. 419. In *Railway Co. v. Goodbar*, supra, Mr. Justice Elliott says that "it is the place of entry that controls." As said in *Railway Co. v. Tretts*, 96 Ind. 450: "The place of entry is the material question. This is the ruling in many cases. [Citing a number of cases.]

These cases declare that if the place where the animals entered was one which the railroad company was bound to fence, and the place was not fenced, the company is liable, although the place where the animals were killed was securely fenced; but, if the animals entered at a point where the railroad company was not bound to fence, the company is not liable, although the animals were killed at a place where there was no fence." The evidence of the case at bar brings it clearly within this rule. Under the statutes and decisions of this state, a railway company is not required to fence its depot grounds or railway tracks therein. *Moses v. Railroad Co.*, supra. And the evidence is clear that the animals went upon the track from the depot grounds, and, this being so, their injuries were in no way attributable to the absence of a fence required by the statute.

It was contended to some extent on the trial that the railroad company had included in its depot grounds more land than it lawfully had a right to do; but this question is wholly immaterial in this case, because the undisputed evidence shows that the animals went upon the track at a point between the station building and the west switch, and there is no suggestion that such point is not within the depot grounds, whether their proper limit is a question of law or fact. It follows that the judgment of the court below must be reversed and the cause remanded, with directions to enter nonsuit in favor of the defendant as to the second cause of action set up in the complaint, and to render judgment accordingly.

FARREL v. OREGON GOLD-MIN. CO.

(Supreme Court of Oregon. July 31, 1897.)

FOREIGN CORPORATIONS—JURISDICTION—SERVICE OF PROCESS—APPEAL—RECORD—AFFIDAVITS.

1. A personal judgment by default may be rendered against a foreign corporation, though the return of the service does not show that it was doing business in the state when service was made, for, though Hill's Ann. Laws, § 516, makes such fact essential to jurisdiction, it should be shown in some other part of the record.

2. A foreign corporation doing business in Oregon is subject to its laws, and hence, as there is no special law relative to service upon it, a service upon its president is *prima facie* sufficient, though the return does not show he was authorized to represent the corporation, in view of the statutes providing for such service upon domestic corporations.

3. Hill's Ann. Laws, § 543, provides that a judgment "shall be reviewed only as to questions of law appearing upon the transcript." Section 541 defines a transcript as a certified copy of the judgment roll. Section 272, subd. 2, defines the judgment roll as consisting of summons and return, pleadings, bill of exceptions, and orders relating to parties, together with a copy of the judgment entry, and all other journal entries and orders involving the merits and necessarily affecting the judgment. *Held*, that affidavits filed in support of a motion to vacate a judgment are not part of the judgment roll, and hence the supreme court cannot consider them in support of a ruling on such motion, unless they are brought up by bill of exceptions.

4. When a ruling is based on a finding of fact

from evidence, the facts upon which it is made are no part of the record, unless incorporated into the bill of exceptions, whether the exception to the ruling is taken in person, or the ruling is deemed excepted to under the statute.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by J. R. Farrel against the Oregon Gold-Mining Company. There was a judgment for plaintiff, and from an order refusing to vacate the same defendant appeals. Affirmed.

On July 22, 1895, Farrel commenced an action in the circuit court of Union county against the Oregon Gold-Mining Company, a Kentucky corporation, to recover the sum of \$6,511.50. In his complaint he alleges, among other things, that the "defendant is now, and has heretofore been, engaged in the business of owning, operating, and conducting mines, and a general quartz mining and milling business, in Union county, Oregon." It appears from the complaint that one of the causes of action is for services rendered by plaintiff in Union county, as superintendent and agent of the defendant corporation, in and about the operation, working, and caring for its milling and mining properties in that county. A summons was regularly issued and served upon the defendant corporation by the delivery of a copy thereof, together with a certified copy of the complaint, to H. Walters, its president, in Union county. The defendant failed to appear and answer as required, and on October 7, 1895, judgment by default was rendered against it for the amount prayed for in the complaint. On the 18th of March following the defendant appeared specially, and moved the court to set aside and vacate the judgment, on the ground that the court had no jurisdiction of the corporation, which motion being overruled, the defendant appeals.

J. D. Slater and L. B. Cox, for appellant. T. H. Crawford and F. V. Holman, for respondent.

BEAN, J. (after stating the facts). The motion to open the default and vacate the judgment in this case is based upon the ground that the judgment is void for the reason (1) that the sheriff's return is insufficient to warrant its entry, and (2) that the corporation was in fact not doing business in the state at the time the action was commenced, and that Walters, its president, upon whom service was made, was here on other business, and not as its representative.

In support of the first point it is contended that it is essential, in order to support the jurisdiction of the courts of this state to render a personal judgment by default against a foreign corporation, that it shall appear from the return of the service that the corporation was engaged in business in the state at the time the service was made, and that the agent upon whom it was made was authorized to represent the corporation here. But we cannot concur in this view of the law. It is

quite true the statute provides that no foreign corporation shall be subject to the jurisdiction of the courts of the state in personam unless it appear in the action or have an agency established here for the transaction of some portion of its business. Hill's Ann. Laws, § 516. But this is only declaratory of the general rule that, in the absence of a voluntary appearance, the courts of one state have no jurisdiction over a corporation created in another, unless it is transacting some portion of its corporate business within the state where sued. And as a corporation can act only through its agents, it necessarily follows that if it is doing business in the state it must have an agency established here, within the meaning of the statute. In no other way can it do business, and hence the statute simply means that, in the absence of a voluntary appearance, no foreign corporation shall be subject to the jurisdiction of the courts of this state unless it is engaged in the transaction of some portion of its corporate business at the time the action is commenced; and this is the rule prevailing elsewhere. *Aldrich v. Development Co.*, 24 Or. 32, 32 Pac. 756; 6 *Thomp. Corp.* § 7995; 2 *Mor. Corp.* § 980; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559; *U. S. v. American Bell Tel. Co.*, 29 Fed. 17; *Carpenter v. Air-Brake Co.*, 32 Fed. 434. So long as a corporation confines its operations to the state within which it was created, it cannot be subjected to the jurisdiction of a court of another state, where it has no office or transacts no business, by the service of process on some officer or agent while temporarily present in the latter state, because he cannot take the corporation with him beyond the jurisdiction of the state of its creation. But when it voluntarily goes into another state, and by the express permission or acquiescence of such state engages in the transaction of its corporate business, it is liable to be brought into the courts thereof by service of process upon such officer or agent as the local laws may designate, and the judgment founded thereon will be held good everywhere unless the mode of acquiring jurisdiction violates the principles of natural justice. In short, when a corporation migrates into another state, and engages in business there, it becomes, in effect, for jurisdictional purposes, a domestic corporation, and liable to suit upon a cause of action arising in the state of its adoption by service of process in the manner provided for the service of domestic corporations, unless the statute otherwise provides. 6 *Thomp. Corp.* § 8019; *Insurance Co. v. Carrugi*, 41 Ga. 680. A corporation of one state cannot do business in another without the consent of the latter, express or implied, and hence a state may impose, as a condition upon which a foreign corporation shall do business within its borders, that it accept as sufficient the service of process upon such officers or agents as may be prescribed. This condition may be

implied as well as expressed. When, therefore, a state provides by general law that process may be served upon a private corporation by serving the same upon certain officers or agents thereof, and a foreign corporation subsequently comes into the state to do business, it will be deemed to have consented to subject itself to the jurisdiction of the local courts by the service of process upon the officers or agents designated in the local statute. Now, by the laws and policy of this state, foreign corporations are as free to engage in business therein as corporations of its own creation; but, no special provision having been made for the service of process upon them (except certain corporations not necessary to be named), it may be made in like manner as upon domestic corporations, and a return thereof, good in an action against the latter, will, under similar circumstances, be good against the former.

As already suggested, the contention for the defendant is that the return is insufficient, because it does not show that the corporation was doing business in the state at the time the service was made, or that Walters was an agent authorized to represent it here. The first objection is, we think, sufficiently answered by the opinion of Mr. Justice Field in the case of *St. Clair v. Cox*, supra, in which it was said, in effect, that, in order to support the jurisdiction of the courts of a state to render a personal judgment against a foreign corporation, it must appear somewhere in the record, either in the application for the writ, or accompanying the service, or in the pleadings or findings of the court, that the corporation was engaged in business in the state; but, when the transaction of business by the corporations so appeared, "a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the community, that his duties were limited to those of a subordinate employé or to a particular transaction, or that his agency had ceased when the matter in suit arose." It does appear, from the complaint in this case, that the defendant corporation was engaged in business in the state at the time the action was commenced, and this was sufficient to support the jurisdiction of the court, within the rule laid down by Mr. Justice Field in the case referred to. And in the nature of things this must be so. The sheriff, as a ministerial officer, is neither required nor authorized to determine the question of jurisdiction and certify to his conclusion in his return. He is charged with the duty of serving the process, and is required to certify to the fact of such service, and upon whom it was made, and then it remains for the court to determine, from the entire record, whether, under the service as made by him, it has jurisdiction of the per-

son of the defendant. So that we think the objection to the validity of the judgment in question cannot be sustained on the ground that the sheriff did not certify that the defendant was doing business in the state at the time the service was made. Nor do we think the return fatally defective because it does not show that at the time of service Walters was an agent authorized to represent the defendant in this state. It does show that he was the president of the defendant, and that the summons was served upon him in Union county; and, as it elsewhere appears in the record that the corporation was doing business in that county, this is a sufficient compliance with the provisions of section 55, prescribing the mode of service of process upon private corporations, and is prima facie sufficient to give the court jurisdiction. The statute referred to provides that, in an action against a private corporation, service shall be made upon the president or other head of the corporation, secretary, cashier, or managing agent, or, in case none of such officers shall reside or have an office in the county where the cause of action arose, then upon any clerk or agent of the corporation who may reside or be found in the county. The object of service of process is to bring notice home to the defendant, and hence the statute contemplates that, in an action against a private corporation, service may be made upon the president or other head of the corporation, if it can be done within the county where the action is pending, and, if not, upon some subordinate agent. Such would be the rule in an action against a domestic corporation, and, as we have seen, the same rule applies to an action against a foreign corporation, when engaged in the transaction of business in this state. If a foreign corporation is not doing business here, service upon its president or other officer will, of course, not give the courts of the state jurisdiction of the corporation, because it does not accompany such officers into the state; but where the corporation itself has come into the state, and engaged in the transaction of its ordinary corporate business, service upon its president in the county where the cause of action arose is at least prima facie sufficient.

The other objection to the judgment is that the court was without jurisdiction because the defendant corporation was not doing business in this state at the time the action was commenced, nor was Walters, upon whom service was had, its agent or representative here. If the facts are as stated in this objection, the judgment is unquestionably void; for, as we have seen, the courts of this state cannot acquire jurisdiction over foreign corporations unless they are engaged in business here. But the plaintiff objects to the consideration of this question because the issue presented was one of fact, to be determined by the trial court from evidence dehors the record, and that such evidence is not a part of the record on this appeal, and cannot, therefore, be considered by the court. Accompanying the transcript are a

large number of affidavits which appear to have been filed in the court below, and which, it is claimed, contain the evidence upon which the issue in question was tried and determined; but they are not brought up by bill of exceptions, or in any way identified or made a part of the record by the trial court, and the contention for the plaintiff is that, for this reason, they cannot be considered on this appeal. The statute provides that, upon an appeal from a judgment, "the same shall be reviewed only as to questions of law appearing upon the transcript," etc. (Hill's Ann. Laws, § 543), and that the transcript is "a copy certified by the clerk of the roll or final record or the pleadings, orders, papers, and journal entries that constitute such roll or record," etc. (Id. § 541). From these two sections of the statute it is clear that no questions can be considered on an appeal from a judgment except such as appear from the judgment roll; and, unless the affidavits referred to are a part of such roll, there is nothing before this court for consideration upon this point. Now, the statute defines a judgment roll, and, so far as applicable to the case in hand, it consists of the summons and proof of service, the pleadings, bill of exceptions, orders relating to the change of parties, together with a copy of the entry of judgment, and all other journal entries and orders in any way involving the merits and necessarily affecting the judgment. Id. § 272, subd. 2. It is clear, therefore, that affidavits or other matters dehors the judgment roll as thus defined are no part of the record, and cannot be considered on appeal from the judgment, unless made so by a bill of exceptions; and so this court has uniformly held. "No papers should be included in the transcript in any case," says Thayer, C. J., "except such as constitute the judgment roll or final record, or which have been made of record by being incorporated into a bill of exceptions. They cannot be considered for any purpose, and serve only to embarrass the court and counsel. We held in *Osborn v. Graves*, 11 Or. 528, 6 Pac. 227, in effect, that no paper not a part of the transcript, although certified as such, could be considered on the appeal. Because an exception need not be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon the matters in writing and on file in the court, does not preclude the necessity of making a statement of the exception. In such case an exception to the decision is deemed to have been taken. The law regards it as having been objected to, which constitutes an exception. But that is a mere challenge to the correctness of the decision. Whether it is erroneous or not depends upon facts. It is often necessary to show the circumstances under which it was made in order to prove it to be erroneous." *Mitchell v. Powers*, 16 Or. 491, 19 Pac. 647. And to the same effect are *Scott v. Cook*, 1 Or. 25; *Railway Co. v. Wright*, 10 Or. 162; *State v. Drake*, 11 Or. 396, 4 Pac. 1204; *State v. Chee Gong*, 17 Or. 635, 21 Pac.

882; *Van Bibber v. Fields*, 25 Or. 530, 36 Pac. 526. Indeed, a careful examination of authorities has failed to disclose any case in which the court, on appeal from a judgment, has, under a statute similar to ours, ever reviewed the determination of a trial court, based on a mere question of evidence, unless the evidence upon which it acted has in some way been made a part of the record by such court; and the decisions are numerous where they have refused to do so. See 2 Enc. Pl. & Prac. 270, and note, for a collation of authorities; *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Nash v. Harris*, 57 Cal. 242; *Aultman v. Howe*, 10 Neb. 8, 4 N. W. 357; *City of Plattsmouth v. Boeck*, 32 Neb. 297, 49 N. W. 167; *Fitzgerald v. Benadom*, 35 Neb. 317, 53 N. W. 72; *Development Co. v. Nye*, 5 Wash. 301, 31 Pac. 752.

It is contended by the defendant that, the proceedings in this case having taken place after the rendition of judgment, and the decision having been made wholly upon matters in writing and on file in the court, the statute in reference to the judgment roll does not apply, and that no exception or bill of exceptions is necessary to entitle the affidavits to be considered on appeal. But this argument assumes, in the first place, that the decision was in fact made wholly upon matters in writing and on file in the court, without anything in the record upon which to base the assumption, and, second, that a bill of exceptions is only necessary when the rulings of the court are not deemed excepted to under the law. Neither of these positions is, in our opinion, sound. There is no law which we now call to mind requiring a motion to vacate a judgment based upon a question of fact dehors the record to be determined by the trial court on affidavits alone, and it appears from the authorities cited that, when the ruling of the court is based upon a finding of fact from evidence, it makes no difference whether the exception is taken in person, or the ruling is deemed excepted to under the statute. The facts upon which it is made are no part of the record unless reduced to writing, and settled and signed as a bill of exceptions. The case of *Ankeny v. Milling Co.*, 10 Or. 390, is to be distinguished from the case in hand, in that it was a special statutory proceeding for an order to abate a nuisance, and wholly independent of the original action. It follows that we cannot review the findings of the circuit court on the question of fact presented by the motion to vacate because the evidence upon which it was based is not properly here. The judgment of the court below must be affirmed, and it is so ordered.

RICHMOND et al. v. McNEILL.

(Supreme Court of Oregon. July 31, 1897.)

RAILROADS—FIRES—NEGLIGENCE—PRESUMPTION—PROVINCE OF JURY.

1. A railroad company allowed inflammable material to collect upon its right of way. It

was discovered to be ignited within five minutes after a freight train passed. The fire spread, burning property of an adjoining owner. It was shown that fire could not have originated from smoldering embers in the ground. *Held* sufficient to raise a presumption that the fire was started by the negligence of the company, which it was the duty of the company to rebut.

2. The adjoining owner's employé, being three-quarters of a mile away, saw the smoke, but did not at first apprehend danger, as some section men had passed the spot within five minutes. After 10 or 15 minutes he returned to the house, and gave the alarm, remaining about five minutes. His employer being absent, he harnessed a team, taking about 10 minutes, and drove to the fire with his wife, two children, and another employé, to try to save the property, but upon arriving they found it impossible, in their judgment, to extinguish the fire, so made no attempt to do so. *Held*, that the question of contributory negligence of the employer was for the jury.

Appeal from circuit court, Union county; Stephen A. Lowell, Judge.

Action by F. L. Richmond and W. T. Wright against E. McNeill, receiver of the Oregon Railway & Navigation Company. From judgment for defendant, plaintiff appeals. Reversed.

This is an action by F. L. Richmond and W. T. Wright against E. McNeill, as receiver of the Oregon Railway & Navigation Company, a corporation, to recover damages for injury to land belonging to them in Union county, Or., by the burning of the soil thereof and the grass, fence posts, and wire thereon, the destruction of which is alleged to have been caused by the negligent operation of a railway locomotive on the line of said company, whereby sparks were emitted therefrom, which, falling upon a quantity of dry grass and other inflammable material, carelessly permitted by the defendant, his agents and servants, to accumulate on the right of way of the railway company, caused the same to ignite, and the fire kindled thereby spread to plaintiffs' adjoining premises, causing the injury of which they complain. The complaint is in the usual form, and, issue being joined thereon, at the trial the plaintiffs introduced their evidence, and rested, whereupon the court, considering that neither the plaintiffs nor their agents had exercised such a degree of care and diligence in protecting their property from the ravages of the fire as was reasonably within their power, upon motion therefor gave a judgment of nonsuit, from which the plaintiffs appeal.

Geo. E. Chamberlain, for appellants. J. M. Long and T. H. Crawford, for respondent.

MOORE, C. J. (after stating the facts). The judgment complained of was evidently based upon the assumption that, although the fire which caused the injury was negligently emitted from a locomotive, and, communicating with the dry grasses and other inflammable materials which were carelessly permitted to accumulate on the right of way, spread therefrom, and burned the plaintiffs' property, yet that, by the exercise of rea-

sonable care and diligence on their part, the injury of which they complain might have been averted. An examination of the evidence adduced by plaintiffs tends to show that on October 25, 1895, they were the owners and in the possession of 650 acres of peat land, covered with rank grasses and tules, the soil of which was composed of combustible material, easily ignited; that the line of the railway of the said corporation runs across this land, and that on October 25, 1895, between 6 and 7 o'clock in the morning, a freight train going east passed over the same, and soon thereafter one S. P. Gates, an employé of the plaintiffs, who was about three-quarters of a mile therefrom, discovered smoke ascending from what he supposed to be the right of way through the land in question. Gates testified that within 5 minutes after the train passed he saw smoke, which he watched for about 10 or 15 minutes; that he then went into the house to give the alarm of fire, where he remained about five minutes; he thereupon went to the barn to hitch up a team, which occupied about 10 minutes, and, neither of the plaintiffs nor their superintendent being present, he, in company with his wife, two children, and another employé, drove to the fire, to see if they could do anything to guard the property; that it required about 10 or 15 minutes to make the journey, and upon their arrival they went along the water ditch on the premises to see that the fire did not cross it into the land lying on the opposite side, but, having no means with which to combat the fire, and believing that it would be useless to attempt it even if they were supplied therewith, they made no effort in that direction. This witness also says that he saw the section men going west that morning; that they met the freight train at plaintiffs' land, where they removed their hand car from the track, to allow the train to pass, after which the car was replaced, and they resumed their journey. Alexander Ferguson, another witness, who lived about two miles from the scene of the fire, saw the train pass, and, soon after passing plaintiffs' land, he saw smoke, which he thought might have been caused by section men burning railroad ties. From this evidence, can it be said that plaintiffs' agents did not exercise that degree of care and diligence which it was possible for them to exert in protecting the property from destruction? The rule is settled in this state that if a party, by slight effort, and without danger, could have avoided the destruction of his property by fire negligently set by another, and refuses to put forth a reasonable exertion to arrest the impending injury, such failure on his part will preclude his right of recovery. *Eaton v. Navigation Co.*, 19 Or. 391, 24 Pac. 415. In *Railroad Co. v. McClelland*, 42 Ill. 355, the court, upon defendant's request, refused to give the following instruction: "If the son and servant of the plaintiff saw the fire in time to put it out, while it was on the right of way, be-

fore it reached the plaintiff's meadow, it was his duty to do so. And if, through his negligence in not doing so, the fire consumed the property of the plaintiff, the defendant would not be liable therefor." And, judgment having been rendered in favor of plaintiff, it was reversed on appeal; Breese, J., in rendering the decision of the court, saying: "It was, then, a proper subject of inquiry by the jury, could the plaintiff's son and servant, by the exercise of reasonable diligence, have prevented the spread of the fire? He saw the fire in time to arrest its progress, or, at any rate, in time to make some effort to that end, but did not choose so to do. He left the scene, and was absent nearly one hour, and on his return the fire had reached the meadow. Common prudence required he should have made some effort to prevent this, and it was negligence on his part, for which the plaintiff is answerable, that he did not. The fire in the meadow in July may be charged to the negligence of the plaintiff's son, who was in a position to have prevented it. The court should have given this instruction to the jury, and it was error to refuse it." In the absence of the principal, it has been held that it is the duty of the agent or employé engaged with reference to the care or management of any property that is threatened with destruction by fire caused by the negligence of another to make a reasonable effort to avert the injury, and the neglect of the agent or employé in this respect is the failure of the principal. *Railway Co. v. Hecht*, 33 Ark. 357. It would seem that the rule announced in this case is correct upon principle, but it cannot reasonably be expected that an agent or employé engaged in another branch or department of the principal's service would exert that same degree of care and protection of property over which he had no control, and in which he had but little interest, as he would over that under his immediate charge, and particularly so when the destruction of the latter class of property might mean a loss of employment. Nor can it be expected that a servant, in the absence of his master, can have the same interest, or exercise a like degree of care, in protecting from destruction property over which he has control as is to be looked for in the owner; but he must, it would seem, make some effort in that direction. *Whart. Neg.* (2d Ed.) par. 877. The evidence shows that plaintiffs' superintendent, being obliged to leave the place, appointed Gates to look after it in his absence, and this would doubtless demand of him, in the protection of the property from the ravages of the fire, a degree of care commensurate with his responsibility.

Having shown that a duty devolved upon Gates by reason of his employment, we will review the evidence, together with the reasonable inferences deducible therefrom which tend to show the manner in which he discharged this legal obligation. It will be admitted that fire is a destructive agent, and, ordinarily,

he who would avert the effect of its devastation of inflammable property must act promptly upon the discovery of the danger. Applying this rule, which would appear to be just and reasonable, to the acts of Gates, it will be remembered that, after discovering the smoke on what he supposed to be the right of way, he watched it for about 10 or 15 minutes before he made any effort towards preventing a spread of the fire if it were imminent. He saw the section men, when the freight train met them, at a point on the line at which the fire thereafter started; and while he does not testify that he thought the smoke was caused by a fire set by these men to burn railroad ties, Ferguson, another witness, does, although the latter was two miles from the scene of the fire, while Gates was only three-quarters of a mile distant. The jury might reasonably have inferred that Gates did not conclude that there was any danger from the fire, the smoke of which he saw; and, such a conclusion being deducible from the fact of his observation, the reasonable period of it before he became convinced that the danger was imminent must necessarily have been a question of fact for the jury to ascertain. So, too, the time spent in giving information of the fire, hitching up a team, and making the journey is reasonable, or might be so found by a jury. At least the court could not say, as a matter of law, that the time thus consumed was unreasonable. Gates also says that his object in going to the fire was to see if anything could be done to guard the property, upon arriving at which they went along the water ditch to prevent the fire from crossing it, but that, having no means, they made no effort to; and, if they had tried, they could not have put out the fire. The failure of an owner of property to protect it from destruction by fire when it is within his power to do so with reasonable effort and without danger, thereby precluding his right of recovery for the damages resulting therefrom in case of its loss, must necessarily rest on the doctrine of contributory negligence. The danger incident to the fire, and the effort, when any has been made by the owner of the property, to prevent its destruction, are facts which it is within the sole province of the jury to determine, unless the court can say, as a matter of law, that there was no apparent danger and no reasonable effort. The editor of the *American and English Encyclopedia of Law* (volume 4, p. 94), announcing the rule for determining whose duty it is to measure the degree of care demanded of the owner in such cases, says: "When the facts are disputed, or more than one inference can be fairly drawn from them as to the care, or want of care, of the plaintiff, the question of contributory negligence is for the jury; but when the facts are undisputed, and but one inference regarding the care of the plaintiff can be drawn from them, the question is one of law for the court."

"Negligence, as I understand it," says Cooley, C. J., in *Railroad Co. v. Van Steinburg*, 17 Mich. 99, "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury." The learned justice and text writer elsewhere in the opinion also says, "As a general rule, it cannot be doubted that the question of negligence is a question of fact, and not of law," and cites many cases in support of this proposition. Applying these rules to the conduct of Gates on the occasion of the fire, we think it cannot be said that the only inference deducible therefrom is that he made no reasonable effort to prevent the spread of the fire, or to mitigate the threatened injury. It appears from the evidence that he went with reasonable diligence to the scene of the fire, ready and willing to do what he could, as he says, "to guard the property"; and that he passed along the water ditch several times to see that the fire did not cross it conclusively shows that he made some effort to perform his duty, the degree of which must be a question of fact peculiarly within the province of a jury to ascertain, and by their verdict to say whether his endeavor was all that could have been reasonably performed; and, such being the case, the judgment of nonsuit cannot be sustained upon that ground.

2. It is contended, however, by counsel for defendant, that, plaintiffs having failed to offer any evidence tending to show that the fire was set by sparks emitted from the locomotive in question, or that it was sending out sparks, cinders, or great volumes of smoke on that day, or that it or any other engine had ever done so in that vicinity, or that the track at that place was up grade, the freight train long or heavily loaded, or that the engine was working hard, or that it was faulty in construction, defective in appliances for arresting sparks, or carelessly or negligently operated, or any other facts from which an inference might be deduced that the fire which caused the injury originated from a spark or cinder emitted from the locomotive attached to the freight train, the judgment of nonsuit was properly rendered; while counsel for plaintiffs maintain that, having given evidence tending to prove that the defendant negligently permitted dry grass and other inflammable material to accumulate on the right of way, which were ignited immediately after the train passed their premises, and also that the fire which destroyed their property could not probably have originated from any other source, raised such an inference that the fire was caused by a spark emitted from the locomotive as to impose on the defendant the burden of proving that the engine in use on that day was properly constructed, possessed proper and modern appliances for confining sparks and cinders, and was carefully operated by skilled and prudent employees, and hence a judgment of nonsuit could not be predicated upon this

ground. Reviewing the evidence offered on this branch of the subject, it tends to show that the witness Gates first saw the freight train that morning at a point about 150 or 200 yards west of where the fire thereafter started; that he also saw the section men going west on a hand car, which they removed from the track to permit the train to pass, after which they replaced the car, and resumed their journey; that just after the train passed, and while it was still in view of this witness, and within five minutes after the section men passed the point where the fire appeared, he discovered the fire; and that, in his opinion, and to the best of his knowledge, it started on the right of way. He also says that the weather was dry, that defendant had permitted dry grass to accumulate on the right of way, and that there had been no other fire in that vicinity that fall. The witness Ferguson says that from his place, which is about two miles west of where the fire started, he had a fair view of the railway track, and on that morning saw the train, which at that time of the year he generally watched pretty close; that he did not see it set any fire, and thought he was free therefrom at that time, but that in a little while after it passed he saw smoke arising at a point which appeared to him to be right at the railroad where it passes through plaintiffs' premises, and he then thought it might have been caused by men at work burning ties. The witness Van Gates, plaintiffs' superintendent, also says that defendant's employees dumped off grass and weeds about four or five feet from the ends of the ties along the railway track across the premises in question. From the résumé of the evidence applicable to the question involved, can it be fairly said that it was sufficient to raise an inference from which the jury might reasonably find that the fire originated from a spark emitted from a locomotive attached to the freight train? "The doctrine," says Sherwood, J., "is now very well settled, and we think correctly, that a railroad company must keep its right of way reasonably clear of dangerous combustible matter; and, if a fire occurs in consequence of a negligent failure so to do, and damages therefrom ensue to the property of another, the company will be liable therefor." *Jones v. Railroad Co.*, 59 Mich. 437, 26 N. W. 662, citing a long list of authorities. See, also, 8 Am. & Eng. Enc. Law, p. 14, in which a contributor, announcing the reason for this rule, says: "The general rule is that a railway company must keep its track and right of way clear of all such substances as are liable to be ignited by sparks or cinders from its engines. This is a duty clearly implied in the grant or charter which confers the right to use steam engines. As fire is a dangerous agent, it is but reasonable to presume that the legislature, in making the grant, annexed the implied condition that the track and right of way shall be kept in such a condition as to avoid danger from fire spreading therefrom." It might seem, from a casual examination of the lan-

guage here quoted, that if a railway company permitted inflammable material to accumulate on its track and right of way, and by any means fire was communicated thereto, which, spreading to, destroyed the property of another, liability would thereby attach; but such, upon principle, cannot be the case, for this implied condition annexed to the grant is to keep the track and right of way in such a condition as to be reasonably free from danger by fire incident to the passage of locomotives and trains. If a railroad company, not using its line of railway, were to permit dry grass or shavings to accumulate on the track and right of way, and such material should be set on fire by any means by another, it would certainly not be contended that the railroad company would be liable for any damages that might result therefrom. So, too, if the railroad track, with inflammable material allowed to accumulate thereon, were in constant use by the company in the operation of its trains, and some evil-disposed person were to apply a lighted match to such material, or if the same were struck by lightning, whereby it became ignited, and injury resulted, the railroad company would not be liable therefor. The use of steam as a motive power renders a fire in the locomotive a necessity, and it is against this agent, when so confined and used, that the company operating the engine must carefully guard; and to render it liable for negligence in this respect it must appear, either directly or by necessary inference, that the fire doing the injury complained of emanated from the receptacle in which the legislative grant permits it to be transported. "A railway company," says Staples, J., in *Railroad Co. v. Medley*, 75 Va. 499, "may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, operated by the most skillful engineers; it may do all that skill and science can suggest in the management of its locomotives; and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow that it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most approved and best-constructed machinery." When it appears in evidence that damages have resulted from a fire caused by sparks or cinders emitted from a locomotive, a presumption of negligence in the construction and management of such engine is thereby created which it is incumbent upon the railroad company to overcome, and it may ordinarily escape responsibility by showing that the engine, which was the primary cause of the injury, was properly constructed, had

the most approved appliances for arresting sparks and cinders, and was carefully operated by skillful and competent employes. *Koontz v. Navigation Co.*, 20 Or. 3, 23 Pac. 820. The rule to be extracted from the Virginia case, however, would seem to be that, if the evidence conclusively shows that sparks or cinders were emitted from a locomotive, thereby igniting inflammable material negligently permitted by the railroad company to accumulate on its track and right of way, and, spreading therefrom, destroyed the property of another, the railroad company would be liable for the damage resulting, which it could not evade by showing that the engine distributing the fire was faultless in construction, perfect in appliances for arresting sparks, and skillfully and carefully operated. *Railway Co. v. Overman*, 110 Ind. 539, 10 N. E. 575; *Gibbons v. Railroad Co.*, 66 Wis. 161, 28 N. W. 170. Such a rule would seem just in its application, for it might reasonably be expected that sparks or cinders would be emitted from a locomotive, notwithstanding every precaution against their escape has seemingly been taken, and, when falling upon inflammable material negligently permitted by a railroad company to accumulate on its track or right of way, which is thereby ignited, and the fire spreading to destroyed the property of another, the secondary, perhaps, but the real, cause of the injury is the negligence of the company in permitting the accumulation of such material, in view of which the character of the engine, its appliances, or operation must necessarily become immaterial factors in avoiding liability resulting from the destruction of property which might have been prevented by the exercise of greater care in the removal of such dangerous material.

In the case at bar the evidence tends to show that the fire started on the right of way, or at least the witness Gates so thought from his point of observation, about three-quarters of a mile distant; but that it was caused by a spark or cinder emitted from the engine is inferable only from the mere fact that a train passed the point where the fire originated a few minutes before it was discovered. The evidence also tends to show that soil of the character destroyed had been known to retain fire for months after being ignited; but it also appears that there had been no fire, prior to the one in question, in this immediate vicinity that fall, so that the inference that the fire might have originated from smoldering embers is rebutted. It is generally known that sparks and cinders escape from engines and cause fires which destroy property, and, this being so, the probability of danger from this cause must necessarily be in inverse ratio to the remoteness from the railway track, in view of which we think an inference is reasonably deducible that a fire occurring immediately after the passage of a train, and discovered in combustible material negligently permitted to accumulate on the track or right of way, orig-

inated from a spark emitted from the engine, and particularly so when other evidence has been introduced tending to rebut any inferences that it might have arisen from other causes, thereby imposing upon the railroad company negligently permitting the accumulation of such material which has given rise to the fire the burden of dispelling such inference by raising a counter inference that the fire could not reasonably have been started in this manner by showing that the track at that point was level, that the engine was properly constructed, possessed suitable appliances for arresting sparks and clinders, was operated by skillful, careful, and competent employees, and that it was not laboring to start the train to which it was attached or to stop it after being set in motion; thus leaving the question to the jury to ascertain the fact from an examination and consideration of all the evidence whether or not the fire causing the injury originated from a spark or clinder emitted from the locomotive. Such a rule, it would seem upon principle, ought to be enforced, for, having been negligent in permitting the accumulation of dry grass and other inflammable material at exposed places, it is reasonable to infer from the fact that the fire was started therein that it was caused by a spark given off by the engine; and as the means of dispelling the inference is entirely in the power of the railway company, the person sustaining the injury cannot be expected to know, much less to prove, that the engine was defective in its appliances or construction, or that it was negligently operated on the occasion of the fire, in view of which, to compel him to establish these facts would, in many instances, be equivalent to a denial of justice. 1 Thomp. Neg. 153, subd. 3. In case, however, a fire starts beyond, or even on, the right of way, if no inflammable material is permitted to accumulate thereon, and loss of property result to another therefrom, the person sustaining the damages ought to be obliged to give evidence of such facts, in addition to the discovery of the fire soon after the passage of a train, as would tend to raise an inference that the fire was caused by carelessness, either in the construction or operation of the engine, before the railroad company should be required to rebut such inference, because it might reasonably have been expected that fires will occur as an incident to the operation of trains by steam as a motive power; but where the inflammable material negligently permitted to accumulate on the track or right of way is ignited, and the fire is discovered soon after the passage of a train, the duty should be imposed on a railroad company, after the proof of this fact, and the introduction, if possible, of evidence tending to show that the fire could not reasonably have occurred from other causes, to rebut the inference of carelessness arising from proof of the fire, because it could not have been reasonably supposed that such material would have been allowed to accumulate.

The plaintiffs in this case gave evidence tending to show that the fire did not arise from smoldering embers in the soil, and, having also shown that it probably started on the right of way, in combustible material, they made such a case as to raise an inference that it was caused by a spark emitted from the engine, to dispel which the duty was imposed upon the defendant to show that the engine was properly constructed, and carefully operated; and, this being so, the judgment of nonsuit cannot be predicated on that ground, and hence it follows that the judgment is reversed, and the cause remanded for retrial.

BURNS v. PAYNE et al.

(Supreme Court of Oregon. July 31, 1897.)

JUSTICES' COURTS—RIGHT OF APPEAL.

A garnishee may appeal from a judgment rendered against him in a justice's court, under Hill's Ann. Laws, § 2117, providing that "either party may appeal from a judgment given in a justice's court," and sections 152 and 163-170, providing that a plaintiff may obtain a personal judgment against a garnishee.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by J. R. Burns against Charles H. Payne and David Eccles, garnishee. From a judgment for Eccles, plaintiff appeals. Affirmed.

J. B. Messick, for appellant. Johns & Smith, for respondent.

WOLVERTON, J. An action was commenced in the justice court for district No. 1, Baker county, Or., by the plaintiff, against Payne, the defendant, and a writ of attachment issued September 19, 1896. Thereupon the writ and a notice of garnishment was served upon David Eccles, and, his return thereto not proving satisfactory to plaintiff, he was required by the court to appear before it on October 6, 1896, and answer under oath touching his liability to the defendant. Eccles appeared, and answered the allegations and interrogatories served upon him by plaintiff, and when the issues were fully joined a trial was had, which resulted, on November 16, 1896, in a judgment in favor of the plaintiff, and against Eccles, for the sum of \$26.90 and costs, taxed at \$14.25. Prior thereto, to wit, on November 9th, judgment had been rendered in the main case in favor of the plaintiff, and against Payne, the defendant, for the sum of \$32.24, and \$13.20 costs. Eccles appealed from the judgment rendered against him in the garnishee proceedings to the circuit court, and a motion was there filed to dismiss the appeal, based upon the ground that no appeal lies from the judgment of a justice's court rendered against the garnishee in such proceedings. This motion was overruled, and, a trial being had, the judgment against Eccles was reversed, and one rendered against the plaintiff for

costs and disbursements, from which he appealed to this court, and the sole question presented is the one which arises upon said motion to dismiss the appeal.

It is contended that the statute which gives an appeal from a judgment in a justice court is not sufficiently comprehensive in its terms to embrace a judgment rendered in a garnishee proceeding, and that it was the intention of the legislature to give an appeal from a judgment in the main case only, or from the one which determines the action, and no other. Section 2117 of Hill's Annotated Laws of Oregon provides that "either party may appeal from a judgment given in a justice's court, in a civil action, when the sum in controversy is not less than ten dollars," etc. It will be observed, from the wording of this statute, that it is a party to the judgment who may appeal, not a party to the action; but it may be conceded that a party to the judgment must also be a party to the action in order to entitle him to the remedy here prescribed. The statute, under the general Code procedure, has provided a remedy by attachment and garnishment, and, in case where the garnishee refuses to give a certificate, or if, when given, it proves unsatisfactory to the plaintiff, it prescribes a mode by which the garnishee may be summoned to appear and answer under oath touching his liability to the defendant, or for any property which he may have in his possession belonging to such defendant and subject to garnishment. Allegations and interrogatories may be served, and, as it pertains to the former, it has been settled that it is essential that they should be filed and served (*Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398), and the garnishee is required to file a written answer thereto, to which the plaintiff may reply, thus formulating complete issues between the plaintiff and the garnishee touching his liability to the defendant. Upon these issues trial may be had, as upon ordinary issues of fact between plaintiff and defendant, and judgment rendered against the garnishee and in favor of the plaintiff, with the single restriction that the judgment shall not be for a greater amount than that recovered against the defendant in the action, and execution may issue against the garnishee as upon ordinary judgments. See Hill's Ann. Laws Or. §§ 152, 163-170, inclusive. It has also been determined that the proceedings here provided for are at law, as contradistinguished from equity, and that the trial and manner of reserving questions for review in the appellate court are governed by the rules applicable to law actions. *Knowles v. Herbert*, 11 Or. 54, 4 Pac. 126; *Williams v. Gallick*, 11 Or. 337, 3 Pac. 469; *Case v. Noyes*, supra. Mr. Waples says that the proceeding against a garnishee "is a judicial cause between parties. It is begun by a summons, or its equivalent, and results in a judgment, with all the other characteristics essential to a

lawsuit." Wap. Attachm. par. 470. The proceeding, it is true, is ancillary, and subsidiary to the main action, and is undoubtedly dependent for its utility upon the final results attained in that action; but the garnishment in effect subrogates the plaintiff to the rights of the defendant in the main action, and empowers him to sue the defendant's garnished debtor. He takes the shoes and asserts the rights of the defendant against the garnishee. "He sues for property or credits in his own name, but upon the cause of action acquired by such legal subrogation." The garnishee is a party only to the action against himself, in which the plaintiff urges the right of the principal defendant against him, and is not a party to the main action. See Wap. Attachm. pars. 473-475, 477. *Strahan, J.*, in *Case v. Noyes*, supra, says: "The allegations provided by the Code are designed to enable the plaintiff to bring upon the record the cause of action which the original defendant had against the garnishee, and to which the plaintiff has become subrogated by virtue of the attachment." So that we have here all the characteristics of a distinct action, though subsidiary to the main case, and for the purposes of trial and appeal it has been so treated in practice, in so far as it pertains to the courts of general jurisdiction. For all essential purposes the proceeding must be regarded as an action, and such it has been decided to be, in effect, by this court (*Smith v. Conrad*, supra), the parties to it being the plaintiff in the main action, suing in the right of the defendant, and the garnishee; and that it is a civil action no one will dispute.

The jurisdiction of the justice's court extends to the allowance of the provisional remedy by attachment in like cases as in a court of record. Hill's Ann. Laws Or. § 2057. For the mode and manner of making up the issues, conducting the trial, and procuring judgment, we are referred by the Justice's Code (Id. § 2064) to the Code of Civil Procedure, which establishes and comprehends all the provisional remedies known to the statute, and provides the manner of their enforcement. So that the mode of procedure in the garnishment proceedings is the same, whether prosecuted in the justice's court or in a court of general jurisdiction; and, if a proceeding can be regarded as an action in the latter jurisdiction, it must be so regarded in the former. In this view the garnishee, against whom the plaintiff prevails in such proceedings, is "a party to a judgment in a civil action in a justice's court," within the meaning of the provision allowing appeals from such judgments. This appears to be a reasonable interpretation of those sections of the Justice's Code pertaining to the commencement of actions in justices' courts, the allowance of the provisional remedies, and the remedy by appeal, and in consequence with the intent of the legislature in adopting the Code. The statute is certainly broad enough to comprehend the action promoted

by the garnishment, as well as the action in the main case. The judgment of the court below will be affirmed.

MULDRICK et al. v. GALBRAITH.

(Supreme Court of Oregon. July 31, 1897.)

IMPLIED CONTRACTS—CONSIDERATION—EXECUTORS AND ADMINISTRATORS—ACCOUNTING—EXTRA ALLOWANCE—ATTORNEY'S FEES.

1. A nephew who made a trip at his uncle's request, could not recover the expenses thereof from the uncle's estate, in view of the confidential relations that had existed between them, where there was no agreement by the uncle to pay such expenses.

2. He was entitled, however, to the expenses of a trip made after the uncle's death at the suggestion of the executrix for the purpose of consulting with her as to the proper management of the estate.

3. A nephew who persuaded his uncle to accommodate him by accompanying him on a dangerous trip, and paid his expenses, cannot recover from the uncle's estate the amount of the expenses, although the uncle had agreed to repay them.

4. When one attorney either performs or directs all the legal work in settling an estate, the compensation therefor may be entered in the administrator's account, and allowed as one gross sum.

5. Under Hill's Ann. Laws, § 1180, providing that an administrator's compensation shall be a percentage of the amount of the estate accounted for, and that extra compensation may be allowed for extraordinary services, the extra allowance is in the discretion of the lower court; and where the administrator was awarded \$50 as extra compensation for maintaining a suit resulting in the recovery of \$10,000, and the consequent enhancement of his statutory allowance, the extra compensation was sufficient.

6. An administrator retained an attorney to assist in settling the estate, and to act as counsel in a suit on behalf of the estate to collect \$30,000. Recovery being doubtful, an agreement was made that the attorney should receive a liberal fee, if successful; otherwise that he should be paid only actual expenses. The amount recovered was \$10,000. Hill's Ann. Laws, § 1178, provides that an administrator shall be allowed all necessary expenses, including reasonable attorney's fees, in any necessary litigation or matter requiring legal advice. *Held*, that an allowance of \$2,000 as expenses for total legal services was reasonable.

7. Where several counsel are unnecessarily employed in the settlement of an estate, credit should not be allowed for the fees of more than one.

Appeal from circuit court, Grant county; Morton D. Clifford, Judge.

Final accounting of W. J. Galbraith as administrator of the estate of John McCullough, deceased. From a decree modifying an order of the county court made on the trial of objections filed by Jennie Muldrick and another to certain items of the account, the administrator appeals. Modified.

This is an appeal from a decree modifying an order of the county court of Grant county, made in settling the defendant's final account as administrator. The facts are: That on June 11, 1894, John McCullough died testate, leaving an estate in Washington county, Idaho, of the probable value of \$100,000; and, his last will and testament being admitted to

probate in that county, Rebecca J. McCullough, his widow, was appointed, and thereupon duly qualified, as executrix thereof. That the deceased also left an estate in Grant county, Or., and on October 14, 1894, the county court thereof appointed W. J. Galbraith administrator, with the will annexed, and he thereafter duly qualified as such. That the assets of the estate in the latter county consisted principally of a debt due from one John Muldrick, who, as the financial agent of the deceased in his lifetime, had received large sums of money to the use of his principal, but upon Galbraith's appointment Muldrick informed him and the persons who were appointed appraisers that he was not indebted to, but that the estate owed him about \$3,000. Galbraith thereupon employed Thornton Williams as his attorney, and together they went to Weiser, Idaho, to consult with the executrix in relation to the matter, and, after examining the books of account kept and other memoranda left by the deceased, as well as letters written to him by Muldrick, acknowledging the receipt and collection of certain sums of money to the use of the deceased, an action was commenced against Muldrick by Galbraith in his representative capacity to recover the sum of \$31,450.92, the amount claimed to be due from Muldrick to the deceased, as ascertained from an inspection of the books, letters, etc. That Muldrick, after denying the material allegations of the complaint, averred in his answer that he had an accounting and settlement with the deceased, upon effecting which there was found to be due to the latter the sum of 25 cents, which he then paid, and thereafter the deceased became indebted to him in the sum of \$2,990.64, for which he prayed judgment against the estate. The reply having put in issue the allegations of new matter contained in the answer, a trial was commenced, and, after Galbraith had introduced his evidence, and rested, a stipulation was entered into under the terms of which a judgment for the sum of \$10,000 was rendered against Muldrick. That Galbraith, having fully administered the estate under his charge, filed his final account, showing that he had collected the sum of \$10,373.99; that he had paid out a portion of this amount in the discharge of his duties, and, having a certain sum on hand, prayed that it might be applied to the payment of his charges and expenses as administrator, including the claims of Thornton Williams as his attorney, and that the remainder might be paid to the executrix. That Margaret Wood and Jennie Muldrick, heirs of the deceased, filed objections to certain items contained in this final account, to which Galbraith answered, showing the reasonableness of said charges, and, a reply to the answer having been filed, the cause was referred to W. J. Coleman, who took and reported the evidence, from which the county court made its findings upon the matters in issue, and rejected the following items of the

account: (1) To expenses incurred by Galbraith on a journey from Canyon City, Or., to Weiser, Idaho, and return (several items), \$24.05. (2) To amount paid by Galbraith for lumber at the request of the deceased, \$285. (3) To two trips to Weiser prior to his appointment as administrator, \$120. (4) To expenses of McCullough on a journey to Coeur d'Alene, paid by Galbraith, \$100. (5) To advice from and service by Thornton Williams in making the inventory, \$25. Upon the remaining items to which objections were made the court allowed them in part only as follows: (6) To expenses and time of Galbraith on a trip to Weiser with Williams, \$100, and another trip there after witnesses, \$30, total for the two trips, \$130; amount allowed, \$60. (7) To additional compensation for extra services as administrator, \$500; allowed, \$50. (8) To trip to Weiser by Williams, advice and service in preparing statement of claim against Muldrick, filed with inventory, \$250; \$60 allowed. (9) To services rendered in procuring evidence and conducting the trial in the action of Galbraith against Muldrick, \$2,500; \$1,000 allowed. (10) To services in settling up the estate, \$400; amount allowed, \$100. The final account was thereupon approved with these exceptions, and it was decreed that the administrator should be discharged upon his payment to the executrix of the sum of \$8,303.38, which he then had on hand. From this decree the administrator and said heirs appealed to the circuit court, which found, as to the ninth item, that the sum of \$150 had been paid by the administrator to local attorneys as their fees in the trial of the case of Galbraith against Muldrick, and thereupon reduced the amount so awarded to Williams to \$850, thereby increasing the amount to be paid to the executrix, but otherwise affirmed the decree of the county court, and from this latter decree the administrator appeals to this court.

James A. Fee, for appellant. M. W. Smith and C. A. Sweek, for respondents.

MOORE, C. J. (after stating the facts). The only questions presented for consideration by this appeal are whether the items contained in the final account of the administrator to which objections have been made are proper charges against the decedent's estate in Grant county, and, if so, are they reasonable in amount? Considering the items objected to in their order as numbered, it appears that the county court allowed on account of the sixth item the sum of \$30 per trip as expenses by Galbraith in making the journey from Canyon City, Or., to Weiser, Idaho, and return, and, as the first item of \$24.05 is apparently embraced in that allowance, we think said first item was properly rejected. The deceased being the owner of a tract of land in Grant county, Galbraith, at his request, purchased for him a quantity of lumber to build a house thereon, paying there-

for the sum of \$285; but, the deceased having given this land to Galbraith, who was his nephew, and executed a deed to him therefor, the house was not erected, and, the lumber having been considerably damaged, Galbraith, after his appointment as administrator, sold it for the sum of \$80. Jennie Wood, a niece of the deceased, having been called as a witness on behalf of the objectors, in answer to a question as to what statements she had heard John McCullough make in regard to the lumber in question, said, "I have heard my uncle say a number of times that he never ordered any such bill of lumber." Galbraith, however, testified that after he had ordered the lumber, in pursuance of McCullough's request, the latter, thinking the house would be too large, and cost more than he desired to expend in its construction, objected to the size of the material, but, after inquiring as to the size and probable cost of a house in the vicinity, he concluded to accept the lumber, and it was thereupon hauled to and stacked in a shed on the premises. Comparing the testimony of Jennie Wood with that of Galbraith, the reason for McCullough's statement, as testified to by her, is apparent, and, while the deceased may never have ordered such a bill of lumber, he did ultimately ratify the order as given by Galbraith, and, such being the case, we think it conclusively appears that the estate is liable for the cost of the material, and should be credited with the amount received on account of the sale thereof. Galbraith made two trips to Weiser prior to his appointment as administrator, the first at the request of the deceased and the second at the suggestion of the executrix, for which he charges the estate \$120. It does not conclusively appear that McCullough promised to pay his nephew anything for making the first journey, and, in view of the relation existing between them, we think the county court properly rejected that part of the third item; but we believe Galbraith is entitled to the sum of \$30 on account of the trip he made at the suggestion of and to consult with the executrix as to the proper management of the estate. It appears that Galbraith's brother was murdered at Coeur d'Alene, and, desiring to visit that place, to look after his brother's estate, he persuaded McCullough to accompany him, paying the latter's expenses, amounting to the sum of \$100, which McCullough agreed to repay. This journey, in our judgment, was made by McCullough for the accommodation of Galbraith, whose wife objected to his visiting the scene of the killing of his brother unless his uncle accompanied him; and, notwithstanding McCullough agreed to pay his own expenses incurred on the trip, we think they do not constitute a legal charge against his estate, and hence the county court properly rejected the fourth item. It also appears that the fifth item of \$25, for the services of an attorney in making an inventory, was disallowed; but, when it is remembered that this charge is made for the attor-

ney employed in the settlement of the estate, we cannot see that any very grave error was committed in rejecting it. While it might aid a county court in reaching a proper conclusion as to what would be reasonable compensation for an attorney in the settlement of an estate, and particularly so when the services performed have been rendered by different attorneys, to have each present an itemized account of his part of the work, when it appears that one attorney performed all the services, or was the senior counsel in the management and settlement of an estate, the reason for the course suggested must necessarily cease, and the attorney fee allowed in such case may be a gross sum, measured by the services performed, while taking into consideration the value of the estate involved, as well as the ability of the person by whose counsel and labors the same has been brought to a successful and final settlement.

Examining those items of the final account which were allowed in part only, it appears that Galbraith charges the sum of \$100 for expenses incurred and time employed in making a journey to Weiser, Idaho, while as a part of the same item he charges only \$30 for the time employed in making another trip to that place. The evidence tends to show that the expenses incident to the journey do not necessarily exceed the sum of \$30; and, the county court having allowed \$60 as a reasonable charge for making the two trips, we think no error was committed in modifying the sixth item. It also appears that Galbraith, having received the sum of \$352.19 as the commission prescribed by law, demanded the further sum of \$500 as extra compensation for his services as administrator, but the county court allowed on account thereof the sum of \$50 only. The statute, after prescribing the commission which an administrator or executor is entitled to receive, also provides that: "In all cases, such further compensation as is just and reasonable may be allowed by the court or judge thereof, for any extraordinary and unusual services, not ordinarily required of an executor or administrator in the discharge of his trust." Hill's Ann. Laws Or. § 1180. The county court, under this provision, after awarding Galbraith the sum of \$60 on account of expenses incurred in making two trips to Weiser, Idaho, also allowed him the sum of \$50 as extra compensation, so that the total so received by the administrator amounted to the sum of \$462.19. The allowance to an administrator of extra compensation for services rendered in the discharge of his duties must necessarily be a matter largely within the discretion of the county court, which, being conversant with the services required, as well as those performed by its appointee, can ordinarily be relied upon to make a fair allowance for unusual services; and, such being the case, the amount so awarded ought not to be disturbed on a review of its acts on appeal, unless it clearly appears that there has been a manifest abuse of discretion, or that the amount allowed was

disproportionate, or not equivalent, to the services performed. "The fees provided by statute," says Bean, J., in *Steel v. Holladay*, 20 Or. 462, 28 Pac. 562, "are to be deemed ample compensation for an executor, except in unusual cases, and when he is required to render extraordinary services not ordinarily required of an executor. His additional compensation, if any, is within the discretionary power of the court to allow; and when a claim is made therefor it should be scrutinized with care, and never allowed unless the court is satisfied that it is just and reasonable." It is true, the administrator instituted an action, and thereby recovered the amount so obtained by him which furnished the greater portion of the assets of the estate upon which his commission was predicated, and without it his compensation would have been nominal; so that, while he may have been compelled to perform extra duty, we think the county court allowed him a reasonable compensation therefor. The claim of the administrator on account of the charge of Thornton Williams for \$250, under the eighth item, was reduced by the county court to \$60, no doubt intending thereby to reimburse the attorney for the expenses incurred, and to adjust his compensation under the general claim therefor. This being so, what has hereinbefore been said in discussing the fifth item may apply with equal force to this, and, adopting the rule there announced, we think no error was committed in not allowing a greater sum. The charge, under the ninth item, for an attorney fee for prosecuting the action of Galbraith against Muldrick, furnishes the principal issue in the case before us. The evidence tends to show that it was quite doubtful, when the action was commenced, whether any sum whatever could be recovered from Muldrick, because it was difficult to say with any degree of certainty what amounts, if any, he had paid on account of the money received by him to the use of the deceased. In this uncertain condition of affairs, Galbraith entered into a contract with Williams, by which it was agreed that, if the result proved unsatisfactory, he should receive his actual expenses only, but, if he should be successful in the action, and thereby obtain a considerable amount, he was to receive a liberal fee. This agreement presents the question whether its terms can be enforced, and, if so, what is a reasonable attorney fee under the circumstances. The statute provides that: "An executor or administrator shall be allowed, in the settlement of his account, all necessary expenses incurred in the care, management, and settlement of the estate, including reasonable attorney fees in any necessary litigation or matter requiring legal advice or counsel." Hill's Ann. Laws Or. § 1178. That the action against Muldrick was necessary is evident from his declaration that he was not indebted to the estate, and this statement is made more emphatic by his verified answer to the effect that the estate was indebted to him in the sum of \$2,989.64. The administrator, however, could not, under

this statute, bind the estate to pay for the services of an attorney any more than they were reasonably worth, for the rule appears to be pretty well settled that a person acting in a representative capacity cannot create a charge against the estate over which he has control, except as specially authorized by statute, or to reimburse himself for moneys necessarily expended in protecting the property intrusted to him. *Weaver v. Van Akin*, 71 Mich. 60, 38 N. W. 677; *Noyes v. Blakeman*, 6 N. Y. 507. The contract entered into with Williams is, in effect, to pay him what his services were reasonably worth, and, being contingent upon a recovery, the question to be considered is whether the allowance by the circuit court fills the measure of the contract. In taking the deposition of Hon. H. H. Northup, county judge of Multnomah county, upon that subject, the following question was propounded to him: "In case the fee was contingent, what, in your judgment, would be a reasonable charge?" To which he answered: "It is usual, where the fee is contingent, for the parties to agree upon the amount to be paid. If, however, it was the understanding that no fee was to be paid unless the plaintiff in the suit was successful, and no price was stipulated to be paid, I would say that \$1,500 or \$2,000 would be reasonable." Further testifying, this witness says: "Of course, it is not possible for me to answer as definitely as I would like to. If the attorney was required to visit different localities, remote from his residence and place of business, and was required to pay his own expenses, of course that would add to the charge that he should make, and the amount he was to be paid. If the understanding was that he was to receive no compensation unless recovery was had, and he was to be well paid in case of recovery, and a recovery of \$10,000 was had, I don't know that \$2,500 would be an excessive fee; but I think that \$2,000 would be a fair compensation. If the estate was before me, I would settle the claim at \$2,000 rather than \$2,500." This witness is corroborated by the testimony of John F. Caples, W. W. Thayer, ex chief justice of this court, attorneys of the city of Portland, and also by J. C. Moreland, ex county judge of Multnomah county; John J. Ballreay and James A. Fee, ex circuit judges, and by M. Dustin and T. G. Halley, the latter of whom say that the fees of an attorney in the eastern part of this state are greater than in the city of Portland, and that \$2,500 is not an unreasonable sum to be paid for the services rendered. In view of this evidence, we think the circuit and county courts are in error in fixing the compensation for the services performed in the trial of said action. It is true, the action was not brought to recover unliquidated damages, in which case a large percentage of the amount recovered is usually demanded as attorney's fees; but, while the action involved the recovery of a sum that could be reduced to a mathematical certainty, this amount was uncertain, and

must necessarily remain so until Muldrick submitted in evidence the payment he had made on account of the money received by him. The evidence of the attorneys called as experts tends to show that an attorney employed to settle an estate would probably become more conversant with the facts, and could try an action in which the administrator was a party cheaper than a stranger to the proceedings; and, this being so, we believe that the sum of \$2,000 affords a reasonable compensation as attorney's fees for the trial of the action and the settlement of the estate. "Where several counsel," says Mr. Woerner in his work on the American Law of Administration (section 515), "are employed, credit should not be allowed for the fees of more than one;" citing in support thereof the case of *Crowder v. Shakelford*, 35 Miss. 321, in which it appears that, competent counsel having been retained to try a suit, others were thereupon engaged to assist. Handy, J., rendering the opinion of the court, says: "As to the disallowance of the fees paid in the suits against Mrs. Stokes, it appears that the fee paid one counsel was allowed; and there appears to have been no necessity for the employment of additional counsel, as the cases were not litigated. The claim on this account was, therefore, properly rejected." The rule thus laid down cannot well apply where different attorneys have necessarily been employed to perform separate parts of the service demanded, in which case the fees would be proportionally greater than if the entire service was rendered by the same attorney. In view of this rule, we have considered the sum of \$2,000 as a reasonable compensation for the whole service, and, as there has been paid by the administrator to Parrish & Cozad \$25, and to M. Dustin \$150, as attorney's fees, the remainder, or \$1,825, is deemed a reasonable fee for the service performed by Williams; but, having received from the administrator the sum of \$520 on account thereof, there is yet due him the further sum of \$1,305. This is in addition to the payments of \$13 and \$25, respectively, made to him on account of collections of money due the estate, and the sum of \$60 on account of his expenses. The conclusion we have reached renders it unnecessary to pass upon the sum awarded under the tenth item, which is embraced in the amount herein awarded. The decree, in so far as it relates to the attorney fee due Thornton Williams and the amount to be paid to executrix, will therefore be modified in accordance with this opinion, but in all other respects affirmed.

STATE v. SARGENT.

(Supreme Court of Oregon. July 31, 1897.)

ASSAULT WITH INTENT TO RAPE—AGE OF CONSENT—RES GESTÆ—HEARSAY.

1. In proof of an assault with intent to rape, the mother of prosecutrix may testify as to her manner and appearance, and the condition of her

person, shortly after the alleged assault, and to the fact that she made a disclosure.

2. Such evidence is admissible although prosecutrix is a child of tender years.

3. It is error, however, to permit the mother to relate what the daughter and a companion told her touching the particulars of the alleged assault.

4. Since Hill's Ann. Laws, § 1733, which, as amended by Sess. Laws 1895, p. 67, makes it rape to have carnal knowledge of a child under 16 years of age, and section 1740, providing for punishment for an assault with intent to rape, were enacted at the same time, they will be interpreted in pari materia, and accordingly one may be guilty of an assault with intent to rape a child under 16 years of age who consented.

Appeal from circuit court, Morrow county; Stephen A. Lowell, Judge.

Chet Sargent appeals from a conviction of assault with intent to rape. Reversed.

G. W. Rea and H. S. Wilson, for appellant. H. J. Bean, for the State.

WOLVERTON, J. The defendant was indicted and convicted of an assault upon Bessie Robbins, a female child of the age of eight years, with intent to commit a rape. The child testified as a witness for the state, in substance, that one Grace Casey was with her at the time of the alleged assault; that they went directly from the place of the assault to where the Casey girl's mother lived, in the same block, and that Grace related to her mother what had transpired; that they went from there to where Mrs. Robbins, the mother of Bessie lived, also in the same block, and that Grace told Mrs. Robbins what had happened. Grace Casey corroborated Bessie, and thereupon Mrs. Robbins was called and testified, over the objection of the defendant, that Grace told her what had happened while Bessie was standing by; that Bessie, when asked if what Grace said was true, ran out of doors, and hid behind the house, and then into the bedroom, and hid under the bed, and, upon being persuaded to come out, that she then told the same story as had been just related by the two girls. She further testified that she immediately made an examination of the child, and found her all right. Error is predicated upon the action of the court below in permitting Mrs. Robbins' testimony to go to the jury. What Bessie Robbins and Grace Casey told her touching the acts and demeanor of the defendant towards Bessie cannot be considered as part of the res gestæ constituting the alleged assault. True, the disclosure was made soon after the alleged assault, but what she learned from the girls was simply hearsay, a narration of the past event, and not the language of emotion caused by the supposed occurrence. The rule, however, is well established that hearsay evidence in such instances is permissible, but the authorities are divided as to its limits. Without undertaking at length the reasoning upon which they diverge and are controlled, we think the better rule to be that which confines such testimony in the first instance or in chief for the state to the fact that the in-

jured party made recent complaint of the act charged, to evidence of her state and appearance, marks of violence, and the condition of her apparel shortly after the alleged occurrence. Such authorities justify the admission of the testimony of third parties to the fact that the prosecutrix made recent complaint upon the ground that it is the natural instinct of an outraged female to make immediate disclosure thereof to a near relative or confidential friend; and, inasmuch as her failure to do so would tend to discredit her as a witness, the prosecution is permitted to anticipate such a claim by affirmative proof that complaint was made. So it is that evidence of the fact that she made such complaint, as well as of her manner and appearance when made, is admitted as corroborative of her testimony touching the crime charged. *Baccio v. People*, 41 N. Y. 265; *Parker v. State*, 67 Md. 329, 10 Atl. 219; *Pefferling v. State*, 40 Tex. 486; *Proper v. State* (Wis.) 55 N. W. 1035; *Thompson v. State*, 38 Ind. 39; *State v. Shettleworth*, 18 Minn. 208 (Gil. 191); *State v. Richards*, 33 Iowa, 420; *Stephen v. State*, 11 Ga. 225; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691; 3 Rice, Ev. 834, 835; *Oleson v. State*, 38 Am. Rep. 366. Nor does the rule seem to be different where the prosecutrix is a child of tender years. *State v. Tom*, 8 Or. 180, and *People v. McGee*, 1 Denio, 19. In the case at bar, Mrs. Robbins, by a sweeping sentence, in effect testified to all that the two girls had told her concerning the alleged assault upon Bessie by the defendant, and under the rule it was error to permit it. This could not be deemed less than a repetition of the children's narrative of the occurrence, and therefore subject to the very pertinent objection that it was hearsay. It was proper for the mother to testify to the fact that Bessie had made the disclosure, and to describe her manner and appearance at the time, and the condition in which she found her person upon the examination made, but not to relate what the girls had told her touching the particulars of what transpired relative to the alleged assault. For this error the case must be reversed.

We will notice but one other assignment, as the case must go back, and the other questions urged here are not likely to arise upon a retrial. It is strenuously urged by the counsel for the defendant that there can be no assault with intent to commit a rape where the female consents, even though she be under the age of 16 years. The statutory crime of rape is thus defined: "If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female such person shall be deemed guilty of rape." Section 1733, Hill's Ann. Laws Or., as amended (see Sess. Laws 1895, p. 67). Section 1740, Hill's Ann. Laws Or., provides for the punishment of any person found guilty of an assault with intent to commit a rape. It is the theory of counsel that these sections

of the statute do not fix the age of consent, except as it pertains to carnal knowledge; in other words, that if the act of carnal knowledge had been consummated with the consent of a female under the age of 16 years, it would make no difference whether she consented or not, the crime of rape would nevertheless be the result of such coition; but not so with an assault with intent to commit the crime, as the statute has not fixed the age of consent with reference to that offense. In this we cannot concur. It is rape for a person above the age of 16 years to carnally know any female child under that age, and this without the use of force. Now, when the legislature established the additional crime of assault with intent to commit a rape, it evidently had in view the crime of rape as defined by the original section 1733, of which the present is amendatory. In fact, both sections were enacted at one and the same time, and should, under a well-settled rule, be interpreted in pari materia. Hence the word "rape," as used in the latter section, must be deemed to have been used in the sense in which it is defined by the former, and it must be taken as if its definition is read into the latter section. In this view of the matter there is no difficulty in reaching the conclusion that nonconsent of a female child under the age of 16 years when assaulted by a person above that age with intent to commit a rape is no more an essential or an ingredient of the one crime than the other. One involves the completed act, the other the intent to consummate such a purpose; and if consent is immaterial upon a charge of committing the completed act, which necessarily includes an assault, no reason exists why it should not be so upon a charge of an assault with intent to accomplish the same purpose. *Com. v. Roosnell* (Mass.) 8 N. E. 747. The law has determined that a female child under the age denominated is incapable of consenting. It is as though she had no mind upon the subject, no volition pertaining to it. There is a period in child life when in reality it is incapable of consenting, and the legislature has simply fixed a time, arbitrarily, as it may be, but nevertheless wisely, when a girl may be considered to have arrived at an age of sufficient discretion, and fully competent to give her consent to an act which is a palpable wrong, both in morals and in law. Under these conditions, while a girl may give her formal and apparent consent, yet in law she gives none. The evidence of such consent is withheld, and rendered wholly incompetent for the establishment of such a fact, as in law the fact itself does not exist. Looking at the question in this light, it is easy to comprehend the legal and logical conclusion that an assault with an intent to commit a rape is as much without the consent of a girl under the age of 16 years, although she formally yields concurrence, as that the commission of rape is without her consent under like acquiescence. This conclusion is supported by many cases, and we

believe it to be the better doctrine, although some authorities are to be found on the contrary. See *Com. v. Roosnell*, supra; *Murphy v. State*, 120 Ind. 116, 22 N. E. 106; *State v. Grosshelm* (Iowa,) 44 N. W. 541; *People v. Courier* (Mich.) 44 N. W. 571; *People v. McDonald*, 9 Mich. 150; *People v. Goulette* (Mich.) 45 N. W. 1124; *Proper v. State*, supra; *Davis v. State* (Neb.) 47 N. W. 854; *Comer v. State* (Tex. Cr. App.) 20 S. W. 547; *Hays v. People*, 1 Hill, 351. The judgment of the court below will be reversed, and the cause remanded for such other proceedings as may seem pertinent, not inconsistent with this opinion.

CARNAGIE et al. v. DIVEN et al.

(Supreme Court of Oregon. July 31, 1897.)

VOLUNTARY CONVEYANCES—CANCELLATION—MENTAL INCAPACITY—PLEADING.

1. Neither a grantor nor his heirs can impeach a conveyance as voluntary unless at the time the conveyance was executed the grantor was in such a state of mental weakness as to be incapable of fully understanding the nature and effect of the transaction.

2. Want of capacity to execute a conveyance cannot be presumed from the grantor's extreme age.

3. A complaint of heirs to set aside a deed of their ancestor on the ground of his incapacity is insufficient, where it alleges that he died the day after the execution of the deed, and "that prior to the time of his death, and immediately before said time," he was incapacitated from conveying his property, as it fails to show that he was incapacitated at the time the deed was executed.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by George M. Carnagie and others against Ambrose P. Diven and others. From a decree for defendants, plaintiffs appeal. Affirmed.

This is a suit by the heirs of John Campbell to set aside a conveyance executed by him to the defendant Ambrose P. Diven. The plaintiffs allege that on October 22, 1892, Campbell was the owner in fee of 320 acres of land in Baker county, of the value of \$4,500, which on that day, for the expressed consideration of said sum, he purported to convey to Diven; that on the next day Campbell suddenly died intestate, at the age of 83 years, leaving in said county an estate which has been duly administered upon, the debts fully paid, and the administrator discharged; "that prior to the time of his death, and immediately before said time, the said John Campbell was very feeble in body and mind, occasioned by his extreme old age, and entirely unable to intelligently contract or perform any business; that Diven and his wife, well knowing Campbell's infirmities and his consequent inability to enter into a contract or transact any business, took advantage of their knowledge and his enfeebled condition, and by falsely representing that they would care for and support him during his lifetime, pay him the sum of \$2,500, and build on said

real property a comfortable dwelling house, to cost not less than \$1,200, induced him to execute the deed in question, but neither Diven and his wife intended to keep or perform any of said promises or representations, nor did they intend to pay Campbell at any time, nor have they ever paid any one, any consideration whatever for said real property." The plaintiffs show their right to inherit the decedent's property if no conveyance thereof had been made, and pray for the relief hereinbefore stated. The court having sustained a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit, the plaintiffs refused to plead further, whereupon the suit was dismissed, and plaintiffs appeal.

J. B. Messick, for appellants. F. L. Moore, for respondents.

MOORE, C. J. (after stating the facts). The important question raised by the demurrer is whether the complaint states sufficient facts to entitle the plaintiffs to the relief demanded. Every person of lawful age who is seised of real property in this state may dispose of his interest therein agreeably to his wishes, and, in the exercise of this right, may make a voluntary conveyance thereof binding upon the parties thereto. *Bradtfeldt v. Cooke*, 27 Or. 184, 40 Pac. 1. And while his creditors, acting on the theory that the debtor should be just before he is generous, may have such conveyance set aside as being in fraud of their rights, and thereupon have the property affected thereby applied to the satisfaction of their liens upon it, neither the grantor nor his heirs will be permitted to impeach the transfer unless it appears to the satisfaction of a court of equity that at the time the conveyance was executed the grantor was laboring under such a state of mental weakness or exaltation as to be incapable of fully understanding the nature and effect of the transaction. *Allore v. Jewell*, 94 U. S. 506; *Griffith v. Godey*, 113 U. S. 89, 5 Sup. Ct. 383; *Jackson v. King*, 15 Am. Dec. 354; *Dennett v. Dennett*, 84 Am. Dec. 97. It has been held by this court that, where the consideration paid for land was grossly inadequate, equity would afford relief and set aside the conveyance when it satisfactorily appeared that the grantor at the time the deed was executed was of such weak understanding as to be incompetent to transact business. *Scovill v. Barney*, 4 Or. 288; *Archer v. Lapp*, 12 Or. 196, 6 Pac. 672. The plaintiffs having alleged that the grantee never paid or intended to pay any consideration whatever for the land in question, it was not incumbent upon them, as a condition precedent to the right of cancellation of the deed, to aver a tender of, or a readiness to repay, the purchase price; and hence the sufficiency of the complaint must be measured by the allegation of Campbell's mental infirmity at the time the conveyance was executed. Capacity to convey real prop-

erty must be equivalent to ability to devise the same, in which case the state of the testator's mind is determined by its condition at the time the instrument was executed. *Clark's Heirs v. Ellis*, 9 Or. 123. "For the sole question," says *Williams, J.*, in *Kinne v. Kinne*, 9 Conn. 102, "is, what was his state of mind at that time? Had he then an understanding of the nature of the business he engaged in, a recollection of the property he meant to dispose of, and of the persons to whom he meant to convey it, and the manner in which he meant to distribute it between them?" In *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6, it was held that neither old age, sickness, nor extreme distress or debility of body incapacitates, provided the testator has possession of his mental faculties and understands the business in which he is engaged. It is nowhere alleged in the complaint that Campbell had been adjudged insane prior to the execution of said deed, so that the condition of his mind would be presumed to continue, and his lack of power to execute a conveyance cannot be inferred from his extreme age. It was incumbent upon the plaintiffs to prove at the trial the state of his mind at the time the deed was executed, and, if they would avoid its effect, they should have alleged that he was incapacitated at that time. An examination of this allegation as above quoted will show that there is an entire failure in this respect. "That prior to the time of his death" may mean some time anterior to the execution of the deed, "and immediately before said time" may also mean at any time subsequent to the conveyance; so that the averment may be strictly true, and still the grantor may have been in the full possession of his mental powers at the time the deed was executed. The complaint, being defective in this regard, failed to state facts sufficient to constitute a cause of suit; and, this being so, the court committed no error in sustaining the demurrer, and hence the decree is affirmed.

(15 Utah, 225)

BECKER v. MARBLE CREEK IRR. CO.
et al.¹

(Supreme Court of Utah. July 16, 1897.)

APPEAL—AMENDMENTS—IRRIGATING RIGHTS—APPROPRIATION—ABANDONMENT.

1. Where, from an examination of the record, it appears that plaintiff had a primary right to use sufficient water of a certain creek for irrigating certain lands, and no abandonment of such right, as contemplated by the statute, was shown by defendants, the supreme court may so modify the decree of the trial court as to make it comply with the showing made in the record of the case, and award to plaintiff an equitable portion of the water in dispute.

2. A prior appropriator of water of a certain stream cannot so increase his demands and use of the water as to deprive a subsequent appropriator of his rights acquired before such increased demands and use.

3. An appropriator who permits a part of the water to run to waste, or fails to use a

¹ For modification on motion for rehearing, see 49 Pac. 1119.

certain portion of it for some beneficial purpose, is only entitled to that part of the water actually applied to a beneficial use.

Zane, C. J., dissenting.
(Syllabus by the Court.)

Appeal from district court, Box Elder county; C. H. Hart, Judge.

Action by Jerry Becker against the Marble Creek Irrigation Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

L. R. Rhodes, for appellant. Evans & Rogers, for respondents.

CHERRY, District Judge. This is a decree of the First judicial district court of Box Elder county, giving the defendants all the waters of Marble creek, in that county, for irrigation purposes. The defendant company was organized in 1893 for the purpose of controlling and distributing so much of the water of said creek as might be necessary for the irrigation of the defendants' lands. The record shows that Marble creek has its source in the mountains above Park valley, through which it flows about 10 miles; that the defendants own and occupy a number of small farms, aggregating about 900 acres, which they irrigate with its waters; that the plaintiff occupies 160 acres of meadow lands, situated from 4 to 5 miles below the lands of the defendants, about 100 acres of which he alleges has been irrigated by himself and through his predecessors in interest, from the waters of said creek, for about 30 years. The defendants deny the appropriation by the plaintiff and his grantors, and claim by way of cross complaint that they and their grantors have used all the waters of said creek for about 26 years, except the overflow during high water. The case was tried by the court, and the decree entered on the 30th day of June, 1896. The testimony on some of the facts material to support the decree was contradictory and unsatisfactory, but there seems to be little or no dispute upon the vital issue of plaintiff's right to use a sufficient amount of said water for the purposes for which he claimed it. The uncontradicted evidence showed that plaintiff's land produced wild and tame grasses when sufficiently watered; that the defendants, since their appropriation of the said waters, have been gradually increasing the number of acres to be irrigated, thus requiring a corresponding increase in the quantity of water, all of which came from the waters of said Marble creek; that some of the defendants permitted large quantities of water to be wasted by suffering it to flood the roads, and flow into unused lands; that the plaintiff needed the water for irrigating in the early part of the season, viz. May, June, and forepart of July. The evidence also shows, and it is virtually conceded in the ninth finding of fact by the court, that in those months there is a surplus of water in said creek; that sufficient water came down said creek in the natural channel on the

months above mentioned to supply the plaintiff's wants until by the gradual increase of the defendants' acreage they used practically all of the water, and that thereafter plaintiff's farm decreased in the production of its usual crop. While there may be some difficulty from the conflicting evidence to determine which of these parties were the prior appropriators of water at regular periods, yet we think it is plain that, even conceding the defendants were, prior to the year 1883, and including that year, and since, the plaintiff became the next subsequent appropriator, using the water not appropriated by the defendants, and that his present lack of water is caused by the defendants increasing their demand until they use all the water in the stream, and thus totally deprive the plaintiff of whatever rights he had acquired in 1883, by his appropriation. In the arid region water is life, and it is too precious an article to be permitted to run to waste. The great weight of modern authority is to the effect that when an appropriator permits part of the water appropriated to run to waste, or fails to use a certain portion of it for some beneficial use or purpose, he can only hold that part of the water which has been actually applied to a beneficial use, and his right is limited to the quantity so used. *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Combs v. Ditch Co.*, 17 Colo. 146, 28 Pac. 966. The mere fact that the defendants had secured control of all the water through a so-called "saving ditch" would not give them the absolute right to deprive a subsequent appropriator of such quantity as they did not put to a beneficial use. *Fort Morgan Land & C. Co. v. South Platte Ditch Co.* (Colo. Sup.) 30 Pac. 1032; *Reservoir Co. v. Southworth* (Colo. Sup.) 21 Pac. 1028. The awarding of a priority in excess of the amount actually appropriated for a beneficial use at the time is error. The saving ditch was constructed at a time when the plaintiff, or his predecessors, was using part of the water. It diverted all the water from the natural channel for some distance, and then discharged the overflow back into the channel. This could give to defendants only such increase or saving of the volume of the stream as was occasioned by the construction of the ditch; and whatever rights the plaintiff had acquired in the waters of Marble creek prior to the construction of the ditch would not be impaired, even if he made no objection, or did not aid in its construction. Their relation to each other would be that of tenants in common respecting the waters of the stream, and a court of equity has power to ascertain and determine their respective rights as to the waters therein flowing. *Irrigation Co. v. Moyle*, 4 Utah, 327, 9 Pac. 867; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838; *Combs v. Slayton*, 19 Or. 90, 28 Pac. 661. The waters of a prior appropriator are fixed by the extent of his appropriation for a beneficial use, and others may subsequently appropriate any water of a

stream not so used by a prior appropriator; and such latter appropriation becomes a vested right, and entitled to as much protection as the former, and a right of which he cannot be deprived except by voluntary alienation, or forfeiture by abandonment. The rights of the former being thus fixed, he cannot enlarge his rights to the detriment of the latter by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose. *Lobdell v. Simpson*, 2 Nev. 274; *Water Co. v. Powell*, 34 Cal. 109; *Gould, Waters*, § 231; *Kin. Irr.* §§ 175, 176; *Salina Creek Irrigation Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac. 578. In the case at bar the findings of the lower court admit of a surplus of water during the early part of the season, ending in the month of June, and at a time when the plaintiff most needed the water; yet in the decree the court decides that the defendants have a prior right to use sufficient of the waters of Marble creek to irrigate 1,000 acres of land; thus by order of court permitting an enlargement of defendants' rights to the extent of 100 acres from the amount of acres now farmed by them, and that at a time of year when there is a surplus of water. We are led to the conclusion that the trial court erred in rendering the decree, and we are of the opinion that the same should be modified so as to give to plaintiff an equitable portion of the water in dispute, viz.: That the plaintiff be decreed to have the uninterrupted flow of said stream in its natural channel at stated periods of 48 hours each, commencing at 12 o'clock noon with the 10th day of May, the 25th day of May, the 10th day of June, the 20th day of June, the 1st day of July, and the 10th day of July in each year; and that the plaintiff be decreed the right to use for irrigation purposes all surplus or overflow waters of said Marble creek during the months of April, May, June, and July of each year.

From an examination of the record, it appears that the preponderance of the evidence establishes the fact that the plaintiff had a primary right to use sufficient of said waters for the purposes of irrigating his meadow land, and no abandonment of such right, as contemplated by our statutes, was shown by the defendants. The case is remanded, with instructions to the trial court to enter up a decree in accordance with the views herein expressed, and that each of the parties be enjoined from interfering with the rights of the others as stated in this opinion, and that the plaintiff recover his costs.

MINER, J., concurs.

ZANE, C. J. (dissenting). The plaintiff alleged in his complaint that about 30 years ago he appropriated enough of the waters of Marble creek to irrigate 100 acres of land, and that he had never abandoned his appropriation. This allegation the defendants denied, and filed a cross complaint against the

plaintiff, in which they alleged that they and their grantors had used all the waters of the creek for about 26 years, except the overflow during high water caused by melting snow or heavy rains for short periods. A large number of witnesses testified on both sides of these issues. The trial court, after hearing all the evidence, found for the defendants to the original complaint and for the plaintiff to the cross complaint. It must be conceded that the evidence was very conflicting and unsatisfactory, and reasonable men, after considering it, might differ as to the side on which it preponderated. When the proof of any fact is so unsatisfactory and uncertain, this court has refused to reverse. The trial court hears the witnesses in a case like this, and observes their appearance and demeanor on the stand, and has better opportunity to judge of their credibility. I dissent from the judgment of the court reversing the judgment of the court below.

(15 Utah 463)

SCHROEDER v. KINNEY.

(Supreme Court of Utah. July 3, 1897.)

VENDOR AND PURCHASER—MORTGAGES—SURETYSHIP.

K., in part payment of purchase price, gave a mortgage to D. Before the maturity of the notes given with the mortgage, K. sold the property to O., who assumed the payment of the notes after their maturity. D., in consideration of an increase of the interest on the notes, extended the time of their payment without the consent of K., and the value of the mortgaged property depreciated from the time of such extension below the face of the mortgage debt. Held, that K., the mortgagor, was released from liability on the notes.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; before Justice Le Grand Young.

Action by A. T. Schroeder against Clesson S. Kinney and others. From a judgment against defendant Kinney, he appeals. Reversed.

Richard B. Shepard, for appellant. Moyle, Zane & Costigan, for respondent.

MINER, J. This action was brought to foreclose a mortgage given May 16, 1890, by Clesson S. Kinney and Antoinette B. Kinney, his wife, to A. R. Derge, to secure the payment of two promissory notes for \$375 each, made by Clesson S. Kinney to the order of A. R. Derge, due two and three years from date of mortgage, and given to secure the part payment of the purchase price of the property covered by the mortgage. The notes drew 10 per cent. interest per annum, payable quarterly from date, and the mortgage provided for the payment of 10 per cent. attorney's fee in case of failure to perform the conditions of the mortgage. On the 21st day of September, 1891, Kinney sold the land by contract to John Owens, and on September 26, 1891, Kinney and wife conveyed the mortgaged premises to John Owens by warranty deed, free from incumbrance, except this mortgage to A. R.

Derge for \$750, which Owens, the party of the second part, assumed by writing in the deed, and agreed to pay. On December 12, 1890, A. R. Derge assigned the notes and mortgage to H. Derge, without recourse. On September 20, 1894, H. Derge, by his attorney, A. R. Derge, assigned the note to A. T. Schroeder, the plaintiff, as trustee, by writing indorsed on the back of the mortgage. On December 12, 1890, H. Derge, of Wisconsin, appointed A. R. Derge, of Salt Lake City, his attorney, to assign and satisfy mortgages on record. A. R. Derge attended to all the business by direction of his father, H. Derge. This action was commenced November 20, 1894, asking a foreclosure of the mortgage as against C. S. Kinney and his wife, Antoinette B. Kinney, John Owens and his wife, Jane Owens, and a deficiency judgment against Clesson S. Kinney and John Owens; also a receiver, and 10 per cent. attorney's fee. Service was had on Owens and wife by publication only. They made no answer, and their default was duly entered. Antoinette B. Kinney answered separately, and disclaimed any interest in the property. C. S. Kinney answered, and alleged that on May 16, 1892, at the maturity of the first note, and on May 16, 1893, at the maturity of the second note, said A. R. and H. Derge, owners, extended the time of payment of said notes and mortgage for three months upon consideration of the payment of 12 per cent. interest per annum thereon instead of 10 per cent. per annum, as provided in the notes, which agreement was unknown to the defendant and without his consent; also that payment was extended on like consideration in November, 1892, February 16, 1893, May, August, and November, 1893, and February, May, and August, 1894, without his knowledge or consent; that the mortgaged premises were inadequate, and insufficient to pay the debt secured by the mortgage at the time the suit was brought, and from the times of such extensions of payment, but was sufficient to pay said mortgage debt at the time the notes fell due; and claimed a release by reason of such extensions of payment. Derge had notice that Owens had assumed the payment of the mortgage debt soon after he assumed its payment. The first note was due May 16, 1892; the second note was due May 16, 1893. Owens paid all the interest on the notes quarterly as it fell due up to and including August 16, 1894, and on November, 1894, he paid \$100 on the principal. All payments of interest commencing on August 16, 1892, up to August 16, 1894, were made at the rate of 12 per cent. per annum under agreement with A. R. Derge, in consideration of the extension of time of payment of the notes. Previous payments of interest were made by him at 10 per cent. per annum up to the maturity of the first note. Kinney testified that he was first informed that Derge looked to him for payment of the notes on September 22, 1893; that at this time, or soon after, A. R. Derge informed him that he had extended the time of

payment of the notes from the time they were due to September, 1893; that Owens did not pay the interest, and that he (Derge) looked to him (Kinney) for payment; that he refused to pay them because the time had been extended 1½ years on the first note without his consent; that in October, 1893, Derge informed him that he and Owens had gotten together, and fixed the matter up, and that he had given Owens another extension until next spring to pay the notes; that such extension was without his consent; that he told Derge to foreclose; that the mortgaged property was worth \$900 to \$1,000, May 16, 1892, and on August 16, 1894, it was worth only about \$500 to \$600.

The testimony of A. R. Derge, together with letters and receipts to Owens, shows that he had extended the time of payment of the first note from the time it was due until September 22, 1893, when he demanded payment from Kinney. He testified that at this time Kinney requested him to extend the payment of the notes, or allow Owens further time. This Kinney denies. Derge also says that about a month or so later Kinney informed him that he would not be liable on the notes by reason of the extension, and told him to foreclose. It is clear that shortly after this conversation Derge voluntarily extended the time of payment on both notes up to August 16, 1894, and as consideration for such extension received 12 per cent. interest on the notes, instead of 10 per cent., as provided in the notes, and that the value of the property had depreciated from \$300 to \$500. There is no testimony showing that Kinney consented to the extensions of time after September, 1893, when he informed Derge that he would not pay the notes, and asked him to foreclose. The testimony also shows that Derge extended the time of payment from maturity of the notes up to about September 22, 1893, in consideration of the payment of 12 per cent. interest, partly in advance, without the consent, concurrence, or knowledge of Kinney. Kinney paid nothing on the notes after his sale to Owens. Upon the hearing below the court found all the issues against defendant Kinney, and rendered a deficiency judgment against him for the amount due upon the notes, from which decree this appeal is taken.

It is a general rule that a purchaser who assumes the mortgage becomes, as to the mortgagee, the principal debtor, and the mortgagor a surety; yet under such circumstances the mortgagee, unless he assented to such an arrangement, may treat both as principal debtors, and may have a personal decree against both. So the purchaser, having assumed the payment of an existing mortgage, he thereby becomes the principal debtor, and the mortgagor a surety of the debt merely, and an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the consent of the mortgagor, discharges the mortgagor from liability under it. 1 Jones, Mortg.

§§ 741, 742; *Calvo v. Davies*, 73 N. Y. 211; *Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437; *Bunnell v. Carter*, 46 Pac. 755, 14 Utah, 100; *Walley v. Bank*, 47 Pac. 147, 14 Utah, 305. In this case it appears from the testimony that after the maturity of the debt secured by the mortgage the mortgagee, without the knowledge or consent of Kinney, in consideration of the payment to him by Owens of an increased rate of interest over that borne by the notes, extended the payment of the notes and mortgage from time to time, for a considerable time after they became due, up to August 16, 1894; that the value of the mortgaged property had depreciated from the time of such extension below the face of the mortgage debt. By this extension of the time of payment without the concurrence of Kinney at the time of each extension, based upon the consideration of an additional payment of interest, the land having depreciated in value in the meantime below the mortgage debt, Kinney was released from liability on the notes. This holding is in accordance with the previous decisions of this court in the case of *Gillett v. Taylor*, 46 Pac. 1090, 14 Utah, 190; *Bunnell v. Carter*, 46 Pac. 755, 14 Utah, 100; *Clark v. Fisk*, 9 Utah, 94, 33 Pac. 248, and is sustained by *Jones, Mortg.* §§ 741, 742; *Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437; *Murray v. Marshall*, 94 N. Y. 611; 2 *Brandt, Sur.* (2d Ed.) §§ 354, 359-375; *Walley v. Bank*, 47 Pac. 147, 14 Utah, 305. We are of the opinion that the court erred in its findings and judgment, and in holding defendant Kinney personally liable on the deficiency judgment. The district court is instructed to modify its findings and judgment in accordance with this opinion, and to set aside and vacate the personal judgment and decree rendered against defendant Kinney. Defendant Kinney is entitled to costs.

ZANE, C. J., and BARTCH, J., concur.

(9 N.M. 23)

WORMSER et al. v. LINDAUER.

(Supreme Court of New Mexico. Aug. 25, 1897.)

PARTNERSHIP—WHAT CONSTITUTES—ACCOUNTING—JOINT CAUSES OF ACTION.

1. Plaintiffs suing as partners of one firm cannot recover for the amount that had been due from defendant to a former partnership between him and plaintiffs, where said partnership has been dissolved, and a final accounting had, as the action should be several, not joint.

2. One who owns a share in the assets of a firm, and has a one-third interest in the profits of the continued conduct of the business, but who is excluded from any control in such business, is not in partnership with such firm, as between the parties.

Error to district court, Grant county; before Justice H. B. Hamilton.

Action by G. Wormser & Co. against Sigmund Lindauer. From a judgment for defendant, plaintiffs bring error. Affirmed.

The plaintiffs in error sued Sigmund Lindauer in the district court of Grant county,

describing themselves as Gustav Wormser and Isaac Wormser, "partners doing business at the town of Deming, in said county of Grant, under the firm name and style of G. Wormser & Co.," the action being assumptit. The declaration alleges an indebtedness of \$8,713.12 upon open account, and with it was filed a verified account with the caption, "Mr. Sigmund Lindauer, in acct. with G. Wormser & Co., Dr.," showing debits and credits beginning with June 4, 1891, and extending down to October 1, 1894. The verification is by Gustav Wormser as a member of said firm, and that Sigmund Lindauer is indebted to the firm of G. Wormser & Co. in said sum. The plea is the general issue verified. At the close of all the testimony the court below instructed the jury to find a verdict for the defendant, which was done. Motion for a new trial having been made and overruled, the cause is before us on writ of error sued out by plaintiffs in the lower court. The evidence in this record shows that during and prior to the year 1891, Sigmund Lindauer, Gustav Wormser, and Isaac Wormser were co-partners doing business under the firm name and style of Lindauer, Wormser & Co., and that on June 27, 1891, they entered into a written agreement that the firm of Lindauer, Wormser & Co. should "stand dissolved from and after July 1, 1891, the said Sigmund Lindauer withdrawing from said firm." It was further provided that Lindauer "has a one-third interest in the net assets of said firm," and that buildings, corrals, etc., should be appraised at \$24,000 or more, as shown upon final accounting January 1, 1892. Then follows this clause of the written agreement for dissolution: "In further ascertaining said assets, an account of all stock, merchandise, etc., shall be taken during the last week of December, 1891, books balanced, and profit and loss charged with bad accounts; the net assets thus ascertained to be the basis of settlement of division. That is to say, Sigmund Lindauer withdrawing from the said firm July 1st, 1891, ceases to render services or draw any salary for services after said last-mentioned date, but retains his one-third interest in the profits accruing from the continuing conduct of the business up to and until January 1st, 1892, said continuing conduct being by the firm of G. Wormser & Co., composed of Gustav Wormser and Isaac Wormser, parties thereto; it being fully understood that said new firm of G. Wormser & Co. shall proceed [?] to the good will of Lindauer, Wormser & Co., and shall have full authority to collect, pay, and adjust all open accounts of or affecting Lindauer, Wormser & Co., and to do all things necessary to such collection, payment, and adjustment, including the signing of the old firm name. It is further agreed that Sigmund Lindauer retains his one-third of the profit and loss account, subject to and with right of proportionate share in any collections which may be made from said account, whether the same be made before or after January 1st, 1892." Omitting other

clauses, not material, the final paragraph reads as follows: "The business will be continued by Gustav Wormser under the firm name and style of G. Wormser & Co., as aforesaid, for the best interests of all concerned, but it is understood that the dissolution of Lindauer, Wormser & Co. is absolute July 1st, 1891." Executed in triplicate, and signed by the three. The testimony to establish the indebtedness claimed is to the effect that on January 1, 1892, the defendant owed to the partnership the sum of \$9,709.58, which sum was afterwards reduced by one-third of amount collected from accounts carried to the profit and loss account to the sum sued for, the witness Gustav Wormser stating that Mr. Lindauer owed the firm of G. Wormser & Co. on the last day of December, 1891, \$9,709.58. This witness shows, as does also the agreement, that a large portion of this indebtedness accrued prior to July 1, 1891, and the entire indebtedness of \$9,709.58 was the amount on a balance agreed on between the witness and defendant in the final accounting contemplated by the agreement for dissolution, stock being taken, and appraisal of buildings, etc., being made between witness, purporting to represent himself and Isaac Wormser, and defendant as partners, and that the defendant recognized the balance struck, and agreed to pay the same "some day." Defendant denied that there was any final accounting, or any striking of a balance, as was testified to by plaintiffs' witnesses, or that he agreed to pay, and said that the conversation in relation to a final accounting had no such result.

S. M. Ashenfelter, for plaintiffs in error.
Joseph Boone, for defendant in error.

COLLIER, J. (after stating the facts). As to whether or not there was sufficient evidence to carry this case to the jury on the question of there being a final accounting and stated balance which could be sued upon at law, it is not, under the view we take of this case, necessary to decide. The important question this record presents is whether or not any right of action has been shown in favor of the plaintiffs as partners composing the firm of G. Wormser & Co. A consideration of the effect of the written agreement of date June 27, 1891, providing for a dissolution and settlement of the affairs of the co-partnership of Lindauer, Wormser & Co., appears to settle this question. It is certain that this agreement states in terms that the firm and partnership of Lindauer, Wormser & Co. "shall be and stand dissolved from and after July 1st, 1891, the said Sigmund Lindauer withdrawing from said firm," and that an account of "all stock, merchandise, etc., shall be taken during the last week of December, 1891, books balanced, and profits and loss charged with bad accounts; and net assets thus ascertained to be the basis of settlement and division." Thus far it seems clear that a final accounting had in December, 1891, would be between

three individuals, Sigmund Lindauer, Gustav Wormser, and Isaac Wormser, composing that firm. If such final accounting were had, who would have the right to sue? We find it stated in 17 Am. & Eng. Enc. Law, 1270, that "after a balance has been struck, if assets of the partnership in excess of his share are in the hands of one partner, the claims of his co-partners against him are several, and not joint, and joint action cannot be maintained upon them"; and to this are cited *Riari v. Wilhelm*, 8 Gill, 356; *Farrar v. Pearson*, 59 Me. 561; *Masters v. Freeman*, 17 Ohio St. 323. In *Riari v. Wilhelm*, supra, it is said that "the ground on which partners, after dissolution, can sue each other in relation to what had been partnership funds or effects, is that, the joint interest as partners having ceased, a new contract had been made between the parties in their individual, as distinct from their partnership, characters." It might be, as stated in some of the cases, that the debtor partner would, to equalize interests, owe one of his partners more than another; and thus, if he happened to owe each the same, that would be a circumstance not at all militating against the position that the claims would be several, and not joint. Concluding, therefore, that if the final accounting were between the partners composing the firm of Lindauer, Wormser & Co., the action would be several, and not joint, let us see whether other provisions of the written agreement can make this action maintainable by the firm of G. Wormser & Co., as it has been brought. It may be conceded, too, we think, that if, instead of Lindauer continuing in partnership after July 1, 1891, with Gustav Wormser and Isaac Wormser as individuals, he became thereafter, until December 31, 1891, the partner of G. Wormser & Co. as a firm, and the entire assets of Lindauer, Wormser & Co. were turned over to the new partnership, with the firm of G. Wormser & Co. to stand in the place of Gustav Wormser and Isaac Wormser, individuals, and the business of the old partnership to be continued, a final accounting of the affairs of the old and new concerns might be had between Lindauer as one partner and G. Wormser & Co. as the other, if the agreement so meant to provide. Whether G. Wormser & Co. would have to sue as assignees or not as to the old indebtedness, we need not here discuss. It cannot be said he was a member of the firm of G. Wormser & Co., because the agreement expressly declares he is not. If he were, this would merely be the old partnership under a new name, and G. Wormser & Co. as a firm could not sue. If not a member of the firm of G. Wormser & Co., was he in partnership with the new firm, he being one member and it the other? The agreement says "he retains his one-third interest in the profits of the continued conduct of the business" by the firm of G. Wormser & Co. It is evident from the agreement that Lindauer is no longer to have a voice in the continued conduct of the business, and, though

having a joint proprietorship in the assets in the hands of the new firm, he exercises no proprietary rights. Joint ownership and participation in profits seem generally to create a partnership between the owners. As conversely stated at page 844, 17 Am. & Eng. Enc. Law: "The receipts of a share of its profits as compensation for services as agent, clerk, manager, broker, or other person acting in a fiduciary capacity is inconsistent with the idea of a joint proprietorship of the business and profits as such, and does not constitute a partnership between the parties." It may be, however, that one may be a joint proprietor of the assets of a business, but not necessarily a joint proprietor of the business itself. This would appear more clearly, if, for example, the capital stock were an ocean steamer, owned by three persons, two of them managing the same, and the profits to be divided between the three; and this even though the law would, as to third persons, consider the three to be partners. The fact that the assets are a stock of merchandise, which changes in specifics, does not prevent the principle from applying. Thus it is laid down (page 842. Id.) that there is no partnership, in cases of joint ownership, where a part of the profits is taken for rent; and to this are cited *Quackenbush v. Sawyer*, 54 Cal. 439, and *Chapman v. Eames*, 67 Me. 452. This agreement specifically states that Lindauer merely retains a third interest in the profits, and excludes him from any control or direction of the business. Why is that not to be construed as an agreement to pay him one-third of the profits for the use by G. Wormser & Co. of his interest in the buildings, corrals, etc., and the employment of his part of the capital invested in the stock of merchandise? We cannot see what other construction can be placed on this agreement. If this be true, then it follows with irresistible logic that the final accounting made in December, 1891, if any were made, must have been between Sigmund Lindauer, Gustav Wormser, and Isaac Wormser, three individuals, and not between S. Lindauer and G. Wormser & Co. This being so, it follows conclusively that G. Wormser & Co. had no right of action against defendant in error on the testimony submitted. For these reasons the judgment of the court below should be affirmed, and it will be accordingly so ordered.

SMITH, C. J., and LAUGHLIN, J., concur.

(9 N. Mex. 70)

RATON WATERWORKS CO. v. TOWN OF RATON.

(Supreme Court of New Mexico. Aug. 6, 1897.)

MUNICIPAL CORPORATIONS—WATER CONTRACTS—VALIDITY—SPECIFIC PERFORMANCE—EQUITY JURISDICTION—TAXATION—FISCAL MANAGEMENT—INDEBTEDNESS—WARRANTS—CONSTRUCTION OF STATUTES.

1. Comp. Laws, § 1622, par. 71, authorized a "special tax" for the payment of water rents, "provided, however, that said last-mentioned tax

shall not exceed the sum of two mills on the dollar for any one year." *Held*, that the proviso clause prohibited the town from paying more for water rents than the sum derived from a two-mill levy.

2. A town is limited to the revenues of a two-mill levy to the payment for water rents, in view of Comp. Laws, § 1622, par. 6, limiting the assessment and levy for all purposes except for water or waterworks to eight mills, and paragraph 71, limiting the tax to pay water rents to two mills, and section 1724, limiting the total levy and collection to ten mills.

3. In view of Comp. Laws, § 1622, par. 6, providing that the taxes declared by ordinance to be collected for a purpose other than the payment of water rents cannot be expended for any purpose other than that specified in such ordinance, any deficiency arising from the insufficiency of a two-mill levy, authorized by paragraph 71, to pay water rents which a town has contracted to pay, cannot be made up from any other fund, especially where the entire levy authorized by law would be insufficient to pay such water rents.

4. Comp. Laws, § 1622, pars. 2, 3, empowering a town to provide for the payment of its debts, and to levy and collect taxes for general and special purposes, are limited by paragraph 71, limiting a levy for the payment of water rents to two mills, so that, if such levy be insufficient to pay a debt for water rents, the town is powerless to pay the deficiency.

5. The facts that complainant spent a large sum of money to establish a waterworks system for the use of which a town contracted to pay, and that such town received the benefits thereof, do not empower a court to compel such town to raise more money by taxation than is authorized by the statutes, in order to fulfill such contract.

6. One who contracts with a town is charged with notice of the statutes limiting the power of the town to fulfill such contract.

7. A contract to pay semiannual water rents for 25 years does not create an indebtedness for the full amount agreed to be paid within the meaning of Act Cong. July 30, 1886, and other statutes, limiting the amount of indebtedness which a town can contract.

8. In view of Comp. Laws, § 1636, providing that within the last quarter of a fiscal year an ordinance shall be passed making appropriations for the ensuing year, an ordinance passed after the beginning of a fiscal year is void in so far as it changes legal appropriations made by ordinance passed within the last quarter of the previous year.

9. An ordinance making town warrants receivable in payment of town licenses is void, in view of Comp. Laws, §§ 1649, 1650, making such warrants payable in the order of presentation.

10. A complaint alleging a refusal of a town to make a levy for the purpose of raising money in order to fulfill a contract, and praying for a specific performance for the enforcement of such contract, cannot be maintained, for, though in such an action an equity court may declare the validity of the contract, it has no jurisdiction to compel a town to make a levy, the remedy being by mandamus.

11. An action at law is the proper remedy, where a town refuses to pay its warrants.

12. A contract wherein a town agrees to pay more than it can collect by taxation is not void, but obligates the town to go to the limit of its power in raising money to fulfill the same.

Appeal from district court, Colfax county; before Chief Justice Thomas Smith.

Bill by Raton Waterworks Company against the town of Raton. From a decree for plaintiff, defendant appeals. Reversed.

The complainant corporation, the Raton Waterworks Company, filed its bill of complaint

in the court below against the defendant corporation, the town of Raton, and among the allegations it alleged that it entered into a certain contract with the said defendant corporation, by which it agreed and bound itself, its successors and assigns, to supply the said defendant corporation with water for a period of 25 years from the 24th day of July, 1891. This contract was an exclusive grant to complainant corporation by the defendant corporation, and was in the nature of an ordinance adopted and approved by the board of trustees of said defendant corporation, and was and is known in the record in the cause as "Ordinance No. 10"; and such parts thereof as seem material to the decision of the cause are as follows, to wit:

"Sec. 4. Said Raton Waterworks Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; provided, persons owning property along the line of such proposed extensions shall take a reasonable amount of water; and provided also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered."

"Sec. 9. The said town hereby exempts from all taxes for a term of twenty-five years from and after the date specified in section 1, July 15th, 1891, the property of said waterworks company of every name, nature and description which may be used by it in the conduct of its business. * * *

"Sec. 10. In consideration of the benefits that will accrue to the town of Raton and its people by the erection and operation of waterworks, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Waterworks Company, or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers, and irrigating public school grounds and parks, and the said town, by the said board of trustees, hereby agrees and binds the said town to pay to the said Raton Waterworks Company, or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Waterworks Company, or its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; provided, the said Raton Waterworks Company, or its assigns, shall erect and maintain at all times in good repair double-discharge fire hydrants with four-inch con-

nections to the main pipe, and two and one-half inch hose connections with each hydrant.

"Sec. 11. The said town of Raton shall pay to the said Raton Waterworks Company, or its assigns, as follows, to wit: On the first day of January and July of each and every year one-half of the aforesaid money, and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semiannual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semiannual payments at the rate of ten per cent. per annum."

"Sec. 15. Within thirty days after granting of this franchise the said Raton Waterworks Company shall file with the town recorder of said town its acceptance in writing of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

"Sec. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose house on the first day of August, A. D. 1891. * * *

The foregoing ordinance was ratified by the qualified electors of the defendant corporation as therein provided. And the contract was duly accepted by the complainant corporation, as therein provided.

It appears in the record from the said bill of complaint that at the request of the board of trustees of defendant corporation complainant put in 44 hydrants, in the manner specified, the semiannual rentals of which amounted to \$1,962.50. It further appears that defendant corporation paid at that rate, semiannually, to complainant corporation, its water rents in money, and by its warrants duly issued for any balance due and for accrued interest, in accordance with said contract and Ordinance No. 10, up to the year 1895; that on May 23, 1895, the defendant corporation enacted Ordinance No. 64, under which it declined to pay more than the revenues derived from a two-mills levy on the dollar each year on all the taxable property within said defendant corporation. Complainant prays for a specific performance of the contract under Ordinance No. 10, and for an order perpetually restraining defendant corporation from enforcing Ordinance No. 64.

The defendant corporation, in its answer, admits that complainant corporation complied with its part of the contract, as stated in said Ordinance No. 64. But "defendant denies that said Ordinance No. 10 became and was and now is valid and operative, and in full force and effect, and obligatory upon both

of the parties to this cause." Also, "defendant denies that under said ordinance and contract it became and was, and now is the duty of defendant to pay complainant as rental for the said hydrants the sum of \$1,962.50 on the 1st day of January and July of each year after the making of the said contract or ordinance. Defendant denies that said sum of \$1,962.50 is the just sum due under the said contract, and it further and specifically denies that it was and is defendant's duty under said contract or ordinance to levy and collect a tax sufficient to meet said alleged semiannual obligations of \$1,962.50." And "defendant denies, however, that said ordinance was enacted wrongfully, and without authority of law, and, on the contrary, insists that the same is valid, and in full force and effect. Defendant further denies that said ordinance numbered 64 was and is invalid, illegal, and void by reason of being in conflict with the terms of said ordinance numbered 59, or any other ordinance." And "defendant denies that it has at any time or place refused to perform its duty under the contract and ordinance referred to in complainant's bill, but, on the contrary, shows that it has performed, and will perform, its obligations toward complainant under said ordinance, so far as the same is binding, valid, and of force and effect. Defendant admits that it has given out that said contract, so far as it calls for the payment of \$1,962.50 semiannually, is inoperative and invalid, and further admits that it has refused to pay said sum of \$1,962.50 semiannually; and for cause of such refusal, defendant, further answering, shows to your honor as follows: That defendant is a municipal corporation, organized under the laws of the territory of New Mexico, as contained in sections 1808 et seq., as amended, of the Compiled Laws of said territory. And as such municipal corporation it granted to complainant, a private incorporated company, the right to build, maintain, and operate waterworks as hereinafter admitted; and as hereinbefore set forth defendant contracted with complainant to furnish water as is fully set forth in said Ordinance No. 10. Defendant further shows that under the law it is authorized, empowered, and required to levy each year, and to cause to be collected, a special tax sufficient to pay off the water rents agreed to be paid to complainant: provided, the said special tax shall not exceed the sum of two mills on the dollar for any one year. Defendant shows that, as practically its entire revenue is derived from its tax levy, it is thus limited in its payment for water rents to the proceeds of a two-mills tax levy on each dollar of taxable property. Defendant further shows that for the year 1891 the total assessment for town purposes, as certified by the county assessor, was \$628,940; that the town tax rate for said year was five mills on the dollar, making a total possible tax yield \$3,119.70, and giving an actual tax yield of \$2,089.52. For the year 1892 the total

assessment was \$673,900, the tax rate eight mills on the dollar, and the actual amount of taxes collected \$3,204.39. For the year 1893 the total assessment was \$807,230, the tax rate was six mills, and the taxes actually collected amounted to \$2,718.83. For the year 1894 the total assessment was \$650,620, the tax rate was ten mills on each dollar of taxable property, and the amount of taxes actually collected was \$3,616.52. Defendant shows that under the law it paid complainant each year the full proceeds of the two-mills tax levy authorized by law for water rents; that in 1892 it paid complainant the sum of \$1,925, in 1893 the sum of \$1,800, in 1894 the sum of \$1,600, and for 1895 it has, under ordinance numbered 64, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent. Defendant shows that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of \$1,500 in said ordinance numbered 64, for complainant's benefit for the year 1895, is a full compliance with complainant's legal demand under said contract Ordinance No. 10, as likewise amounts paid for 1892, 1893, and 1894 are in full of all that complainant can in equity and good conscience demand under its contract with defendant. Your defendant, further answering, shows that said alleged semiannual rental of \$1,962.50, claimed by complainant, is far in the excess of the amount derivable from a two-mills tax levy on the assessed value of the property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal, inoperative, and void. Defendant further shows that said Ordinance No. 10, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax levy, or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law, and in excess of the powers conferred upon them by the statutes of New Mexico. Defendant further shows that said warrants issued to complainant, as set forth in complainant's bill, were and are null and void, having been issued by defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property, and having thus been issued contrary to law, and in excess of the authority conferred upon said trustees by law. Defendant further shows that for the reasons just mentioned Ordinance No. 59 was and is void and inoperative, and that Ordinance No. 64 was and is valid, and in full force."

Such parts of Ordinance No. 59 as appear pertinent are as follows, to wit:

"Section 1. That the general tax levy for the town taxes for the fiscal year commencing on the 1st day of April, 1895, shall be and is here-

by declared to be ten mills for and upon every one dollar (1.00) of assessable property, both personal and real, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

"Sec. 2. There is hereby appropriated out of money and revenues covered into the town treasury, or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same be derived from taxes, licenses, fines, fees or any other source whatsoever, for the following purposes and objects, the following sums and amounts, to wit: To pay all outstanding indebtedness of the town the following amounts: Amount due the Raton Waterworks Company up to January 1st, 1895, \$4,735.15."

The sum of \$4,735.15, referred to, it appears, was a deficit claimed by complainant to be due from the defendant up to that date.

The bill of complaint was sworn to, but an answer under oath was expressly waived, and it was not under oath, and no replication filed by the complainant to the bill of complaint. There were no proofs taken on either side, and the cause was heard on bill and answer. After final decree was entered, defendant assigned errors as follows: "First. That the court below erred in holding that Ordinance No. 10, of the town of Raton, granting franchise to the Raton Waterworks Company to erect and maintain waterworks, published July 24, 1891, and alleged to have been duly ratified and confirmed at an election held in the said town of Raton on the 1st day of August, 1891, became and was and now is valid and operative, and in full force and effect, and in all respects obligatory upon the town of Raton. Second. That the court erred in finding all the material allegations in the said bill of complaint to be true as therein stated. Thld. That the court erred in decreeing a specific performance of said Ordinance No. 10 by and on the part of the town of Raton. Fourth. That the court erred in decreeing that the town of Raton is by reason of said Ordinance No. 10 indebted to the said Raton Waterworks Company in the sums mentioned in the said decree, or in any amount whatsoever, and in decreeing that said town of Raton issue to the said Raton Waterworks Company its warrants in payment and satisfaction of the amounts thus found to be due under said Ordinance No. 10."

J. H. Crist (W. H. Pope, of counsel), for appellant. Warren, Fergusson & Gillett, A. C. Voorhees, and Wm. C. Wrigley, for appellee.

LAUGHLIN, J. (after stating the facts) The enactment of Ordinance No. 10 by the trustees of the defendant town, a submission and approval of the same by a majority of the electors thereof, and the acceptance of the propositions therein by the complainant corporation are admitted by the answer, and this constituted the contract over the terms, con-

ditions, and construction of which this controversy arose, and of which we are required to determine. It is alleged in the bill of complaint, and admitted by the answer, that the water plant of the complainant was constructed in compliance with the requirements of the contract, and that the defendant town is and has been using and reaping the benefits of its part of the results of the contract. It is also alleged and admitted that complainant put in 44 hydrants in the manner prescribed in the contract, and that by the terms of the contract defendant town, by its board of trustees, agreed and obligated itself to pay for 25 of said hydrants \$2,500 per annum, and for the other 19 the sum of \$75 per annum, for 25 years; and that the defendant town agreed to pay as such water rentals the sum of \$1,962.50 semiannually on the 1st day of January and July of each year thereafter for the period of said 25 years. The defendant town avers that the contract so made is void pro tanto, if not void in toto, because it avers that it (the defendant town) is limited by statute to an assessment and levy of not to exceed two mills on the dollar of its taxable property to pay such water rents each year, and no more; and that the sum derived from a two-mills levy each year is not sufficient to pay the sum of \$1,962.50 semiannually, each year, as provided in said ordinance and contract; and that the trustees of the defendant town had no authority to bind it by the passage of said Ordinance No. 10, and the making of the contract thereunder; and that such action was ultra vires, and void pro tanto. The reply to this by the complainant corporation is that, while the proceeds derived from the two-mills levy is insufficient to pay the said sum of \$3,925 per annum, yet the defendant town has the authority, under the statute, and that it is bound, under the terms of the said ordinance and contract, to pay any deficiency which may arise over and beyond the two-mills levy out of the taxes collected for general current expenses; and the trustees of the defendant town had full authority to enact Ordinance No. 10, and to make the contract thereunder, after the same had been submitted to and voted for by a majority of the qualified electors of said defendant town corporation, and that the defendant town is bound thereby.

This brings us up to the issue in the cause, as stated in complainant's brief. Is the contract between the parties hereto, providing for a semiannual payment of \$1,962.50 as water rent, void? A court should labor to sustain the validity of a contract entered into in good faith, and where no fraud appears, and where a consideration has passed from the one, and been received by the other, so long as there is any apparent authority existing at the time in the parties thereto for the making of the same; and the burden rests upon those who attack its validity to make it appear that it is voidable, void pro tanto, or void ab initio. On the other hand, a court should not hesitate to declare a contract void

when it is made to appear for any reason that it should be done; and this rule should apply, and does apply, as to all classes of contracts, whether between corporations and individuals or between individuals. It appears that both the complainant waterworks company and the defendant town of Raton were duly and legally incorporated under the laws of this territory, and that said defendant town corporation was organized and exists under and by virtue of the general incorporation laws of the territory, from section 1608 to and including section 1724 of the Compiled Laws of 1884, and the amendments thereto, relating to incorporated cities and towns; and the authority for making the contract in question is found in that statute, and the part applicable thereto is as follows, to wit: "Sec. 1622, par. 71. And if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: provided, however, that said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year." It is shown in defendant's answer, and it is not denied by any replication or proofs by complainant, that it has paid complainant the proceeds of a two-mills levy and more each year on all the taxable property within defendant's corporate limits, since the contract was entered into. It further appears in the answer that the total assessed valuation of the property subject to taxation, within the corporate limits of said defendant town in the year 1891, and at the time the contract was entered into, was \$628,940, and that the total tax yield for that year on a five-mills levy was \$2,089.52, being only \$127.02 more than one-half the money to make one semiannual payment. For the year 1894 the total assessed valuation was \$650,620, the levy was 10 mills on each dollar of the assessed valuation,—the full limit allowed by law,—and the amount of taxes actually collected was \$3,616.52. This was the largest sum collected in any one of the four years, and was insufficient to pay the yearly water rental contracted by defendant to be paid to the complainant, thus consuming all the revenues of defendant town arising from taxation, and creating a deficiency of \$308.48. The total amount of taxes collected for the years 1892, 1893, and 1894 amounted to the sum of \$9,539.74. The total amount due complainant under the contract for this period beginning July 1, 1892, the date the waterworks was accepted by defendant town, was \$9,812.50. Thus it is plainly shown that the entire sum derived from taxes collected as levied on the property subject to taxation

within the corporate limits of the defendant town was insufficient to pay the water rents contracted to be paid by it. To meet the deficiencies as they occurred from time to time, the defendant issued its warrants, and it appears from Ordinance No. 59, in the record here, that on March 18, 1895, there was a deficit due complainant of \$4,735.15 after having received from the defendant the sum of \$5,325 as water rents, and which it avers was fully two mills on the dollar of its taxable property during that time. And it contends that the warrants issued in payment of said deficiency were so issued by its trustees without authority of law, are in excess of the amount authorized, and are void. It is not shown from what other sources the defendant derives revenues, but it avers that practically all is derived from taxes collected from the levies made on all of its property subject to taxation. It also appears from the record and Ordinance No. 59, which complainant here seeks to have enforced, that on the 1st day of April, 1895, the then existing indebtedness of the defendant town was about \$7,000; and that the appropriation for the current expenses for the fiscal year from that time to April 1, 1896, was about \$6,000. The record does not disclose the assessed valuation of the property subject to taxation within the limits of the defendant town for the year 1895, but, assuming that it was about the same as that of the previous year, the tax yield would fall short of the amount required to pay the water rents, even if a ten-mills levy, the full limit allowed by law for all purposes, had been made each year.

It appears that the cause was set down and heard on the bill and answer in pursuance of a stipulation of the parties thereto, but the stipulation does not appear in the record, and the averments in the answer well pleaded are presumed to be true. "If no replication is filed, the matters of defense set up in defendant's answer will, on hearing, be considered as admitted by the plaintiff, although the answer is not under oath." Equity rule 34 of this court; 1 Daniell, Ch. Prac. *p. 846, and note.

We are now brought directly to the first question for determination: Had the trustees of the defendant town corporation the authority to enact Ordinance No. 10, and enter into the contract in question, and thereby bind the defendant town to pay out of the revenues derived by taxation for general purposes any sum in excess of that to be derived from a levy of two mills on the dollar on its taxable property for each year? We are of the opinion that the trustees did not have authority and power to so contract and bind defendant town in the manner as provided in said Ordinance No. 10. The statute (Comp. Laws, § 1622, par. 71), after the provisions authorizing cities and incorporated towns to construct and operate water and gas works, and for the assessment of water and gas rents on the inhabitants using the same, says:

"And at the regular time of levying taxes in each year said city or town is hereby empowered to levy and cause to be collected, in addition to other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works." There is no ambiguity or doubtful meaning about this part of the statute. It clearly means just what it says; that is, that the proceeds from "a special tax" and the proceeds derived from the water rents prescribed by ordinance "shall be sufficient to pay the expenses of running, repairing, and operating such works." This applies when a city or incorporated town constructs its own waterworks, and there is no intimation whatever that any other revenues shall be applied to the support and maintenance of the waterworks, and no interpretation can be read into this part of the statute by which the trustees of a town constructing its own waterworks would be authorized to apply any of the revenues levied and collected for the general and current expenses of the town to the support and maintenance of its own waterworks. When the right to construct and maintain such waterworks is granted to individuals or an incorporated company, and shall contract for a water supply for any purpose, "such city or town shall levy each year, and cause to be collected, a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company constructing the works." Again, it is provided that "such city or town shall levy each year, and cause to be collected, a special tax, as provided for above," sufficient to pay off all such water rents agreed to be paid to such company. The phrase, "as provided for above," refers back to the conditions wherein the city or incorporated town constructs the waterworks, and can mean nothing else. Now, what is meant by the words "a special tax" is fully explained in the proviso to this paragraph, as follows: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." By this proviso the "special tax" is limited to the proceeds derived from a two-mills levy for any one year to pay for water rents provided for in said Ordinance No. 10 and the contract thereunder. This proviso is manifestly a limitation on the sum to be paid for the water rents by the special tax, and an inhibition on the trustees of defendant town from paying any more than the sum derived from a two-mills levy on the dollar upon the property subject to taxation within its corporate limits. "The office of a proviso, generally," said Mr. Justice Story, in *Minis v. U. S.*, 15 Pet. 423, "is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview." Mr.

Chief Justice Fuller, in *Austin v. U. S.*, 155 U. S. 417, 15 Sup. Ct. 167, says: "While we concede that the law does not attach a fixed and invariable meaning to a proviso, we think it clear that this proviso negatived the authority granted beyond the limit defined." The limit defined by the proviso now under consideration is the proceeds derived from a levy of two mills on the dollar of the assessed valuation of the taxable property in each year for water rents; that is, the trustees of the defendant town can assess, levy, collect, and apply each year the proceeds arising from two mills on the dollar of all taxable property in payment of the water rents, and no more. This sum, together with the water rents it receives from the consumers of its product, puts the complainant water company on the same and an equal footing with the defendant town had it constructed its own waterworks; and it is not contended, nor is there any reason why, the water company should have any other or more extensive rights granted it than the town corporation would or should have had if it had elected to construct and maintain its own water system.

The general incorporation law, under which the defendant town was incorporated, provides (section 1724, Comp. Laws 1884): "No more than one per centum ad valorem shall ever be levied or collected, by any corporation organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure, than one per centum will fully pay off and satisfy." It is apparent from this section that the defendant town corporation, as well as all similar municipal corporations organized under this act, are limited to an assessment and levy of 1 per centum of each dollar of taxable property lying within the corporate limits in payment of all expenses incurred for all purposes; and no indebtedness shall be incurred which will require any greater annual expenditure than the sum so realized shall fully pay off and satisfy. The construction here placed upon paragraph 71 of section 1622 is supported by paragraph 6 of the same section, which provides that cities or incorporated towns may contract an indebtedness by borrowing money or by issuing bonds "for the purpose of the purchase or construction of waterworks for fire and domestic purposes"; but it is further provided in this paragraph as follows: "And no loan for any purpose shall be made, except it be by ordinance, which shall be irrevocable until the indebtedness therein provided for shall be fully paid, specifying the purpose to which the funds to be raised shall be applied, and providing for the levying of a tax not exceeding, in total amount for the entire indebtedness of the city or town, (excepting such debt as may be incurred in supplying the city or town with water or waterworks,) eight mills upon each dollar valuation of the taxable property within the

city or town, sufficient to pay annual interest and extinguish the principal for such debt within the time limited for the debt to run * * * and provided that said tax, when collected, shall only be applied to the purpose in said ordinance specified, until the indebtedness shall be paid and discharged." This paragraph limits the assessment and levy for all purposes, except for water or waterworks, to eight mills on each dollar of the assessed valuation of the taxable property; and paragraph 71, *supra*, fixes and limits the special tax provided to be collected for water rents at two mills; and section 1724 limits the total levy and collection to ten mills on each dollar of the assessed valuation of the taxable property within the corporate limits of the town. And it seems to us that the trustees of defendant corporation are clearly limited to the payment for water rents,—to the revenue derived from the two-mills levy each year.

Complainant contends that, if the levy of the special tax of two mills was insufficient to pay the water rents, then it was the duty of the defendant's trustees to pay any deficiency out of other revenues available from the funds for other and general purposes. But this position is untenable for the reason: First, because paragraph 6, *supra*, provides "that said tax, when collected, shall only be applied to the purposes in said ordinance specified." This prohibits the trustees from diverting any revenues assessed and collected from the purposes specified in the ordinance for which such levy and collection was made. And, second, because it is shown that the largest sum realized in any one year was \$3,616.52, on a levy of 10 mills on the dollar upon all the property subject to taxation within the corporate limits of the defendant town, an amount clearly insufficient to pay the annual water rents of that year of \$3,925; thus leaving nothing for the other current expenses of the town corporation, which, as shown by complainant's own exhibit, Ordinance No. 59 for 1895, amounted to over \$3,000. And, third, because the trustees of the defendant were prohibited from assessing, levying, or collecting more than 10 mills on the dollar for all purposes, general and special. The language employed in the statutes hereinbefore extracted from seems to be clear and positive, and that no reasonable doubt can exist as to the construction to be placed upon them. They bristle all over with limitations and provisions on the subject and powers of taxation, and right well they may for the protection of the taxpayers. In *City of Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820,—a cause involving similar principles,—Mr. Justice Miller, speaking for the court, said: "The language of the constitution is that no city, etc., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property.' It shall not become indebted; shall not incur any pecuniary liability. It shall not do this in any manner; neither by

bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner, or for any purpose whatsoever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." In *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 20 Wall. 660, the court said, in referring to general powers and restrictions in the statute: "It is, therefore, to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself or in some general statute a limitation upon the power of taxation which repels such an inference." As has before been shown, we have special provisos, and a general statute limiting the indebtedness for any and all purposes to 10 mills on each dollar on the assessed valuations for each year. *Davenport v. Kleinschmidt* (Mont.) 13 Pac. 249. "The assessed valuation of the city of York was the sum of \$335,000. The vote authorized the issue of, and it is now sought to compel the defendant (city mayor) to certify, bonds to the amount of thirty thousand dollars, bearing interest at the rate of six per centum per annum. The statute limits the levy of tax for waterworks 'to an amount not exceeding five mills on the dollar in any one year on all the property within such city or village as shown and valued upon the assessment rolls.' Comp. Laws 1885, c. 14, § 69, subd. 15. This is a limitation upon the power of the city council beyond which they have no authority to issue bonds." *State v. Babcock*, 20 Neb. 522, 31 N. W. 8.

Complainant insists that under paragraphs 2, 3, § 1622, *supra*, the defendant had authority, and its duty was, to assess, levy, and collect taxes for general and special purposes sufficient to pay all debts it contracted. Among the powers conferred on municipal corporations by said paragraph 2 is "to appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation." Paragraph 3 is, "to levy and collect taxes for general and special purposes on real and personal property." There is nothing in either paragraph requiring a different construction than as before given, and nothing to change the effect of the limitation in paragraph 71, *supra*. If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for a tax of one-twentieth of 1 per cent. And the case is thus brought

directly within the maxim, "Expressio unius est exclusio alterius." U. S. v. Macon Co., 99 U. S. 582.

But it is further insisted by the complainant that it invested \$115,000 in the construction of its waterworks system, and has fulfilled all the conditions in the contract to be by it performed; and that the defendant town corporation has received the benefits accruing to it by the terms of said contract; and that it should be required and bound to pay for the same according to the terms and conditions of said contract; and that it should not be permitted to repudiate its obligations therein contained; and that it would be contrary to public policy, and a violation of its public duty, to permit it so to do. With the conscience of the defendant corporation (if it has any), its moral obligations, or the question of public policy, if any such question is here involved, this court in this cause, as it is here presented, has no concern whatsoever. The question of this court is one purely of law, as to the rights of these two corporations, and must be considered and determined as presented to us on the bill and the answer. And we have said before that the trustees of the defendant had no authority in law to enter into the said contract in such a manner as to bind the defendant town to pay for water rents any sum in excess of the proceeds derived from a levy of two mills on each dollar on the assessed valuation of all property subject to taxation within the corporate limits of the defendant town each year during the continuance of said contract. This they were authorized to do, and no more. If the representatives of the complainant had, before they entered into the contract, turned to the public statutes under which it was made, they would have seen what is apparent to us, and what would seem no two persons of ordinarily sound and discriminating judgment could have arrived at a different conclusion, was a clear, distinct, and positive prohibition against the payment of more than the proceeds arising from said two-mills levy. These statutes were public notice as to their contents, and alike binding on both corporations. The complainant knowing, as it is presumed to know, that the defendant was limited by the statute of its creation to a two-mills levy for the discharge of its obligation under Ordinance No. 10, it should not be heard to complain that the trustees of the town refused to transcend that power. Complainant made this contract with its eyes open, and when the law advised it that its two-mills levy was sacred against the demand of other creditors, furnishing protection just as necessary for the well-being of citizens as complainant. It also advised it that the other eight mills within the ten-mill limit of taxation for all purposes was sacred from a claim of this nature. "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the

municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of the purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of 1 per cent. has been regularly levied and applied, and no complaint is made as to the levy of the one-half of 1 per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order." U. S. v. Macon Co., supra. And so, in *Law v. People*, 87 Ill. 383: "It is said that to so hold will work great hardships and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other persons who violate the law, or act contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision, and the prohibition contained in the sixty-second section of the charter. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters; and all persons dealing with them must see that the body has power to perform the proposed act. * * * But, should it work hardships to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and the laws and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. The will—it may be unbridled will—of the judge would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until the constitutional and legal barriers are destroyed, and none are secure in their rights." *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720.

Under our form of government there is no

power more frequently used as an abuse than the power to levy and collect a tax, and, while it is absolutely necessary to levy and collect taxes sufficient for the proper and necessary support of the government, either general, local, or special, yet experience has taught that this power has been often used to oppress the citizen, and to deprive him of his property and his natural rights, and only too often for the benefit of the reckless or careless adventurer and speculator; and then, when an attempt is made to check them in their adventurous and reckless career by invoking the aid of the law in behalf of the legal rights of the citizens, they cry out, "Repudiation!" There is no such thing as repudiation when there was no original authority vested in the taxing power by which it is sought to levy and collect the tax. And courts always have and always must arrest any attempt to enforce the collection of a tax when it is apparent that the power to so do was not originally and clearly vested in the taxing power. A case which tested the very foundation, strength, and stability of our government more thoroughly than any other, perhaps, was *McCulloch v. Maryland*, 4 Wheat. 316, in which Marshall, the great chief justice, said: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. * * * But all inconsistencies are to be considered by the magic of the word 'confidence.' Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse to presume which would banish that confidence which is essential to all governments." Incidents are not infrequent where municipalities, through the power to tax, have attempted through that power to illegally and inequitably oppress private corporations of a quasi public nature, and courts have been compelled to restrain such unauthorized efforts. And were courts to permit careless, pliable, or corrupted trustees of corporations to use their pseudo authorities unbridled, the power to tax would certainly in many instances carry with it the power to destroy. And the laws so authorizing the taxing power must be construed liberally in favor of the citizen, and strictly against the power invoked to enforce it. *Webster v. People*, 98 Ill. 343; 15 Am. & Eng. Enc. Law, 1116.

It is contended by the complainant that our general incorporation law for the organization of cities and towns is taken from the Iowa statute on the same subject. That may be true, but it is almost a verbatim copy of the Colorado statute, and we feel satisfied that the construction put upon the statute by the supreme court of Colorado is in effect to support the construction here given our own statute. *People v. May* (Colo. Sup.) 10 Pac. 641; *Sullivan v. City of Leadville* (Colo. Sup.) 18 Pac. 736; *Town of Durango v. Pennington* (Colo. Sup.) 7 Pac. 14; *Lake Co. v. Rollins*,

130 U. S. 662, 9 Sup. Ct. 651; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315. "It is provided by statute that cities have the power to erect waterworks, or authorize the erection of the same; and where such authority is granted to individuals or a corporation the city may authorize a charge for the use of the water, to be collected from the individuals using the same; and a special tax, not exceeding five mills on the dollar in any year, in addition to all other taxes, may be levied for the purpose of paying the expenses and operation of works and which tax, with the water rents, shall be sufficient for that purpose. * * * The obligation of the city is to levy the tax, and see that the amount collected is applied to the specific purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city, and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there cannot be such an indebtedness." *Water Co. v. Woodward*, 49 Iowa, 58.

It is contended by counsel for complainant corporation that the case of *Creston Waterworks Co. v. City of Creston*, recently decided by the supreme court of the state of Iowa, and reported in 70 N. W. 739, is decisive of the question at issue here, in which that court held in that case that: "The limitations in section 643, McClain's Ann. Code, are not upon the power to contract for a supply of water for public use, but upon the power to levy this special tax in aid of the payment therefor. When, within the limit of the five-mill tax, the supply can be thus paid for, it must be so paid, but when that source is not sufficient the deficiency may be paid from the general revenues." It may be said that section 643 of the Iowa statute (1 McClain's Ann. Code) is substantially the same as paragraph 71 of section 1622 of our statutes. The distinction here drawn in the case is between the power to contract for a thing and the power to raise money by taxation to pay for the thing contracted for, and is evidently based upon the well-established principle that a city or municipality has two classes of powers, namely, governmental or public power and the proprietary or business powers of a quasi public power nature. The first is derived directly from the legislative grant, and the second from the discretionary powers inherent in the officers of the municipality, and it is not within the province of a "court to contract or clip the legislative grant," or to restrain or circumvent the discretionary grant or power, so long as it is founded upon sound discretion and good business principles, transacted in good faith, and within the scope of the discretionary powers. *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, and cases cited. In the case under consideration the board of trustees of defendant town had a discretionary grant or power to enter into a contract with complainant corporation for the construction of the waterworks, the quantity

of the water supply to be furnished, the number and size of the hydrants, and the price of the hydrant rentals to be paid, the size and extent of the water mains, the period for which the contract should run,—within, of course, the statutory period,—the pressure and quantity of water, and the price to be paid by private consumers of the water, etc. The legislative grant prescribed the manner in which the revenues should be raised with which payments for the water used by the municipality should be made, and restricted this grant to a special tax levy of two mills on each dollar of taxable property each year, and such other sums as should be realized from the private consumers; and it also gave the authority to make the contract, and prescribed the time within which it should run, and to fulfill the conditions of the contract so made. But the power to make the contract and to execute the proprietary grant and the business portion of a quasi public nature did not carry with it the power to depart from the course prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished. To so hold would be to confer upon the trustees of a municipality the power to abrogate the plain provisions of the statute, which says: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." Comp. Laws, § 1622, par. 71. It has been seen that the revenues of the defendant town realized from all sources in any one year were not sufficient to meet the current expenses of the municipality, and to hold that the deficiency arising after exhausting the sum realized from the two-mills levy might be made up and supplied from the general revenue would be to permit all the revenues to be consumed in the payment of water rentals, and to allow all other municipal obligations to remain unsatisfied, because it has been before shown (section 1724, Comp. Laws 1884) that no more than 1 per centum ad valorem shall ever be levied or collected for all municipal purposes by any town or city corporation organized under this act, and "no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy." If it shall appear that the sum to be realized from a two-mill levy is insufficient to satisfy the water rentals contracted for, that is a matter for legislative, and not judicial, determination. It is not reasonable to presume that the legislature intended to confer upon the boards of trustees of municipal corporations the power to make contracts within the scope of their administrative duties which would consume all the revenue derived from the ad valorem tax of the municipality for one single purpose,—in this instance, in satisfaction of water rentals,—and leave all other obligations incurred by them to remain unsatisfied. We do not think the authority directly in point for the other reason that the five-mills levy that was the maximum to be levied rested,

not on the entire taxable property in the incorporated limits, but only in that receiving benefit and protection, while under our statute the special tax for water runs to everything taxable in the same way that the general tax does. Also the fact of there being an absolute inhibition against levying more than eight mills other than for water is a feature not referred to in the cases last cited, and this is a distinction also, in our view, important. The Montana state statute provides that "the amount of corporation taxes to be assessed and levied in any one year * * * for general municipal or administrative purposes shall not exceed three-fourths of one per centum, and for fire and water purposes one-half of one per centum on the assessed valuation of such property and such special assessments as may be levied from time to time." Laws 1889, p. 185, § 16. In passing on this statute in *State v. Mayor, etc., of City of Great Falls (Mont.)* 49 Pac. 15, the court said: "We are of the opinion that this law became part of the contract embodied in said ordinance, and that ratelors had a right to insist that, in so far as may be necessary to pay what was due it for hydrant rentals in accordance with the rate prescribed in the ordinance contract act, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as should be needed, and not exceeding the five-mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder; and the legislature in said act contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose."

In the case at bar there is no complaint that the property subject to taxation has not been properly assessed, or that the proceeds of the two-mills levy have not been properly collected and applied; nor that the privileges granted complainant corporation constitute an exclusive franchise in the nature of a monopoly, and therefore void for that reason. These questions would have to be determined in another action. *Coy v. Lyons City*, 17 Iowa, 1, was a mandamus proceeding, and not applicable to the case at bar. Almost all of the Iowa authorities cited are with respect to indebtedness, and we believe, after a careful and considerate examination of all of them, that they do not apply, or in any material respect differ from the position here taken. It is insisted by complainant, that the case of *City of Valparaiso v. Gardner*, 97 Ind. 1, supports its position, but we are of the opinion, after a careful examination, that it is not in conflict with the conclusions we have arrived at in the cause at bar. All that was decided in that case was as to what constitutes an indebtedness, and we fully concur in the conclusions stated by that court. It held, in substance, that municipal bonds, or negotiable obligations of any kind, did constitute an indebtedness, but that a contract to pay a cer-

tain fixed sum per month or per year for a certain term of years did not constitute an indebtedness, within the meaning of the constitutional or statutory limitations. We do not hold that the contract in question here creates an indebtedness as contemplated by our statute or the act of congress, by which the complainant agreed to furnish and supply water from 44 hydrants, for which defendant agreed to pay semiannually the sum of \$1,962.50 or \$3,925 per year for 25 years, making a total sum for that time of \$98,125. If that were an indebtedness, the contract would be clearly void, because it would be for an indebtedness beyond the limitation of four per centum prescribed by the act of congress approved July 30, 1886, as well also as the statutory limitation. The complainant might fail to perform its part of the contract, or the defendant might forfeit its rights to receive the water some time during the continuance of the contract, and on the occurring of either event the contract would, on a proper showing, be declared at an end, and no further obligation would rest on either party to the contract. It does not constitute an indebtedness for the whole amount in present. It is a continuing contract from year to year, and is binding on both parties, so long as the conditions therein are not broken. There is nothing negotiable about it in the legal sense of the term. Dill. Mun. Corp. (4th Ed.) § 136. The trustees of defendant town corporation had no authority to enact and enforce Ordinance No. 64, passed May 23, 1895, so as to in any manner change or affect the appropriations then existing for that fiscal year as provided for by Ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896; and it is therefore void to that extent.

Section 1636, Comp. Laws 1884: "The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. * * * The * * * board of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance to be termed an annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amounts appropriated for each object or purpose." Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, in so far as its appropriations are legal, by Ordinance No. 64, which seems to have been passed on May 23, 1895,—after the time provided by statute. The trustees may fix any time for the beginning of the fiscal year, so long as it does not change appropriations already made in a regular and orderly manner. *Sullivan v. City of Leadville* (Colo. Sup.) 18 Pac. 736. The statute (Comp. Laws, § 1649) requires the treas-

urer of the town to keep a book, and to register therein each town order, warrant, or other certificate of such town indebtedness in the order in which it is presented, whether it is paid at the time of such presentation or not. "Sec. 1650. Every fund in the hands of the treasurer of any such city or town of this territory for disbursement, shall be paid out in the order in which the orders drawn thereon and payable out of the same shall be presented for payment." The trustees of the defendant town had no authority to pass and enforce Ordinance No. 65, by which it was attempted to make town warrants issued after June 1, 1895, receivable in payment of town licenses. The law provides that they shall be paid in the order of their presentation as they appear from the book of registry required to be kept by the town treasurer, and not otherwise. The purpose of this ordinance is bad, in that it may permit speculations in town warrants, and might lead eventually to the issuance of warrants not authorized. And it is an effort to divert public funds from their proper channel, and it is void to that extent. *Fazende v. City of Houston*, 34 Fed. 95. It is not quite clear as to just what permanent and final relief complainant could obtain, even though the bill should be sustained, and the prayer granted in all its parts, because the prayer is, first, for specific performance of Ordinance No. 10, for the enforcement of the contract. This court, in a proceeding of this nature, may declare the validity of the contract; but, if the trustees should refuse to make the levy contended for,—which it is alleged and admitted they have done,—then mandamus must be resorted to, to compel them to make it. This is in reality the foundation of this whole proceeding. We think an action at law by mandamus to compel the levy to have been made would have disposed of the whole matter at once. "(1) If the city [in this cause the town] is liable for this money, an action at law is the appropriate remedy. The action for money had and received to the plaintiff's use is the usual and adequate remedy in such cases, when the claim is well founded; and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings. In this view the present bill fails for want of equitable jurisdiction. (2) But there is no more reason for a recovery on the implied contract to repay the money than on the express contract found in the bonds." *City of Litchfield v. Ballou*, supra. So, if the warrants upon which payment is sought here are valid, an action at law is the proper remedy to enforce their payment. They have been issued, and are claimed to be outstanding obligations against defendant town, and it says they are void, and therefore declines to pay them. Then, if in any action at law judgment should be entered in favor of the legal holders, and defendant's trustees should decline to provide for their

payment, mandamus would be the proper remedy to compel the necessary levy. *State v. Mayor, etc., of City of Great Falls (Mont.)* 49 Pac. 15; *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271. We conclude that Ordinance No. 10 and the contract made thereunder are not void, but that the language of section 11 of said ordinance, that the said town agrees to levy and collect a tax sufficient, etc., means and should be construed as an obligation for the town to exhaust its power, if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder. As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two-mills levy, and as Ordinance No. 64 provides for the entire proceeds of a two-mills levy being paid to complainant, it is apparent its bill is without equity, and should be dismissed. The decree entered in the court below is reversed, and the bill of complaint will be dismissed, and an order will be entered directing the lower court to dismiss the bill at the costs of complainant, the Raton Waterworks Company; and it is so ordered.

COLLIER, HAMILTON, and BANTZ, JJ., concur.

(9 N.Mex. 161)

In re LEWISOHN et al.

(Supreme Court of New Mexico. Aug. 25, 1897.)

JURISDICTION—COMMENCEMENT OF ACTION—FILING OF DECLARATION—CERTIORARI—REVIEW.

1. *Comp. Laws*, § 1836, provides that "it shall be the duty of the clerk, when any paper is filed in his office, immediately to enter on the back thereof his certificate of the day on which it was filed," and that, if he neglects to do so, the court may, in its discretion, by an order nunc pro tunc, direct that the certificate be entered. Section 1867 provides that, if a declaration is left with the clerk with intent that process shall immediately issue thereon, the action is thereby commenced, and that such intent is to be presumed. *Held*, that where a declaration was delivered to the clerk, unaccompanied by the statutory advance fee, upon the last day allowed for its filing, and the clerk did not indorse it with his certificate, and the advance fee was subsequently paid, the court had jurisdiction to order the clerk to file the declaration nunc pro tunc.

2. No error in the issuance of an order by the district court, other than the question of the jurisdiction of the court therein, will be considered by the supreme court on application for a writ of certiorari to review the order.

Smith, C. J., dissenting.

Certiorari by Leonard Lewisoohn and others to set aside certain orders of court. Writ discharged.

F. Downs, for petitioners. Chas. A. Spliss, for respondent.

COLLIER, J. The writ of certiorari applied for in this case is not in any way aid

of the appellate jurisdiction of this court, but to have reviewed the records of two causes in the district court of Santa Fé, and to have set aside a nunc pro tunc order in each, as being made without jurisdiction. The nunc pro tunc order in one case is in identical language with that in the other, and both were made the same day. After entitling the case, the order reads as follows: "It being made to appear to the court that plaintiffs left with the clerk of this court the declaration in the above cause on the evening of May 21, 1895, and that it was not filed by the clerk for the reason that plaintiffs did not pay the advance fee as required by law, and that such fee has been paid at this date, it is ordered that the clerk file said declaration as of the date of May 21, 1895; and it is so ordered. May 24, 1895. N. B. Laughlin, Associate Justice," etc. It is to be noted that this order recites that the declaration had been left with the clerk, and that the advance fee required by law had in fact been paid, and there is no averment in the petition for certiorari in conflict with these recitals. It should be assumed, then, that both the declaration and the advance fee were in the hands of the clerk when the order was signed. Section 1836 of our Compiled Laws provides that "it shall be the duty of the clerk when any paper is filed in his office immediately to enter on the back thereof his certificate of the day on which it was filed." Therefore it appears that the auditor delivering to the clerk a paper which should be filed in his office files same, and the clerk's certificate on the back thereof is merely the evidence of the filing. This appears still more clearly by what follows in the same section. If the clerk neglects to place his certificate on the back of the paper the court may, in its discretion, "guided by the justice of the case," by an order nunc pro tunc, direct that the certificate be entered. Here is an express statutory provision that, whether a paper is marked "Filed" or not, a nunc pro tunc order may be made in reference to the same. The statute considers a paper left with the clerk for filing as a paper in the case, and, if it is, the court has jurisdiction to act in regard to the same. Section 1867, *Comp. Laws*, also shows that if a declaration or a bill is left with the clerk with the intent that process shall immediately issue thereon, that makes the commencement of an action, and that such intent is to be presumed. Plaintiffs' attorney left with the clerk the declarations on May 21st, and the advance fee afterwards; all prior to the signing of the nunc pro tunc order. Whether there was error in the nunc pro tunc order cannot be considered by use, but only whether or not there was jurisdiction to make the order. We think there undoubtedly was jurisdiction, and this writ should be discharged. We refrain from passing upon the question whether or not this writ, not being in aid of the appellate jurisdiction, can legally issue to the dis-

strict court, as it is clear that there was jurisdiction to make the order sought to be vacated. An order should be entered discharging this writ, and it will be so ordered.

HAMILTON and BANTZ, JJ., concur.

SMITH, C. J. (dissenting). I cannot concur in the conclusion of my associates, as I cannot conceive that the existence of jurisdiction confers the authority to assume it prior to its acquisition. Such retroactive operation would extend limitations upon actions, and bestow upon courts the power to annul legislation of restrictive character. Jurisdiction obtained is prospective in operation, in personam et in rem, and it is illogical that in its exercise it should be deemed legitimate to affect its subject before the commencement of the litigation bestowing it. In this case the institution of the suit by the plaintiffs was not in conformity with the exactions of the department, absolute in its right to prescribe rules and regulations in the premises, and the time within which it should have been commenced having expired. I do not recognize that it was in the power of the judge to deprive the petitioners of their advantage by an endeavor to protect the plaintiffs against their own default. "The leading object of the writ of certiorari is to keep inferior judicatories within the bounds of their jurisdiction; and where any such tribunal, judicial or quasi judicial, has proceeded without any jurisdiction, or in excess thereof, certiorari lies to correct the error." It must be conceded that the fiat of the judge in this case was an assertion of authority beyond his rights. Being without jurisdiction on May 21st, it is beyond achievement that he could possess himself of it at that date by any judicial legerdemain at a subsequent date, and any order on the 24th of May, presuming to operate prior to its issuance, was in excess of his jurisdiction. If such power as was practiced in this case be within the purview of a judicial official, and the aggrieved party is limited for redress to the prolix proceeding of appeal, his rights may be lost by the unavoidable delay in such effort to secure them. It appears that grave injustice and injury has been done the petitioners by the order of the judge attempting to save to the plaintiffs the limitation within which they should have sued; and it would seem that this court, even if there were legitimate doubts as to the propriety of allowing the writ as strictly applied at common law, should have solved the problem in behalf of the petitioners, in deference to the extension of the writ, in many states, by judicial enlargement, even to the function of reviewing and correcting illegalities and irregularities in proceedings. But an order nunc pro tunc is, by its terms, limited, in its retrospective effect, to the time when the right to issue any order had accrued,—when jurisdiction had attached,—and, if it exceeds this extent, it is a nullity for its excess of jurisdiction.

(9 N.Mex. 105)

CUNNINGHAM et al. v. SUGAR.

(Supreme Court of New Mexico. Aug. 25, 1897.)

WRONGFUL ATTACHMENT—MEASURE OF DAMAGES—EXEMPLARY DAMAGES.

1. Plaintiff, suing one who wrongfully seized his stock of goods under an attachment, cannot recover for lost profits for any time after that, when, with regard to all the circumstances, he could reasonably have had his stock replenished.

2. Injury to credit is too remote to be assessed in favor of one whose property is levied upon as the property of another.

3. A vendee of goods sued a creditor of the seller for wrongfully attaching such goods as belonging to the seller. The evidence was sufficiently conflicting as to the bona fides of the sale to justify a submission of the question to the jury. *Held*, that the vendee was not entitled to exemplary damages, as the evidence did not show any gross negligence or malice on the part of such creditor.

Error to district court, Santa Fé county; before Justice N. B. Laughlin.

Action by L. D. Sugar against W. P. Cunningham and others. From a judgment for plaintiff, defendants bring error. Reversed.

On January 4, 1896, one Goodman sold his stock in trade to L. D. Sugar, who continued in business in the town of San Pedro. Goodman was at the time indebted in a large sum to Mandell Bros., who, on January 30, 1896, sued out an attachment against Goodman, and levied it upon the stock previously sold by Goodman to Sugar, and also upon certain other merchandise which Sugar had added to and mingled with the goods he had bought from Goodman. Judgment was afterwards rendered against Goodman in the attachment suit. This action in trespass was brought by Sugar against Cunningham, the sheriff who levied the attachment, and also against Mandell Bros., in whose favor it was levied. The declaration was in the ordinary form, and alleged the value of the property seized to be \$2,000. It alleged several kinds of special damages, and alleged damages in the aggregate sum of \$4,500. The defendants below pleaded the general issue, and also a special plea of justification. A bill of particulars was prayed and furnished. It sets out the various items of merchandise seized, and their value, and also contains the following items of special damage: (1) "Profits on business from January 30, 1896, the date of taking said goods by defendants, to the date of judgment, per month, \$125." (2) "Interest on money invested at 12 per cent. per annum, \$250." (3) "Injury to business standing and credit as merchant in community, and all other damages, \$500." A mass of testimony was introduced at the trial as to whether the sale of the stock by Goodman to Sugar was made in good faith, or was made to hinder, delay, or defraud Goodman's creditors, and as to Sugar's information upon that subject. A large amount of testimony was also introduced upon the questions of values and damages. It also appears that Sugar refurnished his store with another stock, and resumed business some time in March, 1896.

The jury returned a verdict in favor of Sugar in the sum of \$3,262, and, after unsuccessfully moving for a new trial, the defendants brought the trial into this court on writ of error.

W. B. Childers, for plaintiffs in error. E. L. Bartlett and J. H. Sutherland, for defendant in error.

BANTZ, J. (after stating the facts). The principal matter in controversy is in regard to the correctness of the measure of damages applied to this case in the court's instructions to the jury. The court below authorized the jury to assess as damages (1) the full value of the property seized, (2) the loss of reasonable profits in the business from the date of the levy of the attachment to the time of trial, (3) damages to business standing and credit by reason of the levy. Leaving out of view wrongs done from a corrupt motive, which will be considered when we come to the subject of exemplary damages, the universal and cardinal principle in all civil actions, whether *ex contractu* or *ex delicto*, is that "the person injured shall receive a compensation commensurate with his loss or injury, and no more." 1 *Suth. Dam.* 17; *U. S. v. Smith*, 94 U. S. 214; *Brewster v. Van Llew*, 119 Ill. 554, 8 N. E. 842. No one is held responsible for all the consequences of his wrongful act, but only for those consequences which are natural and proximate; that is, such as might reasonably have been expected under the particular circumstances to ensue; such as, according to the common experience and the usual course of events, might reasonably be anticipated. 1 *Suth. Dam.* 21; *Wood's Mayne, Dam.* (Ed. 1880) § 52; *McDonald v. Snelling*, 14 Allen, 290; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39; *Warwick v. Hutchinson*, 45 N. J. Law, 61. Damages which flow as the necessary result of the wrongful act need not be specially pleaded, but are recoverable under general allegations. Those damages which do not necessarily flow from the wrongful act, but do flow as a natural and proximate consequence of it, are classed as special damages, and to guard against surprise to the defendant these must be averred specially. 1 *Chit. Pl.* 395; *Roberts v. Graham*, 6 Wall. 578; 1 *Suth. Dam.* 763; *Uransky v. Dry Dock*, 118 N. Y. 304, 23 N. E. 451; *Butler v. Kent*, 19 Johns. 223. For the conversion of personal property the measure of damage ordinarily is the value of the property at the time of the conversion and interest thereon to the day of the trial. This is the general rule established by the great weight of authority. 1 *Suth. Dam.* 488; *Cattle Co. v. Mann*, 130 U. S. 78, 9 Sup. Ct. 458; *Seymour v. Ives*, 46 Conn. 110; *Fowler v. Merrill*, 11 How. 375; *Watt v. Potter*, 2 Mason, 77, Fed. Cas. No. 17,291. This rule is especially true of articles of merchandise which can be replaced from the commercial markets at pleasure. Interest is allowed as damages for the deprivation of the use of the property, and this is the only damage which can ordinarily flow from the wrong. Whenever a dif-

ferent rule is to be applied, it is because peculiar circumstances introduce new elements, calling for the allowance of special damages in lieu of interest. To seize and convert the stock in trade of an established business not only involves the loss of the value of the property to the owner, but may also carry with it as a natural and proximate consequence the interruption of his business, and thereby loss to him of profits and trade. If the merchandise may be bought at will in the market, the taking of his stock in trade would be merely a temporary interruption of his business; and it must be remembered that the wrongful act consisted not in interrupting the business, but in the seizure of the property, and therefore the special damage could only continue so long as the interruption may reasonably continue as the natural and proximate consequence of the wrongful act. The question is not what plaintiff may have gained as the fruit of an unrealized speculation, but what he has lost by the act of the defendant. *Smith v. Bolles*, 132 U. S. 129, 10 Sup. Ct. 39. In the case at bar the property was an ordinary stock of merchandise. It was seized on January 30th, and Sugar (plaintiff below) resumed business, and realized the profits of it. In *Crymble v. Mulvaney*, 40 Pac. 501, the Colorado supreme court say: "The profits resulting from an injury to the business after its resumption, and until the commencement of the action, and the loss of credit, were too remote and speculative, and are not allowable under the clear weight of authority." The same rule was made in *Anderson v. Sloane* (Wis.) 40 N. W. 222. If he can recover from the defendants for the same period, he would be making the defendants pay again after the interruption of his business had ceased. The court's instruction authorizing recovery of profits up to the time of trial was, therefore, clearly erroneous.

We will now turn to the question as to the proper rule on this subject. It seems quite clear that when the loss of profits may be assessed as damages, the period for which they may be recovered cannot depend upon the time when the plaintiff may have chosen to replenish his stock and resume business. If it did, he might wait at ease till the period of limitation was about to expire, and, without actually incurring the hazards of mercantile pursuits, recover the estimated profits of a long period of idleness. In *Luce v. Holsington* an ox had been seized under attachment, and in an action for damages it was held that the failure to raise a crop by reason of being deprived of the use of the ox was not the natural or proximate cause of the wrongful levy. The plaintiff could not allow his land to go uncultivated, and then ask the jury to speculate as to his loss. 56 Vt. 436. In *Luse v. Jones*, 39 N. J. Law, 707, the action was for wrongfully seizing a boarding house keeper's furniture, and she was allowed to recover damages to her business through the loss of boarders, and by having to turn others away in the interval "before she could, with proper diligence, furnish her house." In *Allison v. Chandler*, 11

Mich. 555, though damages were allowed for injury to business by disturbing a tenant's possession of a storeroom, he having an established business at that place, the court say: "Where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule would be applied in actions of tort as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market, and has a market value." In *France v. Gaudet*, L. R. 6 Q. B. 199, the action was for conversion of a quantity of wine. No other wine of the same brand and quality was to be had in the market, and the owner had procured a purchaser of it at a certain price. The queen's bench held that the measure of damage was the actual price at which the wine could have been so sold. This, of course, included the profits. But say the court, per Mallor, J.: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and, in case the plaintiff could, by going into the market, have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was, however, admitted on the trial, in the present case, that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market, so as to enable the plaintiff to fulfill his contract with Capt. H." It was not deemed necessary in that case to determine whether notice of special circumstances of damage is or is not necessary on trover, in order to recover from them; but the learned judge was inclined to think that either express notice must be shown or arise out of the circumstances of the case. See *Sedg. Dam.* (4th Ed.) 559. If by reason of distance from the supply market, or like circumstances, an interval must reasonably elapse before business can be resumed, the loss of profits or injury of business by the diversion of trade during that period may be shown, as the natural and proximate result of closing up a mercantile store; but this must be based upon actual conditions previously existing for a period sufficiently long to afford reasonable certainty to it as evidence of damage. In *Minnesota* it held that the evidence is limited to cases where the business had become so established at the time of interruption as that a uniform and actual condition of profits and losses could be shown with reasonable certainty, otherwise the profits would be purely speculative. *Casper v. Klippen* (Minn.) 63 N. W. 737; *Goebel v. Hough* (Minn.) 2 N. W. 849. While the law requires that damages must be proved with certainty, there is nothing requiring a higher degree of certainty upon that than any other branch of the cause, and as upon other matters the proofs may be probable and inferential as well as direct and positive. Much must

be left to the good sense of the jury under guarded and discriminating instructions. In measuring the reasonable time within which the replenishing of stock should occur, regard must be had to all the surrounding circumstances; and for that period loss of profits and injury to business may be assessed, but beyond that period the damage would be 6 per cent. per annum to the time of trial, in addition to the market value of the goods taken. Injury to credit is too remote, and cannot be assessed in behalf of one whose property is levied upon under an execution or an attachment against another person.

2. We have thus far considered the case from the standpoint of compensatory damages. Exemplary damages are awarded when the wrong is done under circumstances indicating malice, wantonness, oppression, or gross negligence. *Railway Co. v. Prentice*, 147 U. S. 107, 13 Sup. Ct. 231. When the wrong is committed by mistake in the assertion of a supposed right without any actual wrong intention, and without such recklessness or negligence as evinces malice, or a conscious disregard of the rights of others, exemplary damages will not be warranted. 1 *Suth. Dam.* 724; 5 *Am. & Eng. Enc. Law*, 21. Hence such damages will not be allowed for seizure of the property of a stranger to the execution when not done wantonly. *Phelps v. Owens*, 11 Cal. 22. When attachment process is sued out or executed in good faith, though by a mistake not attributable to gross negligence, exemplary damages cannot be recovered. *Beveridge v. Welch*, 7 Wis. 465; *Crymble v. Mulvaney* (Colo. Sup.) 40 Pac. 501. The wrong must be willful, malicious, or the result of gross negligence, and it will be error to charge the jury that such damages can be recovered if defendants at the time had good reason to believe that the act was wrongful. *Inman v. Ball*, 65 Iowa, 543, 22 N. W. 676. Something more must be shown than "mere disregard of the rights of others." *Wilkinson v. Searcy*, 76 Ala. 176. The evidence in this case did not warrant the giving of an instruction upon exemplary damages. The attachment was not sued out against Sugar, but against Goodman. The title to the property in question depended upon whether Goodman intended by the sale of it to hinder, delay, or defraud his creditors, and whether Sugar was aware of that intent, or was aware of facts and circumstances which would put a prudent man upon inquiry. That was a question depending upon disputed and conflicting testimony, and these were issues submitted in this very case for the consideration of the jury. Even if Mandell Bros. were mistaken in their conclusion as to these matters, and even though that mistake arose out of negligence, it would be no ground for exemplary damages, unless there was gross negligence or malice, and of that there was no evidence. The issue as to ownership is a live one in the case, and there is nothing to indicate that it is not now maintained in good faith, or that it was begun in bad faith. It

will not be necessary to notice the other errors assigned. The cause will be reversed and remanded, with directions to grant a new trial.

SMITH, C. J., and COLLIER and HAMILTON, JJ., concur.

MERTEN v. SAN ANGELO NAT. BANK.
(Supreme Court of Oklahoma. July 30, 1897.)

JUDGMENTS—RES JUDICATA—MERGER.

A judgment was rendered in the state of Texas upon a promissory note. The judgment was void for the reason that defendant had not been served with process. Subsequently an action was brought in this territory on said void judgment. To this action the defendant pleaded—First, the statute of limitations; second, that the judgment was void. The court ruled the plaintiff to reply to the paragraph of defendant's answer setting up the bar of the statute of limitations. Plaintiff failing to reply, the court, for such default, rendered judgment that plaintiff take nothing by his action, and that the defendant recover his costs. The proceedings were under the Code of Civil Procedure of 1890. In a subsequent action brought upon said promissory note, *held*, that the judgment of default on the plea of the statute of limitations in the former action was not res judicata as to the validity of the Texas judgment, or whether said note was merged therein; that an action could be maintained on said note notwithstanding said Texas judgment and the proceedings thereon in this territory.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by the San Angelo National Bank against W. H. Merten. From a judgment for plaintiff, defendant brings error. Affirmed.

Asp, Shartel & Cottingham, for plaintiff in error. Cottelal & Hornor, for defendant in error.

TARSNEY, J. This is an action instituted in the district court of Logan county to recover on a promissory note executed by the plaintiff in error, W. H. Merten, payable to the order of the defendant in error, the San Angelo National Bank, dated at San Angelo, Tex., June 22, 1886, for \$1,000. On September 3, 1888, the bank brought suit on this note in the district court of Tom Green county, in the state of Texas, and recovered judgment on the note on November 16, 1888. The judgment was a personal judgment. At the time of the commencement of said action in the state of Texas, the statutes of said state assumed to authorize the service of process by personal service of summons upon a defendant outside of the state of Texas. The defendant in that action was then residing at Wichita, in the state of Kansas. The only service of process in the action was that of serving the summons therein upon the defendant at Wichita, Kan., and there was no attempt to have the defendant summoned by any constructive service. On August 1, 1892, Merten, then being a resident of Logan county, Okl. Ter., the bank instituted a suit in the

district court of said county on the judgment obtained in Texas. To the petition in that cause the defendant answered in two paragraphs, as follows: "First, that the action on the said pretended judgment was barred by the statute of limitations; second, that the pretended judgment was rendered without process conferring jurisdiction, and void." Afterwards, on November 1, 1893, said court rendered judgment in said cause as follows: "Now, on this 1st day of November, 1893, this cause coming on for trial in its regular order, pursuant to the assignment of causes on the calendar of the court, and the plaintiff appearing not in person nor by attorney, and the defendant appearing by Asp, Shartel & Cottingham, his attorneys, who make application for judgment by default against the plaintiff, and the court having examined this cause, finds that said plaintiff is in default of a reply to the matter of the defense contained in the first paragraph of the answer of said defendant, that said plaintiff has been duly ruled to reply, and that such rule has long since expired. Wherefore the court finds that the defendant is entitled to judgment. The plaintiff is three times duly called, and comes not. It is therefore considered, ordered, and adjudged that the plaintiff take nothing by this action; that the said defendant, W. H. Merten, have and recover of and from said plaintiff the costs of this action, taxed at \$——."

The fundamental propositions relied upon by the plaintiff in error in this cause are: (1) A note once placed in judgment is merged therein, and no further suit will lie thereon. In order for the plaintiff to maintain this action, it was necessary for him to impeach the existence of the judgments previously rendered. (2) A material proposition once litigated and established can never be reopened by the same parties in another suit. (3) The former adjudication that the original judgment was barred by the statute of limitations expressly affirmed its existence and proper original rendition. And (4) that the right to maintain the present action being dependent on the impeachment of the fundamental groundwork of a former decision of the same court between the same parties, the evidence tending to impeach that judgment should have been excluded in the first instance, and disregarded in the second, and judgment should have gone for the defendant in the court below, instead of the plaintiff.

It is conceded in argument by counsel that the statute of Texas assuming to authorize the personal service of process outside of the state was invalid; that there was no service upon the defendant in the action in that state; that the court had no jurisdiction to render a personal judgment against the defendant; that the judgment was therefore a nullity, and could not in any manner bind the defendant; that the cause of action sued on, namely, the note in question, was not merged in a valid judgment. But the contention is that,

though the judgment was void, the plea of the statute of limitation having been interposed by the defendant against it when the judgment was sued upon in this territory, such plea admitted the existence of the judgment, and, the plea being sustained by the court, it was an adjudication by the court of the existence of a judgment in which the note was merged; that, by the admission of said plea that a judgment existed, defendant is estopped from now denying its existence; and that the judgment of the court upon the plea of limitation was an adjudication of the existence of a judgment against which the statute had run; and that such judgment is *res judicata*.

We are favored with an extensive and able argument, and by the citation of many authorities by counsel showing the nature and effect at the common law of a plea of the statute of limitations. We do not deem it necessary that we should make an analysis of the authorities, or determine the accurate effect, the niceties, or the fictions of common-law pleading, in order to determine the rights of the parties to this action. It is sufficient to say that we cannot concede the full force of the contention of counsel that the plea is an admission that the plaintiff once had a cause of action. At the common law, pleas in bar were not susceptible of any other division than (1) pleas of traverse or denial; and (2) pleas by way of confession and avoidance. An important rule of pleading, deducible from the principle that a plea in bar must traverse or confess and avoid the matter to which it applied, was that a plea in confession and avoidance must give color; that is, that it must give the plaintiff credit for having an apparent or *prima facie* right of action, independently of the matter disclosed in the plea, to destroy it. Tidd, Prac. 552. Mr. Stevens, in his work on Pleadings (page 220), says: "With respect to the quality of these pleadings, it is a rule that every pleading by way of confession and avoidance must give color. This is a rule which it is very essential to understand, in a view to a correct apprehension of the nature of these pleadings; yet it appears to have been not hitherto adequately explained or developed in the books of the science. 'Color' is a term of the ancient rhetoricians, and was adopted at an early period into the language of pleadings. As a term of pleading, it signifies an apparent or *prima facie* right, and the meaning of the rule that every pleading in confession or avoidance must give color is that it must admit of an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated." So that, by the rule of common-law pleading, we see that a plea in bar by way of confession and avoidance was not always considered as a solemn and binding confession or admission of the facts alleged as the plaintiff's cause of action, but was regarded as a fiction to give color, by an admission of the plaintiff's apparent or *prima facie* right to recover. As the

validity of the judgment and the merits of the cause of action sued on were not involved or to be determined by the court upon the issue presented by the plea of the statute of limitations, we cannot hold that the fiction or implied confession or admission contained in the common-law plea of confession and avoidance in pleading the statute of limitations is such an admission as would create an estoppel, or involve the application of the principle of *res judicata* to matters not in issue upon the plea of limitations, or adjudicated by the court under that special plea.

In addition to the defense of the statute of limitations, the defendant pleaded that the judgment sued on was rendered without process conferring jurisdiction, and was void. These pleas were not inconsistent. The defendant, in his answer of new matter,—the running of the statute of limitations,—in order to avoid the cause of action, need not in fact confess it. He had a right to say, "I deny your alleged cause of action, but, if you shall succeed in proving it, still I am not liable, because you have no right to maintain an action against me now, because, whether good or bad your cause, you did not commence action upon it within the time permitted by law." The plea of the statute of limitations goes only to the remedy, and not to the merits of the cause of action. The answer, having presented a denial of the validity of the judgment, presented an issue upon the merits, without necessity for a replication. A judgment upon that issue, other than a judgment of dismissal, could not be taken by default, even under the procedure of the common law. The proceedings in that action were not under the rules of the common law. For years the tendency of American legislation has been towards simplifying the procedure in courts of justice. The technicalities and fictions of common-law pleading and practice have been largely abolished. Rules that made falsehood an essential to the statement of a cause of action or to the defense have been abrogated, and rules of pleading that determined life and property by fiction or technicality, rather than by considerations of justice, have here given way to the rule of common sense. This territory is in the van in this judicial emancipation. The statute in force in this territory when these proceedings were had provides as follows (St. Okl. 1890):

Sec. 4377. The first pleading on the part of the plaintiff is the complaint. The complaint shall contain: First. The title of the cause, specifying the name of the court and the county in which the action was brought and the names of the parties to the action, plaintiff and defendant. Second. A statement of the facts, constituting the cause of action, in plain and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended."

"Sec. 4386. The answer shall contain: First. A denial of each allegation of the complaint controverted by the defendant. Second. A

statement of any new matter constituting a defense, counter-claim or set off in plain and concise language. Third. The defendant may set forth in his answer as many grounds of defense, counter-claim and set off, whether legal or equitable as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered and clearly refer to the cause of action intended to be answered."

"Sec. 4415. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties, but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

"Sec. 4372. An action may be dismissed without prejudice: First. By the plaintiff before the jury retires, or when the trial is by court, at any time before the finding of the court is announced. Second. By the court, where the plaintiff fails to appear on the trial. Third. By the court, on the refusal to make the necessary parties, after having been ordered by the court. Fourth. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence. Fifth. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases upon the trial the decision must be upon the merits."

It was under the provisions of this statute that the proceedings were had and the judgment rendered which is the subject of this controversy. It was for a violation of, or a disobedience specified in the fifth clause of, this last-quoted section, that the judgment was rendered. The court had ruled the plaintiff in the action to reply to defendant's plea of the statute of limitations. The judgment recites that "the court, having examined this cause, finds that said plaintiff is in default of a reply to the matter of the defense contained in the first paragraph of the answer of said defendant, that said plaintiff has been duly ruled to reply, and that such rule has long since expired. Wherefore the court finds that the defendant is entitled to judgment." Giving the statute a plain, liberal construction, and one that shall be in the furtherance of justice, what would be the effect of this judgment? Does it not mean that, for default in complying with a rule or order of the court concerning the proceedings in the action, his action should be dismissed without prejudice? Certainly it was not the intention of the legislature to make the procedure more drastic and more oppressive to litigants than the procedure at common law. They intended to liberalize the procedure, and not to make it more unjust or oppressive. This would have been a judgment of nonsuit at common law. A nonsuit is the result of an abrupt termination of an action, after it has been put at issue, without determining such issue. It is the name of a

judgment given against the plaintiff because of his neglect or default. The form of the judgment in this case is the same as that of a judgment of nonsuit at common law, viz.: "Therefore, it is considered by the court that plaintiff take nothing by his suit, and that defendant recover of plaintiff his costs." It being conceded that the judgment rendered by the court in Texas was without jurisdiction, and therefore a nullity, the note which was the cause of action therein sued on was not merged in any judgment. The note was not sued on in the first action commenced in this territory, but the suit was upon the void judgment, in which there was no merger of the note. The defendant denied the validity of the judgment. At the same time he invoked the statute of limitations. The court ruled the plaintiff to reply to the plea of the statute of limitations. This he failed and neglected to do. The court dismissed his action for this disobedience of its rule, and adjudged him to pay the costs. There was no adjudication of the merits. Had the plaintiff complied with the rule of the court, and filed a reply to the paragraph of the answer setting up the statute of limitations, thus forming an issue upon that plea, and had that issue been determined against the defendant, were it determined that the statute of limitations had not run, the cause would have then stood for trial upon the issue of the validity of the judgment, and until that was determined the principle of res judicata would not have attached. This case is without exact precedent, as far as we are advised or our own research will enable us to determine. We confess that there are some propositions involved that are not free from doubt, but of this we are certain: that there is no doubt as to where right and justice point in this controversy. The defendant gave his promissory note for value. He has not paid the same. The plaintiff has for years been deprived of that to which in good conscience and common honesty it was entitled. The defendant has been deprived of nothing by the proceedings behind which he seeks to shield himself. We would prefer, if we were compelled to determine this matter by doubtful and unsatisfactory interpretation of authorities concerning the fictions and useless refinements of common-law pleading, and should err, that our error should be on the side of commercial integrity and personal honesty, rather than in aid of the repudiation of just obligations. For the reasons stated herein the judgment of the court below is affirmed.

DALE, C. J., who tried the cause below, not sitting. The other judges concurring.

WEEDEN v. ARNOLD et al.
(Supreme Court of Oklahoma. July 30, 1897.)
PHYSICIANS—LICENSE—BOARD OF HEALTH—MANDAMUS.

1. The superintendent of public health of the territory is the proper officer to issue a license

to an applicant as a practicing physician, and it is not the duty of the board of public health to issue such license.

2. Mandamus will not issue to an officer to require the doing of a thing that has already been done, although the person in whose favor the act was performed may have been entitled to the performance of it upon other grounds than those upon which it was performed; and where it appears, under the indefinite allegations of an alternative writ, that a person claiming the right to be licensed as a practicing physician has already been granted this license by the officer whose duty it would be, in a proper case, to issue it, this is held as an additional reason for refusing the writ of mandamus to compel the issuance of such license.

(Syllabus by the Court.)

Mandamus on the relation of L. Weeden against C. D. Arnold and others. Writ denied.

L. G. Pitman and Cutlip & Blakeney, for relator. H. S. Cunningham, Atty. Gen., for respondents.

BIERER, J. The relator, L. Weeden, brings this proceeding in mandamus to compel C. D. Arnold, as president, J. B. Rolater, as secretary, and E. N. Barker, as treasurer, of the territorial board of health, to register him as a practicing physician, under and by virtue of his diploma as a graduate of the Wisconsin Eclectic Medical College, and by reason of a certificate which he alleges he holds from the territorial board of health, authorizing him to practice medicine and surgery in the territory of Oklahoma. Upon the presentation of plaintiff's petition two alternative writs of mandamus seem to have been allowed,—one by Associate Justice Keaton, on the 13th day of January, 1897, and the other by Chief Justice Dale, on the 12th day of February, 1897. The matters presented seem to be upon the latter writ, and that one only will be considered. It contains, however, all that is in the first writ. The alternative writ contains all the matters set up in plaintiff's petition, and it alleges that defendants are, and were at all times therein stated, members, as above given, of the territorial board of health of the territory of Oklahoma. That the Wisconsin Eclectic Medical College is a duly-organized and incorporated medical college of the state of Wisconsin, and is located in the city of Milwaukee, that state. That on the 8th day of September, 1896, said Wisconsin Eclectic Medical College, after due examination as to proficiency and qualification to practice medicine and surgery, granted relator a diploma, showing and entitling relator to the practice of medicine and surgery. That on the 1st day of December, 1896, relator presented to said board of health, and to C. D. Arnold, as president of said board, the diploma of relator from said medical college, with satisfactory proofs, as by law required, that he was a person of good, moral character, and not an habitual drunkard, together with the fees required by the rules of said board, and requesting that he be given a license certifying that he is a practicing physician, and possesses the qualifications as such, and that this the

said board failed to do. That thereafter, on the 27th day of December, 1896, on the requirement of said board of health, and C. D. Arnold, president thereof, he submitted himself to an examination before said board of health as to his proficiency and qualification to practice medicine and surgery within the territory of Oklahoma, and that upon such examination he was found duly qualified, and was granted a certificate declaring his proficiency in all respects required by law, and his good, moral character, and authorizing him to practice medicine and surgery in the territory of Oklahoma; and that this certificate was signed by Arnold, as president, Rolater, as secretary, and Barker, as treasurer, of said board. Upon this his prayer is that said board be required, by virtue of his said diploma, to license him as a practicing physician of this territory.

The attorney general has presented a motion to quash the alternative writ upon numerous grounds, all of the important ones of which go to the right of the relator to maintain his action, on the face of the alternative writ. It is only necessary to consider two of these. Section 352 of the statutes of 1893, under which it is claimed by plaintiff, the relator, that he is entitled to the relief demanded, provides that no person shall be permitted to practice medicine in this territory unless he be a graduate of a medical college, or unless, upon examination before a board composed of the superintendent of public health and two other physicians, to be selected by the territorial board of public health, such person shall be found to be proficient in the practice of medicine and surgery, and shall be found, upon proof, to have been actually engaged in the practice of medicine for a term of not less than five years, and that he is a person of good, moral character, and not an habitual drunkard. Under this section any person possessing the qualifications required is entitled, upon the presentation of his diploma, and the affidavit of two reputable citizens from the county where he resides that he possesses the qualifications of a physician, as therein prescribed, to the superintendent of public health, together with a fee of two dollars, to receive from the superintendent of public health a license, certifying the applicant to be a practicing physician, and having the qualifications as such. Section 339 of the statutes provides for a territorial board of health, which shall be composed of the president, who shall be the superintendent of public instruction of the territory, and a vice president, and superintendent of public health. The vice president is to be some suitable person, a resident of the territory, to be appointed by the governor, and the superintendent of public health is to be a graduate of some medical college recognized by the American Medical Association, and a resident of the territory, and is also to be appointed by the governor, by and with the advice and consent of the territorial council. The contention that plaintiff makes is that,

while he has been licensed to practice medicine in the territory by the territorial board of health, yet he is entitled to a recognition of the diploma which he holds from this medical college, and to receive a certificate based upon it to practice medicine in this territory. If, as a matter of fact, he does possess a license, signed by the superintendent of public health, made upon an examination before the authorities duly constituted under the law to examine him as to his qualifications and proficiency to practice medicine, we should hold that, even if he was entitled to a license to practice upon this diploma, he would have no right to the relief prayed for, for the reason that he already possessed all that the court could require to be given him; that is, a license to practice medicine. The court should spend no time in determining whether, although he had procured a license upon an examination, he was also entitled to it upon his certificate of graduation from the medical college. The law entitles him to a license to practice medicine upon the presentation of the proper certificate of graduation from a medical college, accompanied with the other proofs of residence, good moral character, and sobriety. It also entitles him to this certificate upon the examination required by law, together with similar proofs in the other respects, and, of course, upon the payment of the legal fee. Now, whether the superintendent of public health granted the license upon one or the other of these qualifications would make no difference whatever. It would neither add to nor detract from the rights given him by virtue of such certificate, nor the ability which the holder thereof actually possessed as a member of his profession; and, if the superintendent of public health has granted him a certificate upon one of these grounds, it would be a useless waste of time for the court to determine whether or not he was entitled to it upon the other. Courts do not grant writs of mandamus to require a thing to be done that has already been done, because there may be some other ground for doing it than that upon which the action already taken has been based. But we do not think the plaintiff is entitled to the relief he seeks, because the alternative writ (and his petition contains substantially the same allegations) does not show that he has demanded, nor does it ask the judgment of this court requiring, that this license be granted by the proper officer. He has asked for a certificate to practice medicine, and now asks this court to enforce its issuance by C. D. Arnold, as president, J. B. Rolater, as secretary, and E. N. Barker, as treasurer, of the board of health of the territory, when the statute requires that this license shall be issued, when issued, by the superintendent of public health of the territory, and there is no allegation in either the petition or the writ as to who is the superintendent of public health. It is true that the writ does state that relator presented his diploma to the superintendent of said board,

but the petition nowhere states who the superintendent of the board is. In connection with this allegation, it is stated that at the same time he tendered to C. D. Arnold, president of the board of health, the fees required by the rules and regulations of the board for such certificate; but the statute nowhere makes the president of the board of health the proper officer to whom to either present the diploma or other proofs of qualification, or of whom to demand the license, or to whom to pay the fee. The statute requires these things to be presented to the superintendent of public health. There is another part of the statute, contained in section 340, which provides that the superintendent of public health shall be the secretary of the board of health; and, if Arnold is, as is alleged, president of this board of health, and Rolater is the secretary of the board, then Rolater, and not Arnold, was the proper officer of whom to demand the license, with a tender of the legal fees therefor. In order that a writ of mandamus should issue, it should be shown that the party to whom it is awarded is clearly entitled to it; and it should clearly appear that he has demanded the thing sought to be enforced of the proper officer, and made the tender of the fees required to him; and this writ should not be awarded upon indefinite and uncertain allegations.

We do not think relator entitled to the writ in this case—First, because he does not show by clear and unmistakable allegations that this diploma upon which he claims the right to have this license to practice issued has been presented, with the other proofs, and the fee therefor, to the superintendent of public health, the proper officer under the law to issue such license; and, second, because, if we applied the statute to these indefinite and somewhat mixed-up allegations of the petition and writ, and thereby concluded that, as Rolater is secretary of the board of health, he is also superintendent of public health of the territory, then we must also conclude that what the relator now demands has already been extended to him in the license which he alleges was signed by C. D. Arnold, president, J. B. Rolater, secretary, and E. N. Barker, treasurer, of the territorial board of health; the secretary of such board, as we have seen, under the statute, being the superintendent of public health of the territory. For these reasons the writ is denied. There is nothing in the cases of *Barmore v. Dickson* (Or.) 28 Pac. 8, and *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, relied upon by counsel for petitioner, that conflicts with the views herein expressed. All the justices concurring.

CITY OF GUTHRIE v. NIX et al.
(Supreme Court of Oklahoma. July 30, 1897.)
MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—
CONTRIBUTORY NEGLIGENCE.

The streets, including the sidewalks, of the cities of this territory are dedicated to the pub-

lic use, and, if an abutting proprietor or occupant makes an excavation in the sidewalk, for the convenience and advantage of his adjacent property, it is an invasion and appropriation, to that extent, of a public use; and, having made the appropriation, he cannot, by reason of it, create a cause of action in his own favor against the city, notwithstanding the fact that the city may itself have been at fault and negligent in contributing to the cause of the injury complained of. Such an excavation by an abutting proprietor, resulting in injury to him, is contributory negligence.

Keaton, J., dissenting.

(Syllabus by the Court.)

On petition for rehearing. Reversed.
For former opinion, see 41 Pac. 343.

McATEE, J. The facts in this case are sufficiently stated in 3 Okl. 136, 41 Pac. 343, where it was considered upon a question of pleading.

It was assigned for error that the court refused to give instructions numbered 5 and 6, which were offered on behalf of the defendant upon the trial, which are as follows: "(5) If you find from the evidence that the street in front of the building occupied by the plaintiffs, under the sidewalk, had been excavated by persons other than the defendant, and that such excavation tended to allow water flowing over the sidewalk to flow into the cellar, then the plaintiffs cannot recover. (6) If you find that the excavation under the sidewalk, in front of the building occupied by the plaintiffs, contributed to the injury of the plaintiffs' goods, then plaintiffs cannot recover,"—and in giving instructions 3 and 4, as follows: "(3) The court instructed you that, in order for the plaintiffs to recover in this case, they must prove, by a preponderance of the evidence, that in the month of June, 1892, the plaintiffs were conducting a wholesale grocery business in the city of Guthrie, and were occupying a certain building situated on Oklahoma avenue, at a point near the intersection of said avenue and Vine street, as their place of business; that a part of their stock of goods was in the basement of the building so occupied; that their building was properly built on the grade established by the agents of the defendant; that the defendant negligently constructed what is commonly called a 'sewer' under the surface of the street known as Oklahoma avenue, near the place where the plaintiffs were carrying on their business; that they also permitted obstructions to be placed and left in front of the building, and near the gutter of the street, in front of said building; that, by reason of such negligent construction of the aforesaid sewer, and negligent condition of the street in front of the building aforesaid, the drainage was insufficient to carry off the water which accumulated at that point; and that such water flooded the basement of the building wherein plaintiffs' goods were stored, thereby causing a loss to the plaintiffs in the sum set forth in their complaint. (4) If you believe from the evidence that the city of Guthrie, on Oklahoma avenue in said city, fixed the grade and constructed the street, and caused to be constructed sewers and

drains on said street to carry off the surplus water, which necessarily, in cases of rain, ran down said street by reason of said grading, and that in June, 1892, there came a rain, and said sewers and drains were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water of said rain was forced into the basement of the building in question, and the plaintiffs thereby damaged, then the jury should find for the plaintiffs for the amount which the proof shows such damages to be."

Special interrogatories were, at the request of the defendant, submitted to the jury, in reply to which the jury stated: "That the defendant had not used ordinary care and skill in the construction of the sewer across Oklahoma avenue, which was not sufficient to carry off the surface water created from ordinary hard rains, and that there was an excavation underneath the sidewalk in front of the building occupied by the plaintiffs, when the injury complained of occurred, of which the plaintiffs were informed, and that, if the excavation under the sidewalk had not been made and existed there, the water would not have flowed into the basement of the building from the street; that the rain was a usual hard rain; and that the city of Guthrie did not make the excavation under the sidewalk in front of the building occupied by the plaintiffs."

The question is here directly raised by the exceptions to the giving and refusal to give instructions, and the assignments of error thereon, whether the plaintiffs in making, or, while occupants of the building, permitting, the excavation under the sidewalk, were guilty of contributory negligence, so as to prevent recovery from the negligence of the city in failure to construct a sufficient sewer to carry off a usual hard rain. It was decided in the case of *City of Guthrie v. Beamer*, 3 Okl. 652, 41 Pac. 647, that when the survey and plat had been made and adopted by the inhabitants of the city of Guthrie, and afterwards adopted and approved by the secretary of the interior, that such survey and plat, act of congress, and of the secretary of the interior, was, in effect, a dedication to the public uses of all such portions of the town site as were designated by such plat as streets and alleys, and had the effect to divest the individual claim by settlement or occupancy of such portion; and the fee of the streets, including the sidewalks, is in the municipality, to be held in trust for the use and benefit of the public. This dedication includes the sidewalk, and when the plaintiffs or their lessors entered upon the sidewalk, and made the excavation, they did it in the street, of which they were divested of any interest, and which was dedicated to the public uses, and the appropriation which they made was for their private interest and benefit and advantage. It does not appear that any permission was obtained from the city government to make the excavation, nor is it evident how such permission, if it were shown, could put the plaintiffs in any other or better position to recover against the

city. The act of making the excavation is admitted to have been wholly by the plaintiffs, and for their own benefit. They made it at their own risk. It would be difficult to see upon what principle of law or equity a private lot owner, seeking to make his property abutting upon the street more valuable for his own private purposes, by making an excavation in the street, which is dedicated to public uses, and under the control of the municipality, for private purposes, can make any claim for damages under circumstances in which, but for that excavation, no such injury would have occurred. The excavation was an appropriation by the plaintiffs, for the advantage of their private business, of property dedicated to public uses. Such an excavation was by the supreme court of Kansas denominated a trespass in the case of *Jansen v. City of Atchison*, 16 Kan. 359, in which Judge Brewer, stating the opinion of the court, said that, before a lot owner can be held responsible, there must appear some negligence on his part, or he must have trespassed upon the sidewalk by obstruction upon the surface, or excavation beneath, and such negligence, excavation, or obstruction caused the injury.

It was held in *Nelson v. Godfrey*, 12 Ill. 20, that when a person exercises or enjoys a peculiar privilege, productive of benefit to him alone, the law requires that he should exercise ordinary care to use or enjoy such privilege, in order that no injury to other persons should result through such use and enjoyment; and that digging a coal cellar under the sidewalk was a convenience and privilege for the owner or occupant thereof, and it is incumbent for him to see that he does not endanger the safety of others.

It was held in the case of *Richards v. City of Waupun*, 17 N. W. 976, by the supreme court of Wisconsin, that the right of action against a person or corporation cannot arise in favor of another party merely for misusing his own property. There is no exception available for the nonaction of another in not preventing wrong action in ourselves. No person, by his own transgression, can create a cause of action in his own favor against another for not interfering. That to which a man consents or causes by his own actions cannot be considered an injury for which he can recover damages.

It was said by the supreme court of the state of Kansas in *Smith v. City of Leavenworth*, 15 Kan. 81, a state in which the fee is held to be in the county, that the only legitimate use that can be made of a street or the sidewalk by any other person is for passing and repassing upon the same, although this would probably be different if a person owned the fee to the land occupied by the street; and that any person traveling upon the street has a right to use any portion of the same for that purpose not already otherwise in use, and that the owner, or any person under him, has a right to use any portion of the street in front of his lot in passing to and from his lot, and to and from the improvements on the same, and that, under the existing laws in the state, he has no power to confer up-

on any private person any right to use the street, or any portion of the same, for the purpose of a cellarway, or for any other purpose, except for passing and repassing.

In the case of *Jansen v. City of Atchison*, 16 Kan. 385, the plaintiff sought to recover damages from the city for injuries sustained by reason of falling from a defective sidewalk into an excavation beneath. It was by the supreme court of Kansas held in that case that, ordinarily, an area is supposed to be for the benefit of the adjoining building, for light, air, approach, or storing; and there may be a presumption that it was constructed by the owner, and at his expense, and for his benefit. The finding in this case that the area was not constructed for the benefit of the adjoining property does away with any presumption that it was constructed by the owner, or that he was responsible for injuries resulting from it, and that the proprietor of the abutting lot is not the owner in fee of the street or sidewalk. He is not presumed to be trespassing upon the property of the public. The city has the possession of the street and sidewalk. The court there states that, for wise purposes of public policy, the law casts upon the city the responsibility for the care and safety of its streets and walks, and that it is not relieved therefrom by the fact that the lot owner occupied the sidewalk, or obstructed the passage, or endangered its safety by excavation beneath it.

While, therefore, the plaintiffs, in making the excavation or enjoying it, had constructed or were enjoying a private work exclusively for their own convenience, appropriating a part of the sidewalk for their own benefit, they were violating the only legitimate use which could be made of the street and sidewalk, which was for the passing and repassing upon the same, and in undermining the street or sidewalk were appropriating a part of it for their own benefit, without legal right, and were thus trespassing upon the sidewalk appropriated to the public use; and, while possibly permitted to do so by the city, having consented to or caused the excavation, which, according to the special findings of the jury, directly contributed to the injury, they cannot, for the injury thus received, recover damages, and no act of the city could relieve them from their own liability for such act of private appropriation and trespass. It is a case of contributory negligence, in which the plaintiffs suffered an injury which they brought about by their own act, proximately contributing to the injury, for which they were themselves responsible; and, the fact being so, they cannot recover from the city. The rule applies as well to occupants who are in charge of, or leasing, the premises, and to the tenant for years or at will, as to the owner in fee. *Cooley, Torts*, 80.

The ruling of the court was erroneous whereby instructions numbered 5 and 6, in which this construction of the law was applied for to the court and refused, and instructions 3 and 4, in which the court imposed a liability upon the city, not giving the jury the question of contrib-

utory negligence as to the excavation, were given. The judgment of the court below is reversed. All the justices concur, except DALE, C. J., who presided below, and KEATON, J., who dissents.

(5 Okl. 512)

NELSON v. TERRITORY.

(Supreme Court of Oklahoma. July 30, 1897.)

BAWDYHOUSE—EVIDENCE—REPUTATION—INSTRUCTIONS.

1. In the trial of an information charging the defendant with keeping a house of prostitution, or bawdyhouse, it must be shown—First, that the house is a bawdyhouse; and, second, that the defendant was the keeper thereof.

2. General reputation of the house as a house of prostitution is not competent or sufficient to sustain a conviction. The prosecution is not required to show particular acts of lewdness or prostitution in the house. It is competent for the prosecution to show that the house is resorted to by people of both sexes who are reputed to be of lewd and lascivious character. From evidence of the general reputation of the inmates and persons who resort thereto, as being of lewd and lascivious character, the law will infer that such characters resort thereto for lewd and immoral purposes, and that the house is a bawdyhouse.

3. Evidence that the defendant lived in or was an inmate of the house is not sufficient to warrant a conviction where the information is for the keeping of such house. The keeping is an essential element of the offense, and by "keeping" is meant having the government of, and exercising control and direction over, the house, and the conduct of the inmates thereof.

4. It is not enough for the court to instruct the jury, in general terms, that the burden is upon the territory to establish the guilt of the accused, and each material element of the offense charged, to the satisfaction of the jury, by the evidence, beyond a reasonable doubt; but the accused is entitled to have the court instruct the jury as to what are the material elements of the offense, and in this case the court should have instructed the jury that keeping the house was a material element of the offense, and should have defined to the jury by the instructions what is meant by "keeping."

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice J. R. Keaton.

One Nelson was convicted of keeping a bawdyhouse, and she brings error. Reversed.

Redick, Lewis & Snyder, for plaintiff in error. C. A. Galbraith, for the Territory.

TARSNEY, J. The information in this case charges the defendant with keeping a bawdyhouse and house of ill fame, in violation of section 5, art. 33, c. 25, of the Statutes of 1893. To sustain a conviction for this offense, two things are essentially necessary to be shown by the prosecution: (1) That the house described in the information was a bawdyhouse; (2) that the defendant was the keeper of such house. On the trial the territory offered evidence to prove the general reputation of the house as a house of prostitution. No evidence was offered to establish the character of the house, except the testimony of witnesses that the house was commonly reputed as being a house of prostitution. The evidence offered

was not sufficient to sustain a conviction. It was competent for the territory to prove the character of the house by evidence of the bad character of the persons resorting thereto, and of the inmates thereof. The fact that the inmates of the house and those who resort thereto are persons of bad character constitutes evidence to establish the bad character of the house, and the house cannot have any general reputation or character except as it is obtained through these and other facts. The facts, and not evidence of general reputation, must therefore be the only evidence competent to establish the bad character of the house. The fact that persons of immoral character reside in the house, and that men and women of lewd and immoral character resort thereto, may be sufficient evidence upon which to base a conviction, as the law will infer that persons of such character, when they resort together, do so for lewd and immoral purposes, but evidence that the house has a general reputation is not sufficient. *State v. Hand*, 7 Iowa, 413; *State v. Lyon*, 39 Iowa, 379; 2 Whart. Cr. Law, § 453; *State v. Brunell*, 29 Wis. 435. There are authorities that hold that evidence of the general reputation of the house is competent; that the fact that a house is a bawdyhouse may be proved by reputation. *O'Brien v. People*, 28 Mich. 213; *State v. McDowell*, Dud. (S. C.) 346. But an examination of these cases will show that the courts so holding have drawn a distinction between a house of ill fame and one resorted to for the purposes of prostitution and lewdness; and those cases hold that the jury must be satisfied from the evidence both that the house was one of ill fame, and that it was resorted to for the purpose charged, and that the former may be proved by reputation, and the latter by the testimony of persons having knowledge of the fact that prostitutes and lewd persons resorted there and committed acts of prostitution. We think the definition of a common bawdyhouse embraces the facts that lewd persons of both sexes resort thereto and commit acts of prostitution therein, and that these acts are embraced in the charge of keeping the house, and, being proven, establish the fact that the house is a bawdyhouse, and that no evidence as to the general character of the house, independent of the facts and the character of those resorting thereto, is competent. To sustain the conviction in this case would be to make the offense consist in keeping a house reputed to be a common bawdyhouse, without regard to the question as to whether it is in fact a house of that character, and we are not willing to subscribe to the doctrine that one may be convicted of crime upon evidence simply of common repute.

There is no evidence in this record showing that the defendant was the keeper of the house specified in the information, and no evidence that she was other than an ordinary inmate of the house, except that the police judge of the city of Oklahoma City was per-

mitted to testify that his docket shows that defendant had been convicted at divers times, both before and after the date when this offense is alleged to have been committed, of keeping a bawdyhouse; but there was nothing in the evidence to identify any of the houses for the keeping of which she was convicted with the house specified in this information. Proof that the defendant lived in or was an inmate of a house of prostitution is not sufficient to warrant a conviction, where the indictment or information is for keeping such house. The keeping is an essential element of the offense, and by "keeping" is meant having the government of, and exercising control and direction over, the house, and the conduct of the inmates thereof. As there was no proof that the defendant in this case had or exercised any government, management, or control over the house described in the information, there was no proof that she was a keeper thereof, and no proof to warrant the conviction. The jury should have been instructed that the keeping, as herein defined, was an essential element of the offense of which the accused was charged, but nowhere in the instructions were they so directed. It was not enough for the court to have instructed the jury, in general terms, that the burden was upon the territory to establish the guilt of the accused, and to establish each material element of the offense to the satisfaction of the jury by the evidence, beyond a reasonable doubt; but the defendant was entitled to have the court instruct the jury as to what were the material elements of the offense, and that the keeping (that is, the control, management, and direction) of the house was an essential element of the offense. This the court in this case did not do, but, on the contrary, refused to so instruct when requested by the defendant. The defendant asked the following instructions: "(1) The jury are instructed that, before you will be justified in finding a verdict of guilty against the defendant, you must be satisfied by the evidence in the case, beyond a reasonable doubt, that the defendant, Kittie Nelson, was the keeper of a bawdyhouse, in manner and form as charged in the information; and it is incumbent upon the territory to establish that fact, by affirmative proof, beyond a reasonable doubt. (2) You are instructed that by the term 'keeper,' as used in this connection, is meant the person in charge and control of the house in question, and having the management of such, as distinguished from the other inmates thereof. (3) You are further instructed that, although you should find from the evidence in this case that the defendant, Kittie Nelson, was an inmate of the house in question, and although you should find that said house was a house of prostitution, unless you further find from the evidence, beyond a reasonable doubt, that she was the keeper of the same, your verdict should be 'Not guilty.'" These instructions embrace proper principles of law governing this case. As they were not given in the gen-

eral charge of the court, it was manifest error for the court to refuse them when requested by the defendant. For the errors herein stated the judgment of the court below must be reversed. The judgment is reversed and the cause remanded for a new trial. All the justices concurring.

PENTECOST et al. v. STILES.

(Supreme Court of Oklahoma. July 30, 1897.)

TAXATION—ASSESSMENT—LISTING—PRESUMPTIONS—EQUALIZATION PROCEEDINGS—SALE—NOTICE—CERTIFICATE—MUNICIPAL ORDINANCES—AMENDMENT.

1. The law presumes that a taxing officer on whom is imposed a specific duty has regularly performed his duty, and that the proceeding in the required respect was regularly performed; and in an attack made against the levy and collection of the usual and ordinary taxes on the ground that the assessment list was not taken by the required officer it will be presumed that the listing was regularly done, until the contrary clearly appears.

2. Under the statute of this territory, however, the listing of property for taxation is not a prerequisite to a valid assessment. It is made the duty of the owner to furnish such list to the assessor, and the duty of the assessor to procure the list from the owner; but the list seems to be required only for the purpose of better enabling the assessor to know what the property is, and its value; and, where the owner fails to furnish the list required by law, it is then the duty of the assessor to assess the property from other sources of information.

3. In amending a section of a city ordinance it is not necessary to incorporate into the amendatory section the provision of the ordinance to be amended; but what is required is that the amending section shall contain the entire provision on the subject contained in the old section, and which it is desired to enact by the new section, thus leaving the former section as entirely repealed.

4. The law does not require that the proceedings of the territorial board of equalization should be signed.

5. The supreme court cannot say that proper notice for a tax sale was not given where the notice of the sale of the particular property is not brought into the record.

6. The certificate of sale of lands for taxes required by the law to be executed by the county treasurer on making the sale is for the benefit and protection of the purchaser, whether he be an individual or the county; and the failure of the treasurer to make and execute this certificate in no way affects the validity of the sale, which may be proven by other evidence, if the certificate is not issued.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by Henry W. Pentecost and another, administrators of the estate of Francis R. McKennon, deceased, against Joseph Stiles. From a judgment for defendant, plaintiffs bring error. Affirmed.

Fred M. Elkin and Harper S. Cunningham, for plaintiffs in error. A. H. Huston and Green & Strang, for defendant in error.

BIERER, J. This action was brought by Harry W. Pentecost and Samuel Murphy, as administrators of the estate of Francis R. McKennon, deceased, to enjoin the defendant from

issuing a tax deed to certain real estate in the city of Guthrie. On trial had before the court evidence was offered by the plaintiffs, at the close of which the defendant interposed a demurrer to the evidence, which was sustained by the court, and judgment rendered for the defendant denying the injunction as prayed for. It is claimed by the plaintiffs that there were a number of fatal irregularities in the assessment and levy of the taxes for the year 1892, and the sale of the property therefor, and upon which it is alleged the county treasurer was about to issue a tax deed to the property. These will be noticed in their order.

The first objection to the validity of the tax upon these several pieces of property is that the assessment was not made by the assessor, but was made by a deputy assessor; and it is claimed that under the statutes of this territory there is no provision of law for a deputy assessor; that the law requires the assessment to be made by the assessor, and, no provision being made permitting his duties to be done by a deputy, that an assessment made by a deputy assessor is void. Such an objection made to the validity of a tax proceeding, if it were supported by the facts, might perhaps be a serious one, but it is not now necessary for us to pass upon the question as to whether or not an assessment can be made by a deputy assessor, for the reason that the record does not show that this assessment was so made. There is in the record what is termed an "assessment list," but the list offered does not show what year it was for, nor when it was filed. There is nothing to show that this was the assessment list returned for that year, and nothing to show that there was no other assessment list returned. The only thing presented to indicate that the list returned was the assessment list for that year is that the blank certificate to the affidavit, which is a part of the list, is filled in with the date February 17, 1892, and this is signed by "A. C. Potter, Deputy Assessor." The list, however, is not signed by F. R. McKennon, whose assessment for some year, not stated, it purports to be; and as the list, when made, is, under the law, required to be both signed and sworn to by the person making the list, it is very doubtful whether this could in any respect be considered a list for assessment. In any event, it certainly cannot be sufficient to overcome the presumption that the officer authorized by law performed his legal duty. Besides, the statute provides that each owner of property shall make an assessment list, under oath, of his property subject to taxation, and shall in such list state the value of the property assessed; and, if the owner of the property fails to do so, the law then makes it the duty of the assessor to assess the value of the property as best he can. St. 1890, § 6134. This assessment list appears by the statute not to be required as a necessary prerequisite to a valid assessment, but it is required to be given in order that the assessor may have the statement under oath of the owner of the property, as to the value of the property, and which should be taken as the most appropriate evi-

dence of what the property is worth. It is, however, as much the duty of the owner of the property to furnish this list to the assessor, and thus aid the assessor in his work of fixing property values, as it is for the assessor to procure the list from the owner. And the statute plainly directs that if the list is not furnished, either by neglect or refusal on the part of the owner of the property, then the assessor shall ascertain and estimate the value of the property from other sources and other means. And if the assessment list set out in the record should be held to have been the only list returned of this property for the year 1892, then the owner of the property, or those who have succeeded him, could not complain because there was no valid list. The assessment may be valid with no list at all; and no other complaint than this is made to the validity of the assessment.

The next objection to the tax proceeding is that the ordinance under which the taxes of the city of Guthrie were assessed against this property is void. It appears that the city passed an ordinance levying the city tax on the 1st day of September, 1892, the ordinance being in four sections; and that on the 8th day of September, 1892, section 1 of the first ordinance, and which was the section which levied the general taxes for the city, was amended. The objection upon this part of the case is not very clearly stated, but we understand, from the argument of counsel, the objection to be that the second ordinance did not contain the amended section as well as the provisions that are incorporated into the section as amended. It seems to be claimed that the language of section 602 of the Statutes of 1890, relating to cities of the first class, that "no ordinance shall be revised or amended, unless the new ordinance contain the entire ordinance revised, or the section or sections amended," means that, in amending a city ordinance, in the amended ordinance shall be set out the language of the section amended as well as the amendatory provision. We do not think this is a proper construction of the statute. We construe the language of the statute to mean that where a section of a prior ordinance is amended the amendatory section shall contain the entire revision of the old section; that is, where a section of an ordinance is amended, that section must be repealed, and all the provisions of the ordinance relating to the particular matter contained in the amended section of the old ordinance must be contained in the corresponding section of the new ordinance. Under this construction, the ordinance in question fulfills all the requirements of the statute.

It is also claimed by plaintiffs in error that the tax sale should be enjoined because the proceedings of the territorial board of equalization for the year 1892 were not signed by the members of the board, or by any one on their behalf. It appears from the transcripts of the records taken from the auditor's office, and introduced in evidence by the plaintiffs, that the board did meet at the time provided by law, and did act upon the assessment, and make an equal-

ization thereof. These proceedings do not appear to have been signed by any one, but that the proceedings were had appears beyond question; in fact, it is not asserted that they were not had. No section of the law has been referred to by counsel, and we have found none, that requires these proceedings to be signed by the board.

The next contention of plaintiffs in error is that the publication notice of the tax sale was not made at the time required by law, but that it was made at an earlier date than the statute provides. The record does not show when the publication notice for the sale of the lots in question was made. There is contained in the record what purports to be the affidavit of the publisher that he did publish a delinquent tax list, of which it is stated a copy is thereto attached, but there is no copy attached to the affidavit, nor is it anywhere else in the record; so that we are unable to say that the publication was not properly made.

The only further objection that is relied on to enjoin the tax deed is that the sale was void because the county treasurer failed to sign the certificate of the tax sale. Section 5637 of the Statutes of 1893, under which this sale was made, provides that the purchaser of any tract of land sold by the county treasurer for taxes is entitled to a certificate in writing, describing the land purchased, and giving the amount which he has paid, and the time when the purchaser will be entitled to a deed, and requires that the county treasurer shall, in his official capacity, sign and acknowledge this certificate. And section 5643 of the same statutes provides that whenever the county treasurer of a county shall bid off any real estate in the name of the county he shall make out a certificate of purchase to said county, just as he is required to do if the sale is made to some person other than the county. It appears in evidence that after the sale was made by the county treasurer he did draw up a certificate, but this was retained in the county treasurer's office, unsigned, for the reason, as the treasurer states, that the custom in the office had been not to sign the certificates, but to retain them in that form until some person came in, as was often done, and took an assignment of the certificate from the county treasurer, when the certificate would be completed, and delivered to such person. The statute evidently intended that the county treasurer should, within a reasonable time (there appearing to be no time fixed) after the tax sale, make and sign such certificate, and deliver it to the purchaser, if there was one, other than the county, or to retain it in the treasurer's office where the sale was made to the county; but failure to do this would in no way affect the validity of the tax sale. This certificate is, under the express language of the statute, presumptive evidence of the regularity of all the proceedings prior thereto. It is not required for the purpose of making a tax proceeding valid, but in order that the purchaser, whether that be some individual or the county, may have a duly drawn and properly executed evi-

dence of the purchase. The tax sale, so far as the owner of the property is concerned, may be as valid without this certificate as with it. It may, however, be more difficult to prove the tax sale, and that the purchaser has acquired a lien on the property which he claims to hold by virtue of such sale and the payment of the tax, without the certificate than with it. In this case the fact that the sale was made is not disputed. It is, indeed, alleged in plaintiffs' petition. We find no error in the judgment appealed from, and it is therefore affirmed.

DALE, C. J., having presided in the court below, not sitting; all the other justices concurring.

SON v. TERRITORY.

(Supreme Court of Oklahoma. July 30, 1897.)

HOMICIDE—MOTIVE—EVIDENCE.

1. Where the prosecution rely for a conviction upon circumstantial evidence alone, and it is sought by the testimony of witnesses as to the conduct and acts of the deceased to show a motive upon the part of the accused for the killing, and it does not appear that such acts and conduct of the deceased were brought to the knowledge of the accused, *held* prejudicial error.

2. In order to establish a motive for the commission of a crime, it is essential that the facts upon which the motive is assigned shall be within the knowledge of the party accused.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John C. Tarsney.

Alfred Son was convicted of murder, and he brings error. Reversed.

On the 25th day of April, 1895, the grand jury of D county returned an indictment against Bailey Son, Alfred Son, Dick Yeager (alias Zipp Wyatt), Dan McKinzie, and Grant Pettyjohn, charging said parties with the murder of one Fred Hoffman. The case was taken upon a change of venue to Canadian county, and the defendant Alfred Son tried upon the indictment. Upon the first trial the jury disagreed. The second trial resulted in a conviction of the defendant Alfred Son, the jury fixing the punishment at imprisonment for life. A motion for a new trial was overruled, and the sentence of the court pronounced in accordance with the verdict. To reverse the judgment of the lower court, the case is brought here, and numerous errors are assigned for the consideration of this court, only one of which we deem it necessary to consider. Upon the trial of the cause in the lower court, certain testimony offered by the prosecution went to the jury, over the objection of counsel for the appellant, and it is claimed that in admitting such testimony the court committed prejudicial error. In order to arrive at a proper understanding of what was involved in the testimony objected to, it is necessary to review at some length the facts as we gather them from a reading of the evidence. It appears that Fred Hoffman, the

person whom the appellant is charged to have murdered, was killed by some person or persons on January 22, 1895. At the time of such killing, Hoffman was traveling from his home, some distance southwest of Taloga, to that place; and his body was discovered at a point about $3\frac{1}{2}$ miles southwest of Taloga on January 26th, and when so discovered was in a place by the witnesses termed a "blowhole," in the sand hills near the South Canadian river, and about 75 to 100 feet from the road which Hoffman was traveling upon just previous to the time, as it appears from all the testimony and circumstances in the case, he was murdered. Hoffman was shot twice, as the evidence showed,—one bullet hole near the heart, and one wound by a bullet entering the mouth, and coming out through the top of the head. Within about 25 feet from where the body of Hoffman was found lay the dead body of his horse. The animal had been killed by a shot from a rifle or revolver, the bullet having passed through its neck. The first shot received by Hoffman was the one near the heart, as the one in the mouth appeared from the direction in which the bullet ranged to have been fired after Hoffman had fallen to the ground, and at such a close range as to powder-burn his face. In and about the vicinity of Taloga for a few days prior, and upon the morning of the day when it must be presumed from the evidence Hoffman was killed, there appeared a person styled by some of the witnesses as "Buck," by others as "Red Buck," while still others spoke of him as "Yeager," and one witness gave his real name as "Bert Collins." As developed by the evidence upon the trial, the person so styled and named was a notorious outlaw,—given, according to public rumor, to train and express robbery,—and upon whose head the express companies operating in this territory had set a price. This man was seen to be frequently in the company of Bailey Son and Alfred Son and Grant Pettyjohn, and was on apparent terms of intimacy with such parties. On the morning Hoffman was killed, Alfred Son, the appellant, left the town of Taloga, driving two horses hitched to a single-seated buggy. In the buggy, and riding with him, was Collins, the outlaw, who was leading a gray horse. Both Son and Collins were armed,—the former with a revolver, and the latter with a revolver and a Winchester rifle. Son and Collins left town driving in a southwesterly direction along the same road which Hoffman was traveling in coming into the town. It developed in the testimony offered by the prosecution that Alfred Son was paying attention, as suitor, to a young lady, who had sent him a note asking him to come out to where she was staying and take her to town, and that the trip out, upon the part of Son, was to comply with this request. Just before Son left Taloga he procured a box of cartridges for his revolver, and was in and about a saloon with Collins, drinking, and in fact became considerably intoxi-

cated, and shot off his revolver in the air, and so conducted himself that the stable man where Son procured the buggy with which to make the trip was about to take the same away from him, when Collins interposed, and induced him to permit Son to use the rig, upon Collins' statement that he would see that the team was properly cared for. Under the evidence it appears that Hoffman must have been killed about the time Son and the outlaw, Collins, would, by traveling at an ordinary gait, meet him. One of the witnesses testified that she saw Hoffman cross the ford on the river, and about 15 minutes thereafter saw a buggy coming from an opposite direction. Hoffman was killed at a point about one-half mile from the ford. The buggy she saw was the one Son was riding in. At the time she saw the buggy the outlaw was not with Son, and the gray horse had also disappeared. About the time Son and the outlaw were in the vicinity of the place where Hoffman was killed, shots were heard, which, from their sound and the appearance of the smoke, were close to that point. When the body of Hoffman was discovered, on the 26th day of January, four days after he was presumed to have been killed, parties searching for a clew to the murderers found the track of a buggy which had left the road near the point where the body was found, driven up to the rim of the blowhole, a distance of from 25 to 50 feet from the road, and stopped; and, from the place where the buggy stopped, two persons had walked in the direction of the body, and near thereto, and then returned to the buggy. Two horses had been driven to the buggy, as was evidenced by their tracks. About 100 feet south of where the buggy stood were found the tracks of two more persons leading to and out from the blowhole where the body of Hoffman was found. About two hours after the shooting was heard in the vicinity of the place where the body of Hoffman was afterwards found, a party was seen, upon a gray horse, riding away from such point. In the fall of the year 1894 one express robbery had occurred at Woodward, Okla., and another at Canadian City, Tex., and the Wells-Fargo Express Company were trying to locate and arrest the persons engaged in such robberies. Hoffman was county treasurer of D county, and United States commissioner, and was also secretly trying to aid the express company in ferreting out the parties who committed the robberies referred to. The prosecution relied solely upon circumstantial evidence to convict. The defense offered no testimony. Upon the trial of the case one T. M. Cook, over the objection of counsel for the defendant, was permitted to testify to the fact that Hoffman was employed as a detective to ferret out the parties who had committed the express robberies which had occurred at Woodward, and that his efforts were directed towards fastening the guilt for such crime upon the near relatives of the defendant Son.

One Hicks was also placed upon the stand by the prosecution, who testified that, just prior to his death, Hoffman stated to him that he was engaged in looking up testimony concerning the express robbery at Canadian City, Tex. While it appears from the record that counsel for defendant interposed objections to the testimony of the witness Hicks, yet it is doubtful if the objections, as interposed, should be, by themselves, considered as sufficient to authorize this court in holding them good. Thomas Smith also testified, over the objection of counsel for defendant, that Hoffman, just prior to his death, was charging defendant and his relatives with the express robbery at Woodward, and that Hoffman showed him letters that he wrote, and also received, relative to that matter. The witness Cook testified that it was not generally known that Hoffman was engaged in such work. Other questions were asked and answers given relative to the same matter, to which objections were not properly taken; and the court, upon his own motion, withdrew from the consideration of the jury all the evidence touching the letters. When counsel for the territory first began interrogating the witness for the purpose of showing that Hoffman was, just prior to his death, at work trying to implicate the defendant and his associates in the express robberies, and upon objection being made to such testimony, the court very frankly stated that he thought that the testimony showing that Hoffman was employed by the express company to apprehend the parties who had committed the robbery competent, if such efforts were directed towards the defendant then upon trial, or any person jointly indicted with him. But after the witness had answered that Hoffman was so engaged, and upon motion of counsel for defendant to strike out for the reason that the statements of Hoffman as to his employment were declarations made in the absence of the defendant, the court said that "unless the knowledge that he (Hoffman) was working for that purpose was brought home to the defendant, or some person working with him, it was not competent"; and the court then asked the witness this question: "Do you know anything about these defendants, or of this man who has been described as 'Wyatt,' 'Red Buck,' etc.? Do you know anything of their having knowledge of the business in which Mr. Hoffman was engaged,—that particular business?" To which the witness answered, "I do not." After this question and answer the witness was permitted, over the objection of counsel for defendant, to testify that Hoffman was engaged in working up the evidence concerning the express robbery, against the near relatives of the defendant. For some reason—and we judge, from the statement of the court, that it was inadvertence—the testimony of this and other witnesses touching this matter was not withdrawn from the consideration of the jury, although no attempt was made to show

that the defendant on trial, or, in fact, the parties jointly indicted with him, ever knew or had any cause to believe that Hoffman was engaged in an attempt to connect them with an express robbery.

Houston & Marum, Asp, Shartel & Cottingham, and R. J. Ray, for plaintiff in error. H. G. Springstun, Co. Atty. (Edward Black and J. C. McKnight, of counsel), for the Territory.

DALE, C. J. (after stating the facts). Where circumstantial evidence alone is relied upon for a conviction, proof of a motive upon the part of the accused which would induce him to commit the crime is always competent, and, if a strong motive be shown, unquestionably it would require a less amount of other evidence to bring about a conviction. In other words, motive to commit crime, if shown, may in many cases be sufficient alone, almost, to induce a belief of guilt. Upon the other hand, where no motive for the commission of a crime can be shown it is almost impossible to convince the mind of guilt. Men do not ordinarily commit grave crimes unless there is in their minds a motive strong enough to overcome the natural repugnance against crime, and the fear of punishment which usually follows detection. This view of this question is so universally recognized as being true that it has become incorporated into the law, and in almost all cases where the guilt of a defendant depends upon the facts and circumstances in proof in the case the court instructs the jury to consider the motive or lack of motive which the proof shows may or may not exist in the mind of a defendant on trial charged with crime. Such being the law, it was right and proper for the court in the trial of this case to permit the territory to establish upon the part of this defendant and those associated with him a motive for the killing of Hoffman; and, if it could have been shown that Hoffman was engaged in the attempt to fasten the responsibility for express robberies upon them, it was proper to permit the proof, if, as the court well said, the knowledge of what Hoffman was doing was brought home to the parties charged with the killing. But we think, when the prosecution closed its case without supplying such proof, either by the direct testimony of witnesses, or by proof of facts or circumstances from which the jury might reasonably infer that the defendant had such a knowledge, prejudicial error was committed against the defendant. The only proper office which the proof of Hoffman's efforts against the defendant and his associates could fill was for the purpose of showing a motive upon their part strong enough to tempt them to the murder of Hoffman. This was the view which the trial court took, as indicated by the statement that "unless the knowledge that he (Hoffman) was working for that purpose was brought home to the defendant, or some persons working with him, it was not competent." The evidence in this case does

not meet this requirement, because it does not appear that the defendant, or those with whom he associated, knew what Hoffman was engaged in; neither does it appear that any attempt was made to bring such knowledge home to such parties. A motive cannot operate to influence until the facts which create the motive exist. The facts upon which a motive is based cannot operate upon the mind until they are known by the party against whom the motive is assigned. If one person should contemplate and undertake a great wrong against another,—such a wrong as would induce in the mind of the person against whom it was directed a motive to kill,—and yet such contemplated wrong was unknown to the party, it cannot be justly said that a motive to kill could exist, because the party wronged had no knowledge of the facts which would be necessary to create the motive. Applying this reasoning to the case under consideration, it does not appear that the defendant, or any of the persons jointly indicted with him, knew that Hoffman was trying to implicate him or any of their friends in the express robberies. Upon the other hand, it does appear by the testimony of at least one witness that such fact was not generally known. In the absence of proof of knowledge upon the part of the defendant, the evidence was improper to show a motive to kill. It could not have been offered or received for any other purpose. We cannot tell how much weight the jury may have attached to such testimony. They may have given it great consideration, and, upon the other hand, they may have thought the testimony sufficient without the showing of the motive. About this we have no information. We do know that the evidence was before the jury, and that it may have prejudiced the defendant. The supreme court of Kansas, in *State v. Reed*, 53 Kan. 767, 37 Pac. 174,—a case where a motive for murder was sought to be shown by the proof of facts not brought to the knowledge of the defendant,—by Johnston, J., said: "A more serious objection is made to interviews and conversations held with the deceased some time prior to the shooting, when the defendant was not present, and of which he had no knowledge. A witness was permitted to detail at length a meeting between himself and Hacker on the day before the shooting, the taking of a night drive with the deceased, during which he related to the witness his troubles at Wellington, and his plans for leaving that place and going to Missouri. He was allowed to testify what the mood and manner of the deceased were on that day, and to relate the reasons given by the deceased for leaving Wellington. The reasons stated were the interference in his family, and the trouble made by the defendant. Another witness, over objection, related that he had met the deceased on the next day, and had a conversation with him, in the absence of the defendant, in which the deceased informed him, among other things, that he had determined to go to Mis-

souri, and the reason given was that, if he could get his wife away from where Judge Reed was, they could get along all right together.' Acts and conduct of the deceased previous to the fatal encounter, which formed a part of the *res gestæ*, or which tended to throw light upon the question of motive or malice, might be admitted in evidence; but the acts or conduct of deceased which are not a part of the *res gestæ*, and which could not have influenced the defendant in the commission of the homicide, cannot be shown. The manner and conduct of deceased on the day previous to the killing were not known to the defendant, and are not connected with the homicide, and therefore the defendant could not be affected thereby. Anything that would throw light on the homicide, and anything that would operate upon the mind of the defendant, can be shown, but evidence of the acts or manner of the deceased which never came to the knowledge of the defendant could not be proved." We think this view of the law eminently correct. In support thereof we cite the following cases, which bear upon this proposition: *People v. Carkhuff*, 24 Cal. 640; *Com. v. Gray* (Ky.) 30 S. W. 1015; *People v. Gress* (Cal.) 40 Pac. 732; *Montag v. People* (Ill. Sup.) 30 N. E. 337; *State v. Punshon* (Mo. Sup.) 27 S. W. 1111; *Cheek v. State*, 35 Ind. 492; *Combs v. State*, 75 Ind. 215; *Graves v. People* (Colo. Sup.) 32 Pac. 63.

The other errors assigned are matters which will not arise upon another trial, and it is unnecessary for us to consider them. For the reasons stated the judgment of the lower court is vacated, and the cause remanded for a new trial.

TARSNEY, J., having presided at the trial of the cause in the court below, not sitting; the other justices concurring.

FARISS et al. v. DEMING INV. CO.

(Supreme Court of Oklahoma. July 30, 1897.)
HOMESTEAD—MORTGAGE PRIOR TO PATENT VALID
—FORECLOSURE.

1. Notwithstanding the provisions of section 4 of the homestead act (12 Stat. 393), a mortgage executed upon land after the homestead entry man has made final proof and received final certificate therefor is valid, and such mortgage may be enforced by foreclosure and sale of the land.

2. Where a party has made final proof for a homestead under the laws of the United States, and received from the government a final certificate therefor, and thereafter executes a mortgage, the party in whose favor the mortgage runs may, upon default, foreclose the same, notwithstanding a contest may have been instituted in the land department to cancel the certificate issued to the entry man.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice J. R. Keaton.

Suit by the Deming Investment Company against William S. Fariss and others. Judg-

ment for plaintiff. Defendants bring error. Affirmed.

Allen & Allen, for plaintiffs in error. Red-
 ick, Lewis & Snyder, for defendant in error.

DALE, C. J. The Deming Investment Company, defendant in error, on the 20th day of June, 1896, commenced a foreclosure proceeding in the district court of Oklahoma county against William S. Fariss and others to foreclose a real-estate mortgage given by the defendants below upon a fractional quarter section of land situated in Oklahoma county. A defense was interposed to the action upon the ground that prior to the execution of the mortgage a patent had not issued from the government to the entry man; and, second, that since the government had issued its final receipt for the land a contest proceeding was instituted by another party to cancel the certificate so issued. A demurrer was interposed to the answer, and by the lower court sustained, and judgment of foreclosure entered.

Upon the first question raised, it is sufficient to state that, under the act of congress (12 Stat. 393) providing for homesteads upon the public domain, it is provided that a settler upon such lands may, after he has resided upon and cultivated the same for a period of five years, enter a tract of land, not exceeding 160 acres, and, upon proof of settlement and cultivation, shall be entitled to a patent for the land. It has been held by numerous courts that after a settler has resided upon the land and cultivated the same in accordance with the law for a period of five years, and made proof of such fact, and received his final certificate, he at once becomes entitled to a patent therefor, and the owner of the land, and that his right to convey and pass title thereto is absolute. This question was before the supreme court of Kansas in *Watson v. Voorhees*, 14 Kan. 328, and the court therein held such to be the law. And in *Newkirk v. Marshall*, 35 Kan. 78, 10 Pac. 575, in speaking to this question, the court, by Valentine, J., uses the following language: "Under the United States homestead laws, and by a compliance with them, a person entering a homestead, or, in case of his death, his widow, or, in case of death of both, his heirs or devisee, obtains a vested right in the homestead at the expiration of five years from the entry thereof, and, upon making proper proof, is entitled to a patent to the land from the United States. And as soon as a person is entitled to a patent, although it may not yet have issued or may not issue for years, he or she may contract or be contracted with concerning the land, or sell it and convey the same precisely as though the patent had been already issued. Equity, in order to do justice and to protect the rights of the parties, and to prevent fraud, will generally consider that as having been done which ought to be done; and in order to protect the rights of all parties, where a patent is due,

but has not yet been issued, equity will consider such rights precisely the same as though patent had in fact been issued on the very first day on which it ought to have been issued." To the same effect is *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693, and *Nycum v. McAllister*, 33 Iowa, 374; *Kirkaldie v. Larrabee*, 31 Cal. 455. In reason, and under the authority of the decisions above cited, we do not deem the question an open one.

As to the second contention: In the mortgage deed executed by Fletcher M. Fariss, one of the plaintiffs in error, to the defendant in error, there was contained a covenant that Fariss was seised of a good and indefeasible estate of inheritance in and to the mortgaged premises, and that he was the lawful owner of the premises granted. Fletcher M. Fariss was the entry man, and a widower at the time of the entry, and at the time of the execution of the mortgage was the only person who had any interest in the property so mortgaged. He afterwards conveyed to one of his co-defendants, but, of course, his co-defendants stand in no better attitude to defend than he himself would had he made no such conveyance. In view of the recitals in the mortgage, the party mortgaging, and those to whom he afterwards conveyed, are estopped from denying that the estate mortgaged was other or less than an estate in fee simple. *Association v. Viera*, 48 Cal. 572; *Kirkaldie v. Larrabee*, supra; 1 *Pingree, Mortg.* §§ 701-703; *Tefft v. Munson*, 57 N. Y. 97. Neither does the fact that the government is permitting a contest for the cancellation of the certificate issued to Fletcher M. Fariss change this rule. Whatever of interest Fariss did obtain from the government is, and may be, subjected to the mortgage. The decision of the court below upon the demurrer is sustained.

KEATON, J., having presided at the trial below, not sitting; all the other justices concurring.

HIXON et al. v. CUPP.

(Supreme Court of Oklahoma. July 30, 1897.)

ASSAULT ON PRISONER—LIABILITY OF SHERIFF AND SURETIES—ACTIONS—MEASURE OF DAMAGES.

1. It is the duty of the sheriff to safely keep and protect the prisoners in his charge from unlawful injury, and, if unlawful assaults are made upon such prisoners in the county jail by others who are confined therein, the sheriff will be responsible in an action for damages to the prisoner suffering the injury, if the sheriff and his deputies or jailer in his employment, or deputed by him, are aware of the contemplated assault, and do not use every reasonable means to prevent it. Such neglect on the part of either the sheriff, deputies, or jailer is a failure to "faithfully perform" the duty of sheriff.

2. The liability of the sureties on the sheriff's bond in such a case is a joint one with the sheriff, and they may be sued, together with the sheriff, directly upon his bond, for such non-feasance or misfeasance in office, and they will be liable together with him thereon.

3. The sureties are, however, not liable for exemplary damages. The measure of damages,

as against the sureties, is, in the absence of any provision of the statute, just compensation for actual injury.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by Thomas B. Cupp against John W. Hixon and others. From a judgment for plaintiff, defendants bring error. Modified.

This was an action brought by the defendant in error against Hixon and his sureties on his official bond as sheriff of Logan county for trespass against the person of the defendant in error, committed under the following circumstances: Cupp was arrested on February 13, 1892, upon a warrant duly issued by a justice of the peace of Logan county; and, his bail having been fixed at \$250, he was unable immediately to procure it, and was by Hixon, under and by virtue of the warrant of arrest, confined in the common jail of Logan county, and while there was tried, upon a mock trial by the prisoners confined there, in a pretended moot or "kangaroo" court, and a pretended fine was assessed against him of 50 cents by the other prisoners; and upon his refusal to pay the fine he was seized and overpowered, and subjected to a penalty of 50 lashes and other infamous punishment. It appeared in evidence that it had been the custom of the prisoners in the jail to impose such pretended fines and punishment upon persons placed in the jail, and that Hixon knew of, and took no steps to put a stop to, the custom. The bond of Hixon as sheriff provided, in pursuance of the statute, that he should "faithfully perform and execute the office of sheriff of the county of Logan, during his continuance in office, without fraud, deceit, or oppression," etc. The defendants demurred to the complaint (1) for a misjoinder of parties defendant; and (2) for a misjoinder of the different causes of action; and (3) that the complaint did not state facts sufficient to constitute a cause of action against the defendants, or either of them. The demurrer was overruled, whereupon the defendants answered by a general denial. The cause was tried to a jury, and evidence adduced in support of the charges made in the petition. The court, in addition to the instructions usually given in civil actions, instructed the jury that the sheriff and the sureties were liable in damages if any injury occurred to any person in the custody of undersheriff or jailer appointed by the sheriff, which injury occurred through the omission or negligence of such undersheriff or jailer, to the same extent as the sheriff and the sureties on his official bond, if such injury had occurred by reason of the negligence or omission of the sheriff, and that, in order to find the defendants liable, they would have to find that the defendant Hixon knew that it was the custom of the prisoners confined in the jail under his charge to assault and beat persons brought to such jail, and failed to use such means as were at his command to prevent such acts, or that the

jailer in charge of the jail and prisoners at the time of the alleged trespasses, Bryant, was incompetent to manage the jail, or failed to use the means at his command to prevent the assault upon the plaintiff, and that the defendants were not liable if they found that Bryant was a man competent for the position of jailer, and that he used all the care and appliances at his command to prevent the wrong and assault upon the defendant which was complained of. The court instructed the jury that while the law made it incumbent upon the sheriff and the jailer to protect the prisoner from assault while in jail, yet, if the sheriff and jailer used ordinary care and vigilance, then the defendants were not liable; and, in order to determine whether the sheriff and jailer used the proper care and vigilance, the jury was directed to consider the conditions under which the sheriff and jailer were acting, the character of the jail, the number of prisoners incarcerated, the fact that the sheriff was allowed but one jailer, the means, if any, which were taken to prevent the assaults of the character complained of, and all the facts and circumstances generally shown in evidence. The jury were instructed that if they found that the sheriff knew that such assaults were liable to be made, and did not use the means within his power to put a stop to the custom of such pretended moot courts and punishments, the plaintiff was, in that event, entitled to recover against the defendants not only for actual damages sustained by reason of the injuries, but also exemplary damages. Special questions were submitted to the jury on behalf of the defendants, and answered, to the effect (1) that the defendant Hixon was not present and had no knowledge of the incarceration of the plaintiff, Cupp, at the time the assault was committed; and (2) that the jailer, Bryant, was present at the time of the assault; and (3) that the sheriff, Hixon, had not instructed his subordinates at all times to use their utmost endeavors to prevent the prisoners in the jail from holding kangaroo courts; and (5) to the special question, "How much do you find as actual and compensatory damages?" the answer was made by the jury, "One hundred and fifty dollars;" and "How much do you give as exemplary damages?" the answer was given, "Fifty dollars." The jury at the same time returned their verdict in behalf of the plaintiff for the sum of \$200. A motion for a new trial was overruled.

H. S. Cunningham and G. S. Cunningham, for plaintiffs in error. Cotteral & Hornor, for defendant in error.

McATEE, J. (after stating the facts). This cause is brought here upon numerous assignments of error, which are argued in the briefs chiefly upon two propositions, to wit: (1) That the sheriff was not liable on his official bond for the acts charged; and (2) that, if liable on the bond, an action would not lie against the sureties until a judgment had

first been obtained against the sheriff in an independent action.

The sections of the statute under which the action was brought are found on page 392 of the Statutes of Oklahoma of 1890. They provide, in section 1749, that " * * * the sheriff and his sureties shall be responsible on his official bond, for the acts and omissions of his undersheriff, and also for the acts and omissions of the persons deputed to do particular acts"; and in section 1751 that "the sheriff shall have the charge and custody of the jail of his county and all the prisoners in the same, and shall keep such jail himself, or by his deputy, or jailer, for whose acts, he and his sureties shall be liable." The plaintiff was in the county jail at the time of the acts complained of, under a warrant duly issued from a court authorized to direct the sheriff to arrest and keep the plaintiff in his custody. No question exists as to the validity of the commitment, or that the confinement of the plaintiff was done by the sheriff or his deputy in the due and lawful exercise of his authority as sheriff. So far, then, the sheriff discharged his duty. He was doing and had done one of the things which the law made it his duty, as sheriff, to "faithfully" perform. Had he discharged his whole duty when the plaintiff was arrested and held, under process of law duly issued, in his charge, and thus placed in the county jail, where a large number of prisoners were also confined, charged with the violation of law, and, when he had turned the key upon the plaintiff, had he then faithfully discharged the whole duty imposed upon him, and did he then faithfully keep the jail, while permitting such an assault to be made as is charged in the petition? Evidence was adduced to the jury to show that the sheriff knew that it was the custom of the prisoners confined in the jail under his charge to assault and beat prisoners brought to such jail, after pretended or mock trials, and that he failed to use such means as were at his command to prevent such acts; and the jury were instructed by the court that they could not find the defendant sheriff liable unless he had so known of the custom referred to, and had failed to use such means, or that he had employed an incompetent jailer to take care of the prisoners there confined, including the plaintiff. It is further provided in section 1753 of the Statutes of Oklahoma of 1890 that "It shall be the duty of the sheriff, undersheriffs, and deputies, to keep and preserve the peace of their respective counties and to quiet and suppress all affrays. * * * And in apprehending or securing any person for a felony or breach of the peace, they may call to their aid such person or persons of the county as they may deem necessary." It was, then, under the statute, the duty of the sheriff to preserve the peace, and to quiet and suppress all affrays; and he had the power, in such suppression, to call to his aid any person or persons of his county that he might deem necessary. The county jail was peculiarly and

especially under his province, and the persons confined therein were wholly dependent upon him and his subordinates for protection from violence. The assault made upon the defendant in error was one of an outrageous and unprovoked character; it was without mitigation or excuse; it was made, as the jury found, when the jailer, Bryant, "was present at the time of the assault"; and if the sheriff could, in such a case, be exempt from liability, it would be upon an interpretation of the law which, while making it his duty to preserve the peace throughout the county, would imply an exception in favor of the county jail, which is under his immediate surveillance and protection, and in which the prisoner was shut up, helpless, in the companionship of other prisoners who were known to be in the habit of making assaults of a similar character. It was the duty of the sheriff and his deputies to keep the peace. In the presence of a statute which makes it the duty of the sheriff to keep the peace and suppress affrays throughout the county of Logan, was the sheriff exempt from that duty because the plaintiff was incarcerated in the county jail, immediately under his personal care, and without any means of self-protection? The situation of the plaintiff was one of entire dependence upon the sheriff and his deputies. The duty of protection was one of peculiar force, imposing a stronger obligation than that which the statute makes it the duty of the sheriff to discharge throughout the limits of the county generally. When the court instructed the jury that, if the sheriff and jailer used ordinary care and vigilance, then the defendants were not liable, it was surely expressing the law in terms of moderation, and interpreting the law most favorably to the sheriff. It was the duty of the sheriff to use at least that degree of care in the protection of the plaintiff. The situation of the plaintiff required at least "ordinary care and vigilance," and, if the sheriff and his deputies and jailer omitted these, then they omitted to "faithfully" discharge their duty towards the plaintiff, to that extent imposed by the statute, and he is then expressly declared to be "responsible on his official bond." In the case of *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818, which was an action against a United States marshal and his bondsmen for permitting a prisoner to be killed by a mob, the court said that: "The defendant, as United States marshal, certainly owed a duty in the premises to Marlow,—that of safe-keeping and protection from unlawful injury. The defendant's oath of office, his bond, and the necessary implications of the law, all point to such duty as imposed upon him. See Rev. St. U. S. §§ 782, 783, 5538. 'Whenever the common law, a statute, a municipal by-law, or any other law, imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom.' *Blish. Non-*

cont. Law, § 132, and cases there cited. 'Commonly, where the law has cast a duty upon one to another, simple neglect to discharge it, whereby the other has suffered injury, is actionable.' Id. § 526. 'When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is one form of a universal principle of law, that he who contributes to a wrong, either civil or criminal, is answerable as a doer.' Id. § 39, and cases there cited. That a United States marshal may take prisoners into his custody, permit them to be disarmed and shackled, and then negligently and knowingly deliver them over to incompetent deputies and the known hostility of mobs, without liability for his neglect of duty, is a proposition which we think cannot be sanctioned." While it is sought to sever the liability of the sureties from that of the sheriff, there can be no contention and no reasonable ground for separating the liability of one from that of the other, because the bond is given for the "faithful performance and execution of the office of sheriff"; and if, acting in the discharge of his duty, the sheriff fails to "faithfully perform" that duty, then the sureties are equally liable with himself; and if, while acting virtute officii, a sheriff or his deputy omits to do the thing which, in the faithful discharge of his duty, he ought to have done, it is a misfeasance, and a case of trespass, and the sheriff is liable on his bond. *People v. Schuyler*, 4 N. Y. 179; *Mechem*, Pub. Off. §§ 664, 667, 672, 674, 682, 798. And it was said in *South v. Maryland*, 18 How. 396, that, "to entitle a citizen to sue on the bond for his own use, he must show such a default as would entitle him to recover against the sheriff in an action on the case"; thus holding that, if the plaintiff had a right of recovery in a case like the present, he could sue immediately on the bond. "In his ministerial capacity," the sheriff is bound to execute all processes issuing from the courts of justice. He is keeper of the county jail, and answerable for the safe-keeping of prisoners." And that: "Where he acts ministerially, he is liable, for acts of misfeasance and nonfeasance, to the party who is injured by them."

Upon the second proposition that, if liable thereon, an action would not lie against the sureties until a judgment had first been obtained against the sheriff in an independent action, we do not think that this contention could be sustained. The statute heretofore cited appears sufficiently plain. There appears to be no reason why, in the face of the bond, which is jointly conditioned by the sheriff and his sureties for the faithful performance and execution of his office as sheriff, when the plaintiff comes into court alleging that the sheriff has not faithfully performed and executed his duty as sheriff, there need be any separation and prior action as against the sheriff. Indeed, it is to the interest of the sureties that they should have the privi-

lege and advantage of defending in a joint action with the sheriff, instead of being put upon their defense in an action upon a judgment against the sheriff, in which they have not had the opportunity of defending. No requirement of the kind is made in the statute; nor does there appear to have been any practice of the kind at the common law, nor any foundation in reason for such a separation and prior action against the sheriff himself. It was declared in *Governor v. White*, 24 Am. Dec. 763, by the supreme court of Alabama, that: "Sureties to an official bond are proper parties to a suit brought upon a breach of the condition of the bond, though neither the fact nor amount of their principal and liability has been established by previous suit." No authorities are cited against this view. Authorities in support of it are *State v. Leeds*, 31 N. J. Law, 185; *Hoye v. Raymond*, 25 Kan. 665. And it is declared in *Murfree*, Off. Bonds, §§ 490-492, that: "It is not the general rule that a judgment against the sheriff individually is an essential preliminary to an action on his official bond. * * * There being no necessity for more than one suit to fix the liability of the defendants, only one should be instituted."

We do not think, however, that the sureties can be held liable for exemplary damages. The measure of damages in all cases against the sureties of an officer, in the absence of any statutory rule, is just compensation for actual injury. *Brobst v. Skillen*, 16 Ohio St. 382; *Ziegler v. Com.*, 12 Pa. St. 227; *Bevins v. Ramsey*, 15 How. 179; *Bennett v. Vinyard*, 34 Mo. 216; *City of Lowell v. Parker*, 10 Metc. (Mass.) 309; *Griffin v. Underwood*, 16 Ohio St. 389. The amount of damages assessed by the jury as exemplary damages was therefore without authority, and should have been disallowed by the court, and this order will accordingly be made. In other respects the judgment will be affirmed. All the justices concur, except DALE, C. J., who presided at the trial below, and KEATON, J., who was counsel in the cause, and therefore takes no part in this opinion.

RICHARDSON et al. v. AUGUSTINE.
(Supreme Court of Oklahoma. July 30, 1897.)
CHANGE OF VENUE—PRACTICE—DISCRETION OF COURT.

1. Section 56 of the Code of Civil Procedure, relating to changes of venue, is not imperative or mandatory, and does not require the granting of a change of venue upon any showing made therefor, but the court is vested with a sound discretion, upon the showing made therefor by the applicant, to grant or refuse the same, and on appeal, unless it appears to this court that there has been an abuse of such discretion by the court in the case, the action of the court below will not be disturbed.

2. The statute authorizes a counter showing in opposition to the application, or the introduction of counter affidavits, or other extrinsic evidence, in opposition. The showing contemplated is not an ex parte showing, and other evidence can be considered by the court in contradiction of

the facts and circumstances shown in support of the application. Per Dale, C. J., and McAtee and Keaton, JJ.

3. Affidavits stating only conclusions are not sufficient. The facts and circumstances by which it shall be made to appear to the court that a fair and impartial trial cannot be had must be shown in support of the application. When the facts and circumstances which make it to appear that a fair and impartial trial cannot be had are shown to the court, by affidavits or other extrinsic evidence, by the applicant, and if such facts and circumstances make it clearly to appear that a fair and impartial trial cannot be had, the judge should award the change of venue; otherwise it should be refused.

4. By "abuse of discretion" is here meant a clearly erroneous conclusion and judgment,—one that is clearly against the logic and effect of such facts and circumstances as are presented in support of the application, or against the reasonable, probable, and natural deductions to be drawn from such facts and circumstances.

5. It is not error for the trial court to refuse to pass upon the application before the commencement of the trial or to postpone its determination until after the jury have been impaneled for the trial of the cause. The change of venue need not be awarded or refused before the commencement of the trial. Per Dale, C. J., and McAtee and Keaton, JJ.

(Syllabus by the Court.)

Error from district court, Noble county; before Justice A. G. C. Bierer.

Action in the probate court by T. Augustine against F. M. Richardson and others to recover a deposit in a bank. There was a judgment for plaintiff, and defendants appealed to the district court, where plaintiff again had judgment, and defendants bring error. Reversed.

H. H. Howard, J. L. Pancoast, and C. A. Galbraith, for plaintiffs in error. J. W. Augustine, for defendant in error.

TARSNEY, J. On May 18, 1896, when this cause was called for trial in the district court, the defendants filed their motion for a change of the venue of said cause from the county, and, in support of said motion, filed their affidavits, stating: That the cause of action arose out of the failure of the First State Bank of Perry, a banking institution doing business in Perry, Noble county, from June 11 to September 16, 1895. That defendants were sought to be charged in this action with liability to depositors in said bank at the time of its failure. That defendants believed they had a meritorious defense to said action. That some 30 cases, involving the same question, had been brought against defendants in the several courts of said county, and most of such suits were still pending therein. That 10 or more of said cases had been tried in said probate court, and one had been tried in the district court, of said county. That a large number of persons, aggregating some 100 or more, had been called as jurors in said causes. That the question involved in said causes had been investigated by two grand juries in said county. That a large number of persons had been called as witnesses, both before the grand jury and on trial of said civil causes. At the time of the failure of said

bank, some 200 hundred or more persons were depositors therein, nearly all of whom suffered loss thereby. That such witnesses, jurors, and depositors lived in the various parts of said county, and were all acquainted with what purported to be the facts in said causes, and had freely and frequently discussed such facts in the neighborhoods where they resided. That at the time of the failure of said bank, the facts, or what purported to be the facts and circumstances connected therewith, were published in the newspapers of said county, and generally circulated among the people therein. That the failure of said bank created great excitement in said county, and was generally discussed among the people in every part of said county. That the impression and belief was thereby created, continued, and still prevailed in every part of said county, that defendants were guilty of wrong in connection with said bank, and were liable to the plaintiff and to the other depositors thereof. That numerous persons had made special and repeated efforts to incite a feeling of hostility to defendants. That there had at all times since the failure of said bank existed, and now exists, generally in the minds of the people of said county, particularly the portion thereof competent to serve as jurors, great prejudice and bias against the affiants. That said defendants were then under indictment in said county on charges growing out of the failure of said bank. That the fact of the existence of such indictments was known generally over said county. That such indictments were secured, as affiants believe, because of such prejudice and bias, and for the purpose of coercing them into the payment of the claims of said depositors. That at the time of the trials of the other civil cases, numerous persons of the age to be competent as jurors had been present, and had heard the facts detailed, and were acquainted therewith. That numerous persons had gone about the public places in said county, and made threats against the affiants, and in numerous ways expressed feelings of indignation and ill-will. That all the above facts and circumstances had created in the minds of the people, particularly those of age competent to serve as jurors, in every part of said county, the belief that defendants should be held to answer for the claim of the plaintiff and the other depositors of said bank, creating feelings of great prejudice and bias in the minds of such people. That defendants, by reason of the facts stated, could not have a fair and impartial trial of said or any similar cause in said county.

This affidavit of the defendants was supported by the affidavits of 23 other persons, in which the facts were substantially stated as above. When these affidavits were presented to the court, the judge thereof declined to pass upon the application for change of venue until after the examination of the jury for the trial of the cause, stating that the voir dire examination of the jurors might be used

as testimony in the consideration of the application, and immediately directed the clerk to call the jury. On the examination of the jurors called and examined as to their qualifications, 19 of those called were challenged for cause, and the challenges sustained by the court. Twice during the impaneling of the jury counsel for the defendants requested the court to pass upon the application for change of venue, but the court declined, and stated he would not pass upon it until the jury was impaneled. After the peremptory challenges were exhausted, the application for change of venue was denied. In overruling the application, the court said: "I think the examination of the jurors clearly shows that a fair and impartial trial can be had in this county. Of the jury, eleven jurors are absolutely without any impression on the questions to be tried. One lives in the city of Perry, and has formed and expressed an opinion, but both parties are willing to accept him, and of course that fact could not show ground for a change of venue. This is about the only way you can demonstrate whether a fair and impartial trial could be had,—by an examination of the jurors themselves. I think, too, if the panel had been drawn by the sheriff outside the city of Perry, there would have been no difficulty in getting a jury." Defendants duly excepted to the proceedings of the court and to the overruling of the application for a change of venue, and assign the same as errors.

Section 56 of the Code of Civil Procedure provides: "In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject-matter thereof or is related to either of the parties or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some county where such objection does not exist." This court in *Re Brown*, 2 Okl. 598, 39 Pac. 469, held that the right to a change of venue granted by this section was a right belonging to either party to the action, and that the word "may," as used in said section, means "must"; and in *Cox v. U. S.* (decided by this court at this term) 50 Pac. 175, we held that the words "if it be shown to the court," as appearing in section 49 of article 8 of the Code of Criminal Procedure as amended (Laws 1895, p. 198), was equivalent to, and meant the same as, the words "shall be made to appear to the court" in section 56 of the Civil Code, *supra*; and in *Patswald v. U. S.* (Okl.) 49 Pac. 57, we held that where the awarding or refusing of such change of venue is within the discretion of the court, the action of the court in awarding or refusing such change will not be reversed, unless where an abuse of such discretion is shown by the record. We do not think that section 56 of the Civil Code is imperative or mandatory, requiring the granting of a change of venue upon any showing there-

for, but that the sound discretion is vested in the court, upon the showing made therefor by the applicant, to grant or refuse the same; and on appeal, unless it appears to this court that there has been an abuse of such discretion by the court in the case, the action of the court below will not be disturbed. In *Gray v. Crockett*, 35 Kan. 66, 10 Pac. 452, Horton, C. J., speaking for the court, construing a statute identical in language with section 56 of our Code of Civil Procedure, says: "If the district court had overruled the application to change the place of trial upon the affidavit presented, we would unhesitatingly pronounce the ruling eminently correct, because it seems to us that the true rule in such a case is that such facts and circumstances must be proved by affidavit or other extrinsic evidence; and, unless this clearly appears, a reviewing court will sustain the overruling of the application." Our statute nowhere provides, in express terms or by reasonable implication, for a counter showing in opposition to the application, or for the introduction of counter affidavits, or other extrinsic evidence, in opposition. We are aware that in a number of the states it is held that counter affidavits or extrinsic evidence may be introduced in resistance to the application, but, where it is so held, we think the statutes of the state are clearly distinguishable from ours, as in Wisconsin, where the language of the statute is: "And such court or judge, reasonable notice of the application having been given to the opposite party or his attorney, shall, if satisfied with the truth of the allegations, award a change of venue, etc." In Iowa, in a statute providing for a change of judge, the language is: "In the exercise of a sound discretion shall decide the matter of the petition according to the very right of it, and, if satisfied with the truth of the allegations, award a change of venue." In those classes of cases it may well be contended and held that the judge of the court has a right to put in issue or call in question the truth of the statement of facts contained in the application, but the language of our statute—"In all cases in which it shall be made to appear to the court"—we think contemplates an *ex parte* showing that other evidence cannot be considered by the court in contradiction of the facts alleged in support of the application. But we have held in *Cox v. U. S.*, *supra*, that the facts and circumstances by which it shall be made to appear to the court that a fair and impartial trial cannot be had must be shown in support of the application, and we think the true rule is that, when the facts and circumstances which make it to appear that a fair and impartial trial cannot be had are shown to the court by affidavits, or other extrinsic evidence, by the applicant, if such facts and circumstances make it clearly to appear that a fair and impartial trial cannot be had, the judge should award the change of venue; but if the facts and circumstances, taken as true, do not clearly make it to appear that a fair and impartial

rial cannot be had, the judge should refuse the application. The discretion of the judge is to determine whether or not the facts and circumstances, as presented, make it to clearly appear that a fair and impartial trial cannot be had. If the trial judge abuses this discretion, the appellate court will correct such abuse. By "abuse of discretion" is here meant a clearly erroneous conclusion and judgment,—one that is clearly against the logic and effect of such facts and circumstances, or the reasonable, probable, and natural deductions to be drawn from such facts and circumstances.

My conclusion being that the court below had no right to take into consideration the testimony elicited from the jurors upon their voir dire examination, it remains only for us to determine whether it clearly appears from the affidavits filed by the defendants in support of their application that a fair and impartial trial could not be had, and whether the reasonable, probable, and natural deductions from the facts and circumstances stated make it to clearly appear that a fair and impartial trial could not be had in the cause. Evidently there was grave doubt in the mind of the trial judge, or he would not have delayed ruling on the application until the testimony of the jurors had been taken; and we confess our inability to determine the meaning of the phrase "clearly appear," if the facts and circumstances presented upon this application did not make it to clearly appear that the defendants could not have a fair and impartial trial. The county was not a populous county. It had been settled and organized less than three years. The defendants had been connected with a bank that had recently failed, holding the deposits of more than 200 of the citizens of the county. Charges of criminality against the defendants, in connection with such failure, had been made. Indictments were pending against them. Depositors in numbers were bringing actions against them, to hold them liable individually for such deposits. Hundreds of the people of the county, qualified by age for service as jurors, had been connected in some manner with the transaction, either as jurors, witnesses, or spectators, in the numerous cases that had been tried, or as grand jurors or witnesses in the criminal proceedings, and all had more or less familiarized themselves with the purported facts of the transaction. The details had been fully published in the newspapers of the county, and had been generally circulated. Much excitement existed in the county, and the facts had been generally discussed, and the impression and belief generally prevailed that the defendants were guilty of wrong, and were liable to the plaintiff and to the other depositors; and numerous persons had made special and repeated efforts to incite a feeling of hostility towards the defendants. We cannot close our minds against the conviction that comes to us from a general knowledge that a feeling of intense hostility and prejudice must exist, and does exist, against those connected with a

banking institution that falls under circumstances indicating criminality, and which results in the loss of the small deposits of the members of a community, new, and struggling with the adversities of poverty. The statute authorizing a change of venue was intended to apply to some cases and to some conditions, and if the conditions did not exist in this case to which the statute was intended to apply, we cannot conceive of facts, circumstances, or conditions where it would apply. Certainly it was not intended to apply only in cases where mob violence was so assertive as to prevent the administration of justice, or the application of its safeguards. I think the application for a change of venue should have been granted in this case, and that it was error to refuse it.

While the statute does not, in express terms, provide that the application for change of venue shall be filed and determined before the trial has commenced, we think the spirit of it clearly requires this. Certainly no court would permit an application for change of venue to be filed after the parties had announced ready, and had proceeded to trial; and the rights of the parties must be reciprocal. The trial had begun when the impaneling of the jury commenced, and the court would not have permitted the application to have been filed after that; and, if he would not permit its filing, he had no right to then determine it. The question was not whether 12 men could be found in the county to grant the defendants a fair and impartial trial. The law gives a broader right to litigants than this. It is to have a jury of fair and impartial men selected from the body of the county, the people of which are fair and impartial, unprejudiced against the defendants, and competent to grant them a fair and impartial trial. The 12 must be selected from an unprejudiced community. The defendants were entitled, not alone to the impartiality of a jury, but to the intelligence of a jury, and they were entitled to have that jury selected from the intelligence of the whole body of the people; otherwise, if 99 out of 100 were prejudiced and biased against the defendants, and 12 were found, though lacking in intelligence, who were not biased or prejudiced, it might be said that these 12 could give the defendants the fair and impartial trial which the law guarantees. I think the court erred in not passing upon the application, upon the affidavits presented by the defendants, and before proceeding to the impaneling of the jury. For the reasons stated, the judgment of the court below must be reversed, and the cause remanded for a new trial. It is so ordered.

BIERER, J., who tried the cause below, not sitting. The other judges concur, except as to the views herein expressed upon the questions relating to a counter showing, and as to the time when the application must be determined. Upon those questions the views expressed in the opinion are the views of the writer.

JONES v. TERRITORY.

(Supreme Court of Oklahoma. July 30, 1897.)

GAMING—WHAT CONSTITUTES—CHANGE OF VENUE
—PLEAS—HARMLESS ERROR—STATUTES.

1. The prohibitions of section 1 of article 56 of chapter 25 of the Statutes of 1893 do not alone extend to those who deal or play or conduct the various games of chance therein specified, but such prohibitions extend to the carrying on or opening of any such prohibited game, and the use therein of any device. And any table or other device necessarily adapted to the use and necessarily used in the carrying on of any such games is a gambling device, in contemplation of law; and the setting up or using of such table or device is prohibited; and an information under section 5 of said article, charging the defendant with permitting certain tables to be set up and used for the purpose of gambling in rooms occupied by him and under his control, charges a public offense.

2. In criminal causes transferred before trial from the probate court to the district court, the jurisdiction of the district court does not depend upon the entering of a plea of not guilty before the order of transfer is made. Where a cause has been transferred, and no plea of not guilty previously entered, but the transfer is by agreement of the parties, the defendant appearing in the district court, and proceeding regularly to trial, and the issue of not guilty is submitted to the jury, the omission of the formal entry of the plea of not guilty is an irregularity merely, which does not affect the substantial rights of the defendant, and is not a ground for disturbing the judgment; section 13 of article 16 of the Code of Criminal Procedure providing that: "On an appeal, the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

3. Article 56 of chapter 25 of the Statutes of 1893, known as the "Gambling Act," was legally enacted by the general assembly. *Schweizer v. Territory* (Okl.) 47 Pac. 1094.

(Syllabus by the Court.)

Error from probate court, Oklahoma county.

C. R. Jones was convicted of permitting gambling tables to be set up and used for the purpose of gambling in a house occupied by him, in his possession, and under his control, and he brings error. Affirmed.

R. G. Hays and J. H. Woods, for plaintiff in error. C. A. Galbraith and W. R. Taylor, for the Territory.

TARSNEY, J. This case was commenced in the probate court of Oklahoma county on information filed by the county attorney, in which the defendant was charged with "permitting gambling in a house under his control, in manner and form as follows: For that he did permit gambling tables, to wit: Craps, faro, and poker tables, to be set up and used for the purpose of gambling in a room, to wit, in the lower story of what is commonly known as the 'Bassett Block,' in Oklahoma City, in said county and territory, by him, the said defendant, then occupied, and of which he then had control." The information was filed in the probate court of said county on September 7, 1895. Warrant was issued on the same day, and on the same day defendant was arrested, and brought into court. On November 1, 1895,

by agreement of the parties, it was ordered by the probate court that the cause be certified to the district court of said county for trial. The transcript from the probate court shows that on the 7th day of September, 1895, the 14th day of October, 1895, was set for the arraignment and receiving the plea of the defendant; but said transcript does not show that the defendant was arraigned in said probate court, or ever entered a plea of not guilty therein. On February 8, 1896, the defendant filed in the district court a demurrer to the information, which was overruled, and the case made in this cause shows the following recital: "And thereafter, to wit, on the 1st day of April, 1896, this cause coming on to be tried on the issue joined on the aforesaid information and the plea of not guilty thereto, the following proceedings were had, and evidence introduced." It further appears that a jury was impaneled in the district court, evidence both for the territory and the defendant was introduced, the court instructed the jury as to the law of the case, the cause was argued to the jury by both parties, and the jury returned a verdict of guilty. After unsuccessful motions for new trial and in arrest of judgment, the cause was removed to this court by petition in error, and three grounds for reversal are relied upon in the brief of plaintiff in error. First, the court below erred in overruling the demurrer, for the reason that the information does not state facts sufficient to constitute a public offense; second, because the district court had no jurisdiction to try the cause, for the reason that a plea of not guilty had not been entered in said cause before said cause was transferred from the probate court; third, because the statute under which the information was filed and the case tried was not legally enacted by the legislative assembly of Oklahoma territory.

Upon the first point—that the information did not state a public offense, and that the demurrer was erroneously overruled—the contention of the defendant is that there is no such offense as permitting gambling tables to be set up and used for the purpose of gambling. Section 1 of article 56 of chapter 25 of the Statutes of 1893 provides as follows: "Section 1. That every person who deals, plays or carries on, or opens or causes to be opened or who conducts either as owner or employee whether for hire or not, any game of faro, monte, poker, roulette, craps or any banking or percentage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars and by imprisonment in the county jail for a term not less than thirty days nor more than six months." Section 3 of said article reads: "Sec. 3. Every person who deals, plays or practices in the territory of Oklahoma, or who is in any manner accessory to the dealing, playing or practicing of a swindle known as three-card monte

or any other swindle or confidence game, play or practice, shall be deemed guilty of a felony and upon conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by confinement in the penitentiary for a term of not less than one year nor more than five years." Section 5 of said article reads: "Sec. 5. Every person who shall permit any gaming table, bank, or gaming device prohibited by sections 1 and 3 of this act, to be set up or used for the purpose of gambling in any house, building, shed, shelter, booth, lot or other premises to him belonging or by him occupied or of which he has, at the time, possession or control shall be, on conviction thereof, adjudged guilty of a misdemeanor and punished by a fine not exceeding two hundred dollars nor less than one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months nor less than thirty days or by both such fine and imprisonment in the discretion of the court." It is under section 5 that the information in this case is drawn, and counsel for defendant contend that this section only denounces as an offense the permitting of such gaming tables to be set up as are "prohibited" by sections 1 and 3 of the article, and that said sections 1 and 3 do not "prohibit" the use of gambling tables, but only provide penalties against those who deal, play, carry on, open, or cause to be opened or conducted, the game of faro and other games in said sections specified. While the language of these sections and the connection between the said sections are not as definite and specific as they might be, and there is some ambiguity to make plausible this contention of counsel, yet we think a fair interpretation of these several sections makes the position of counsel untenable. We are bound to give the language used by the legislature such interpretation as will support its evident intent, if the language used is fairly susceptible of such interpretation. That the legislature intended to prohibit the setting up or use of gambling tables is beyond doubt, and that they intended to punish those who should permit such tables to be set up cannot be questioned; and if section 5 did not contain the words "prohibited by sections 1 and 3 of this act," such section 5, in itself, would be complete to prohibit persons from permitting, or to punish persons for permitting, gaming tables to be set up or used for the purpose of gambling; and the reference in section 5 to sections 1 and 3 clearly shows that it was the legislative judgment and intent that the setting up of gaming tables, or their use for gaming purposes, was prohibited by the language of sections 1 and 3. Can the language used in sections 1 and 3, then, be reasonably interpreted to support this intent and judgment? The prohibitions of section 1 do not alone extend to those who deal or play or conduct the various games of chance therein specified, but such prohibition extends to the carrying on or opening of any game of faro, monte, poker, rou-

lette, craps, or any banking or percentage game played with dice, cards, or any device. Now, if the opening or carrying on of any of these prohibited games involves the setting up of any tables or other devices, then the use of such tables or devices is evidently prohibited by section 1. That it is the common understanding of those charged with the duty of administering the criminal laws, especially those against gambling, that certain games, as faro and poker, do require the use of tables upon which they may be played, then it follows that the use of such tables is prohibited by the prohibition against the carrying on or opening of such games. Again, section 1 clearly prohibits the carrying on or opening of any game with any device; and a table, when necessarily adapted to the use and necessarily used in the carrying on of any such game, is a gambling device, in contemplation of law, although such table may have been originally designed for and ordinarily adapted to, lawful uses. We are therefore clearly of the opinion that it was the intention of the legislature to prohibit the owners, occupants, or persons in possession or control of houses, buildings, etc., from permitting any gaming table, bank, or gaming device to be set up or used for the purpose of gambling therein; and that the language of sections 1 and 5, above quoted, with sufficient clearness shows such intent; and that, therefore, the information in this case did charge a public offense, and that the demurrer was rightly overruled.

2. The second contention of counsel for plaintiff in error—that the district court never obtained jurisdiction, because the transfer from the probate court was ordered without a plea of not guilty having been previously entered—cannot be sustained; nor do we think that there was any such irregularity as to call for a reversal. The probate court did not have exclusive original jurisdiction of the cause. Its jurisdiction was only concurrent with that of the district court. Original, although not exclusive, jurisdiction of the subject-matter of the offense charged in this information was in the district court. The information might have been originally filed in the district court, and that court have had original jurisdiction both of the subject-matter and of the person of the defendant. Its jurisdiction did not depend upon a transfer of the cause from the probate court. The information was filed in the district court when transferred from the probate court, and the record of the district court shows the appearance of the defendant therein, and a plea of not guilty, which would give to the district court full and complete jurisdiction both of the subject-matter and of the person of the defendant. But if the contention of counsel that, the action having been begun in the probate court, it was necessary that a plea of not guilty should have been entered before the cause was transferred to the district court to make the proceedings regular were conceded, would such irregularity avoid the subsequent proceedings, and require

a reversal of the judgment? The entering of a plea of not guilty may be prerequisite to the attaching of the right of the defendant to demand a transfer of the cause to the district court; but where the parties agree, as in this case, whether such plea had been entered or not, to transfer the cause, it cannot be said that any substantial prejudice to the rights of the defendant could result therefrom. The probate court is a court of record. The law presumes the proceedings of a court of record to be regular. It does not appear from the record in this case that the plea of not guilty was not entered. The record is simply silent as to whether it was or was not. Assuming it, however, to be a fact that the defendant was not arraigned, and did not enter a formal plea of not guilty before the order transferring the cause was made, the record shows him to have been present in person and by counsel agreeing to the transfer. It shows him entering his appearance in the district court, and demurring to the information, announcing himself ready for trial, going to trial before a jury regularly impaneled and sworn upon an issue of not guilty, and submitting the question of his guilt to their determination. Will the omission of the arraignment and formal plea in the probate court avail the defendant thereafter, either on motion for new trial or in arrest of judgment? It may be conceded that at common law it would, though that may be doubtful, where the offense charged is only a misdemeanor. By section 13 of article 16 of our Code of Criminal Procedure it is provided that: "On an appeal, the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." We are of the opinion that under this section the omission of the probate court to require the defendant to enter a plea of not guilty before making the order transferring the cause to the district court, if such omission occurred, could not affect the substantial rights of the defendant, and therefore is not ground for disturbing the judgment. In a case in the state of Kansas, where the defendant was charged with burglary and grand larceny, and it was conceded that the defendant was not arraigned, and did not plead to the information, it was held by the supreme court, on appeal, that under a statute identical with ours, above quoted, such omission did not affect the substantial rights of the defendant, or justify disturbing the judgment. *State v. Cassady*, 12 Kan. 561.

3. Defendant's third point—that the statute under which the information in this cause was filed and the cause tried was not legally enacted by the legislative assembly of the territory—was fully considered by this court in *Sweltzer v. Territory*, 5 Okl. 297, 47 Pac. 1094, and the opinion in that case is herein adhered to and approved, and is decisive of this point in this case. We therefore find no error in this record, and the judgment of the court below is affirmed. All the judges concur.

(5 Okl. 594)

**DOORLEY v. BUFORD & GEORGE
MANUFACTURING CO.**

(Supreme Court of Oklahoma. July 30, 1897.)
PROCEEDING IN ERROR—TIME FOR FILING—EXTENSION.

1. A proceeding in error in this court to reverse a judgment of the district court must be filed within one year after the rendition of the judgment, or the making of the final order complained of, unless the person bringing the proceeding is an infant, a person of unsound mind, or one who is imprisoned.

2. The time for instituting a proceeding in error in the supreme court to review a judgment of the district court is not extended by the filing of a motion for a new trial, where the action complained of, and embraced in such motion, was in rendering judgment on a motion for judgment on the pleadings.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John L. McAtee.

Replevin by the Buford & George Manufacturing Company against W. F. Doorley. From a judgment for plaintiff, defendant appeals. Dismissed.

W. A. McCartney, W. W. Bixby, and D. K. Cunningham, for plaintiff in error. L. M. Lane, for defendant in error.

BIERER, J. The judgment in this case from which the appeal is taken was rendered in the district court on the 7th day of November, 1895. On the 11th day of November, 1895,—the 10th day of November being Sunday,—defendant filed a motion for a new trial, which was, on the 16th day of November, overruled, and exception taken. The appeal was filed in this court on the 16th day of November, 1896. The only action of the court which is challenged by the motion for a new trial is in sustaining plaintiff's motion for judgment on the pleadings, and giving judgment thereon; and the question which arises at the threshold of the consideration of the question sought to be presented by this appeal is, was the appeal filed in time? Section 4452 of the Statutes of 1893 provides: "No proceeding for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of, or in case the person entitled to such proceeding be an infant, a person of unsound mind, or imprisoned within one year as aforesaid, exclusive of the time of such disability." Under this section the proceeding in error must, except in the excepted cases, be brought within one year from the entry of the judgment or the making of the order complained of. *Winkfield v. Brinkman* (Kan. Sup.) 2 Pac. 113; *Byington v. Quinton* (Kan. Sup.) 25 Pac. 565. The appeal was filed within one year from the time the motion for a new trial was overruled, but not within one year from the time the judgment appealed from was rendered; and in cases where appeals have been so taken in Kansas it has been held that the action

and rulings of the court involved in the determination of the motion for a new trial are presented to the supreme court in time. *Osborne v. Young*, 28 Kan. 769; *Thompson v. Manufacturing Co.*, 29 Kan. 476. In the case of *Dyal v. City of Topeka*, 10 Pac. 161, it was held by the supreme court of Kansas that the power of that court to review any judgment or order of the district court not appealed from within one year after the entry thereof, and where the proceeding was instituted in the supreme court within one year from the decision on the motion for a new trial, was confined to the consideration of such orders, rulings, or judgments "as may be necessarily involved in the ruling upon the motion for the new trial." In the case of *Bates v. Lyman*, 12 Pac. 33, the same court states in the syllabus of the opinion that: "Where a petition in error is filed in the supreme court within one year after the making of an order overruling a motion for a new trial, the proceeding is in time for a review of all the rulings of the court made during the trial, and excepted to at the time, which are referred to in such motion." It is not contemplated by the Code that rulings made by the court upon motions or demurrers preceding the trial should be again brought to the attention of the court by a motion for a new trial, and none of the grounds of such motion embrace any such questions, and it cannot, therefore, be said that the question which was passed upon on the motion for judgment on the pleadings was necessarily involved in the motion for a new trial. A motion for a new trial is not for the purpose of presenting to the court again questions which are saved without such a motion, and which constitute no part of such motion under the Code. A motion for a new trial is not necessary in order that such a question as that presented here may be reviewed in the supreme court; and, if it is not, then manifestly a party cannot have his time for presenting such a question for review in the supreme court extended by filing an entirely useless motion. Such a practice would place it in the power of parties to evade and defeat the object of the statute in requiring that these proceedings in error should be speedily instituted, and litigants cannot be permitted to extend this very liberal statutory limitation by the presentation of entirely useless applications to the trial court.

The conclusion which we have reached is supported by other decisions of the supreme court of Kansas. In the case of *Sanford v. Weeks*, 31 Pac. 1088, it was sought to have the supreme court of that state review the action of the trial court on a former petition for a new trial, and from the denial of which the party failed to take an appeal within one year. Subsequently a petition for the same purpose was filed, and denied, and an appeal taken from the action on this application within the year allowed by law. The supreme court in that case held that it was without

jurisdiction to review the action of the court on the first application, because one year had expired before the appeal was taken. In the case of *Blackwood v. Shaffer* (Kan. Sup.) 24 Pac. 423, a demurrer was sustained to the third paragraph of the defendant's answer, and afterwards the case was tried upon the issues presented by the petition and the other two paragraphs of the answer, and within less than one year after the rendition of the judgment, but not within a year after the action of the court in sustaining the demurrer to the third paragraph of the answer, proceeding in error was brought in the supreme court, and it was held that the supreme court, in such a case, had no power to review the action of the trial court in sustaining the demurrer. In the opinion of the case it is stated: "When a case is brought to the supreme court for the purpose of having any judgment or order of the court below reviewed, everything necessarily involved in such judgment or order is reviewable in the supreme court; but the order of the court below in this case, sustaining the demurrer to the third paragraph of the defendant's answer, is not involved in any other order or in any judgment of the court below, and hence it is not reviewable upon this principle." There is no escape from the conclusion that the action of the trial court which is complained of in this appeal was not properly brought to this court within one year after it was had. The appeal is, therefore, dismissed. All the justices concurring, excepting McATEE, J., who tried the case below, not sitting.

PRAIRIE CATTLE CO. v. WILLIAMSON, Treasurer, et al.

(Supreme Court of Oklahoma. July 30, 1897.)

TAXATION—CATTLE—SITUS—DOUBLE TAXATION.

1. By section 1, art. 5, Sess. Laws 1895, it is provided that, "where any personal property shall be located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September, such property shall be assessed," etc., and section 2 of the same article further provides that, "whenever any live stock shall be located in this territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein." And where the proof shows that cattle owned in another state or territory actually ranged and grazed in a certain county of Oklahoma during the entire year, held, that such cattle were properly taxable in such county.

2. While it may be stated, as a general proposition of law, that personal property has no situs except that of the domicile of the owner, yet this doctrine yields wherever it is applied to the taxation of personal property.

3. Because a cattle company has already listed its property for taxation in another state, and the imposition of taxes in this territory may result in double taxation, such fact does not make the tax in this territory illegal. Each taxing jurisdiction has the right to determine for itself how the taxes within its own jurisdiction shall be levied.

(Syllabus by the Court.)

Error from district court, Beaver county; before Justice A. G. O. Bierer.

Action by the Prairie Cattle Company against J. C. Williamson, treasurer, and F. D. Healey, sheriff of Beaver county. From a judgment for defendants, plaintiff brings error. Affirmed.

J. C. Gunter and A. S. Dickson, for plaintiff in error. R. H. Loofbourrow and Harper S. Cunningham, Atty. Gen., for defendants in error.

DALE, O. J. This case comes up from the district court of Beaver county, and is brought here to reverse a judgment of the lower court in holding that certain taxes levied against the personal property of the Prairie Cattle Company, a corporation, were rightfully so levied. The trial court made no finding of facts, but we have the evidence upon which the judgment was based, and from such record it appears that the Prairie Cattle Company has its home ranch and headquarters about 18 miles south of La Junta, Colo.; that such corporation owns about 16,000 head of cattle, which are made up of all classes and ages, and subsist during the entire year upon such grass and water as they can procure by ranging over a very large area of country in South-eastern Colorado and Northwestern New Mexico, and portions of Beaver county, Okl.; that the corporation, by ownership and lease, has obtained control of portions of the water privileges and lands extending over an area, in places, of about 100 miles north and south and 80 miles east and west, lying in the south-eastern portion of Colorado and the north-western part of New Mexico; that included within this range are large bodies of the public domain, and also numerous other cattle companies and individuals engaged in grazing cattle, and who are the owners or lessees of such other water privileges and lands as are not owned or controlled by the Prairie Cattle Company. This range runs down on the southeast to the vicinity of the north and the west lines of Beaver county, Okl., and numbers of cattle belonging to corporations and individuals drift into Beaver county during storms and at other times for the purpose of procuring water and grass. Owners of such cattle do not claim any grazing rights in Beaver county, and at the spring and fall roundups throw their cattle back on to their own range, and during such season of the year as the cattle are likely to drift into Beaver county keep men employed to ride the ranch line, and throw back into their own range such cattle as they may find drifting off and into said Beaver county; but, notwithstanding their efforts to keep them out, some of their cattle are always, at each roundup, found in Beaver county, and each year the assessor of the township in Beaver county, where the cattle are so found, lists the same for taxation. At the spring roundup in 1895 about 800 head of cattle belonging to the Prairie Cattle Company were found in Cleveland township, of

Beaver county, and the assessor of such township returned for taxation against the company 600 head. One of the witnesses for the defendants in error testified that he thought 600 to be a reasonable estimate of the number of cattle belonging to the Prairie Cattle Company which would be in Cleveland township, Beaver county, most of the year, and that such a number was the average of what might range there during the entire year. It is to defeat the attempt to so tax the cattle that this suit was instituted in the court below, and in its petition filed therein it is alleged, among other things, that the Prairie Cattle Company has its home ranch near Higby, Otero county, Colo., holds real estate in Bent, Otero, Las Animas, and Baca counties in such state, and in Union and Colfax counties in the territory of New Mexico, does not own or control any real estate in the territory of Oklahoma, and that all of the cattle owned by the company were assessed for taxation in the counties of Colorado and New Mexico, above named, and it is the intention of the corporation to pay the taxes so levied when they shall become due; that it has been the intention and purpose of the corporation to keep all of its range cattle in the state of Colorado; that, notwithstanding such efforts, small numbers drifted down into Beaver county, Okl., against the will of the agents of the corporation, but were always, as soon as discovered, driven back into Colorado. To the petition an answer was filed, which, in substance, alleged that the cattle assessed were located in Beaver county after the 1st day of March, 1895, and acquired an actual situs therein before the 1st day of September of such year.

Under the pleadings and facts in this case the only question to determine is, were the cattle subject to taxation in Beaver county? By section 1, art. 5, p. 229, Sess. Laws 1895, it is provided that: "When any personal property shall be located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September, such property is taxable therein for that year and shall be assessed and placed on the tax roll, and the tax collected as provided by this act." Section 2 of the same act, which follows the one just quoted, reads as follows: "Whenever any live stock shall be located in this territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein as contemplated by this act." If the cattle had acquired a situs within the meaning of the sections above quoted, then they are taxable. In view of these provisions of our statute, it would appear that this case must largely turn upon the facts. Under the evidence it appears that 600 head of cattle belonging to the Prairie Cattle Company were, upon an average, for the year 1895, grazing in the township in Beaver county in which they were sought to be taxed. It is true, the same cattle were not there all that time, but that was the number which, if they were there located for the

purpose of grazing, must, under our law, be deemed to have acquired an actual situs for grazing purposes; and it makes no difference that they were there against the will and consent of the agents of the Prairie Cattle Company. The situs of the property does not necessarily depend upon the will or intention of the owner. While it may be stated, as a general proposition of law, that personal property has no situs except that of the domicile of the owner, yet this doctrine yields whenever it is applied to the taxation of personal property. Story, *Conf. Laws*, § 550; *Bank v. Smith*, 65 Ill. 44; *Graham v. Commissioners*, 31 Kan. 473, 2 Pac. 549; *Hardesty v. Fleming*, 57 Tex. 395; *Pierce v. Eddy*, 152 Mass. 594, 26 N. E. 99. And because the cattle company has already listed its property for taxation in Colorado, and the imposition of taxes in Beaver county will result in double taxation, such fact does not make the taxes in Oklahoma illegal, as each taxing jurisdiction has the right to determine for itself how the taxes within such jurisdiction shall be levied. *Blackstone Manuf'g Co. v. Inhabitants of Blackstone*, 13 Gray, 488; *Leonard v. City of New Bedford*, 16 Gray, 292. In view of the law, as above stated, we must determine whether or not the evidence in this case warranted the court below in finding as a fact that the cattle had obtained a situs in Beaver county which would subject them to taxation in such taxing district. Numerous decisions are cited by counsel for appellant in support of their contention that, under the facts of this case, as a matter of law, the cattle had obtained no situs in Oklahoma, and we will notice briefly some of the cases referred to. In *Conley v. Chedle*, 7 Nev. 336, it appears that taxes were sought to be assessed against some logs which were being taken through the county, and the court held that they were in such county merely in transitu; they had gained no situs; and they were not taxable. In *Barnes v. Woodbury*, 17 Nev. 383, 30 Pac. 1068, the owners of a large number of cattle turned them loose in one county in the spring of the year, and in grazing a part of them went into an adjoining county, and remained therein for a period of about six months. The majority of the court held that by so doing the cattle did not obtain a situs within such adjoining county, but that the location of the home ranch governed their location for taxing purposes. While the facts in that case are somewhat analogous to the one we are considering, yet a careful reading of the dissenting opinion detracts considerably from the force of the decision as rendered by the majority of the court. In *Ford v. McGregor*, 20 Nev. 446, 23 Pac. 508, the court held that, where sheep were driven from the home ranch into another county, to be kept temporarily, they did not gain a situs in the county into which they were so driven. In that case it appears that the owners drove a large number of sheep from their ranch into an adjoining county for grazing purposes, intending to keep

them there for about two months, and the court held that such use of the sheep did not change their situs. In *Rhyno v. Madison Co.*, 43 Iowa, 632, it is held that, because the statute of Iowa declares that "the assessor shall list every person in his township, and assess all the property personal and real therein," such language does not necessarily mean that the personal property which happens to be in the township upon the 1st day of January of each year shall come within the provisions of the statute, and that property in the township for temporary purposes is not taxable therein. *Holcomb v. Kellher*, 5 S. D. 438, 59 N. W. 227, is a case where the home ranch was near an Indian reservation, and the cattle, and horses used in herding the same, ranged upon such reservation, as well as in the county where the range was located; and the court, in passing upon such case, held that the situs of the stock was at the home ranch. We think this Dakota case in point, but the statutes of the state upon which the suit was based do not go to the extent of attempting to fix the situs of live stock, as do the provisions of section 2, *supra*, of our act. Our attention is further directed to *Hays v. Steamship Co.*, 17 How. 596, *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, and *People v. Commissioners of Taxes & Assessments*, 58 N. Y. 242. In *Hays v. Steamship Co.* it was sought by the authorities at San Francisco to subject a vessel of the Pacific Mail Steamship Company to taxation, because such vessel happened to be in the harbor at San Francisco at the time when, under the laws of California, property was required to be assessed for taxation. The supreme court of the United States held that the vessel, being registered in the port of New York, and the presence of such vessel in the port of San Francisco being merely for the purpose of taking on or unloading a cargo, the situs of the vessel was at the port of registration. In *St. Louis v. Wiggins Ferry Co.* the St. Louis taxing officers undertook to levy a tax upon the boats of the ferry company operating to and from that side to the Illinois shore. The facts of the case show that the ferry company had erected upon the Illinois side their offices and docks and places where all their boats were kept while not in use, and were claiming such point as their place of business. In *People v. Commissioners of Taxes & Assessments* it was held that where steamships were registered at the port of New York, and sent to the Pacific Ocean to trade, and had not, after leaving the port of New York, registered anew, they were properly taxable in New York; also that where parties residing in the state of New York contracted with parties in Delaware to build steamships under an agreement to pay for the same from time to time as the work progressed, and payments had been made upon such contract, such uncompleted vessels were the property of the New York parties, and were taxable. We have not the statute of the state of New York before us,

and do not know whether the right to levy a tax against the individual owners of the uncompleted vessels was based upon the provisions of the New York statute, but presume it was.

The foregoing are all the cases which are cited in the brief of counsel for appellant to support the contention that the situs of the property is governed by the intention of the owners thereof, and, in the present case, by the headquarters or home ranch of the corporation. *Barnes v. Woodbury and Holcomb v. Kellher*, supra, are the two cases wherein the facts, as we gather them from a reading of the opinion, are somewhat analogous to those of the case we are here considering. In the former, the dissenting opinion, in its reasoning and authorities cited, appears to us to be worthy of great consideration. In the *Dakota* case much stress is laid upon the fact that the trial court, by a finding of fact from the evidence, had reached the conclusion that the situs of the property was at the home ranch of the company. In neither Nevada nor Dakota did the legislature of the state attempt to specifically determine when an actual situs of live stock shall have been acquired, as is the case in this territory, and no decision has been cited wherein such a statute was under consideration. No suggestion is made that it was not within the province of the legislature to pass such an act, and, in fact, we think it may be said that the legislature has not intended by its act to impose a liability by way of taxation upon transient property, or upon live stock in transitu, but do think that it was intended by the lawmakers that, where cattle were located, for grazing purposes, after the 1st day of March and before the 1st of September of any year, to require them to be listed for taxation. In the case under consideration it resolves itself finally into the one question as to whether or not the cattle were located in Beaver county for grazing purposes, and this case must be determined upon that one question. The court below, in order to have rendered its judgment, must have found that the cattle were located for grazing purposes in Beaver county between the 1st day of March and the 1st day of September. We think such fact is warranted under the evidence in this case. Such being true, and the law of this territory providing for the taxation of such live stock when so located, we think the conclusion of the lower court was correct, and must be sustained.

BIERER, J., having presided at the trial below, not sitting; all the other justices concurring.

(5 Okl. 616)

CHADDICK et al. v. LINDSAY.

(Supreme Court of Oklahoma. July 30, 1897.)
MASTER AND SERVANT—RAILROADS—BRAKEMAN—ASSUMPTION OF RISKS.

1. A statute which provides that, in case of the refusal of a (railroad) corporation or its agents to take and transport any passenger or property as

provided in the preceding section, or in case of the neglect or refusal of such corporation or its agents to discharge or deliver passengers or property at the regularly appointed places under the laws which regulate common carriers, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of action, imposes no duty upon the railroad company to erect stations or warehouses for receiving and delivering freight.

2. When the employé of a railroad company takes employment under a company, he is charged with knowledge as to the existence of stations and platforms, and with such conveniences as the company may have for the handling of baggage, and accepts his service from the railroad company with full knowledge of any liability there may be of injury in the absence of such stations, platforms, and conveniences for the handling and storage of baggage, is capable of understanding the danger, and is fully informed of all the facts; and, if there is negligence, he is chargeable with it, just as his employer would be, and he cannot recover damages for the absence of such conveniences.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice J. R. Keaton.

Action by Wallie Lindsay against E. D. Chaddick and another, receivers of the Choctaw Coal & Railway Company. From a judgment for plaintiff, defendants bring error. Reversed.

The plaintiff, Lindsay, was a brakeman of the plaintiffs in error's company at the time referred to in the petition. It was his duty to assist passengers off and on the trains, and to aid in the loading and unloading of baggage. On the morning of July 5, 1892, there was a passenger from Oklahoma City, who had a trunk to be carried to the town of Yukon. He was told by the baggageman that the company would not check his trunk, but would carry it to Yukon for him, and deliver it to him there on the ground, at his own risk, he to take possession of it upon the arrival of the train at Yukon. The trunk was unloaded at Yukon, the defendant in error, Lindsay, removing it from the car, and rolling it six or eight feet from the track. The train went on to El Reno, the western terminus, returned at noon to Oklahoma City, the eastern terminus of the road, and again returned westward in the afternoon, when the trunk was still standing upon the right of way at Yukon. It had, however, in the meantime, been moved nearer to the track in some way not disclosed in the testimony. The engineer of the train saw the trunk before reaching it, in time to have stopped the train, but did not do it, and just before the train was ready to stop the trunk was struck by the engine, which threw it around so that it struck the steps of the front car, on which Wallie Lindsay, the plaintiff, was standing, breaking the steps off from under his feet, threw him down, and the train ran over his right arm, injuring it so that amputation was required. The evidence showed that the defendant in error had run on the train as brakeman for 19 days, passing the station of Yukon four times a day, and that he had passed that point 75 times, and knew that there was no depot or

platform there. This action was begun in the district court on the 27th day of October, 1892. The petition, after reciting the accident, averred that the trunk had been "carelessly placed and left by the defendant railroad company so near to the track that in passing the steps of the car upon which the plaintiff was standing it ran against and struck the trunk, and the steps were thereby torn from the car, throwing the plaintiff to the ground, and resulting in the injury mentioned." The defendants answered by a general denial. The defendant in error, over the objection of the plaintiffs in error, was permitted to introduce evidence to show that there was no platform, depot building, or warehouse, and no station agent at the station of Yukon. After the introduction of the evidence, the defendant in error was permitted to amend his petition, by which amendment it was declared "that the injury and damage to the defendant in error was further occasioned and caused by the neglect and failure of the defendants to furnish and afford sufficient accommodations in the way of platform, depot, and warehouse for the property offered for transportation to it for and to said town of Yukon, then a station on said railroad." At the close of plaintiff's testimony a demurrer of the defendants (plaintiffs in error) to the evidence offered by the plaintiff was overruled. Special interrogatories were submitted to the jury at the request of the defendants, and findings of fact made thereon. To interrogatory 3: "Did the engineer see the trunk before the engine got to it, in going west, in the afternoon on the day in question, in time to stop the train, and avoid the accident?" the jury answered, "Yes, sir." "(5) Whose negligence, if any one's, caused the injury to the plaintiff, and in what did such negligence consist? Ans. The negligence of the Choctaw Coal and Railway Company, and consisted in a failure to provide proper facilities for the safe handling of baggage at Yukon." The jury found a general verdict in favor of the plaintiff below, and assessed his damages at \$4,000. A motion for a new trial was made and overruled, and the case brought here upon assignments of error made by the defendants below, including the averments that (1) the court erred in overruling the demurrer of the defendants below to the evidence of the plaintiff, at the close of the plaintiff's testimony, and (2) in admitting, over the objection of the defendants below, testimony in regard to defendants not having a depot and depot facilities, such as a depot building, platform, agent, or warehouse, at the town of Yukon, and (3) upon the admission and rejection of instructions, and (4) because the special findings of the jury were inconsistent with their general verdict, and (5) because the court erred in overruling the motion for a new trial.

J. W. McLoud and C. B. Stuart, for plaintiffs in error. J. W. Johnson and H. H. Howard, for defendant in error.

McATEE, J. (after stating the facts). Over the objection of the plaintiffs in error the court instructed the jury that: "It is the duty of every railroad company having and operating a line of road within this territory, or those having charge of its affairs, to furnish sufficient accommodations for property, such as trunks, at all stopping places established within said territory for receiving or discharging such property; and if you shall believe from the evidence that defendants knowingly neglected and failed to furnish such accommodation at the town of Yukon, and that said town of Yukon was and had been a regular stopping place upon the line of defendants' road, for the purpose of receiving and discharging such property, at and prior to the date of the injury complained of, and that, by reason of such neglect and failure, the plaintiff received said injury, and that such neglect and failure was one of the proximate causes of said injury, then you should find for the plaintiff." This instruction was founded upon section 1061 of the Statutes of 1890, which is identical with section 1036 of the Statutes of 1893, which is as follows: "Sec. 1036. Every such railroad corporation shall start and run its cars, for the transportation of persons and property, at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered, for transportation, at the place of starting, or at the junction of other railroads, and at siding or stopping places established for receiving and discharging way passengers and freight, and shall take, transport, and discharge passengers and property, at, from and to, such places, on the due payment of tolls, freight, or fare therefor." This is a statute governing and directing transportation both of passengers and of property. It provides for transportation alone. The provision is that "it shall furnish sufficient accommodation for the transportation of all such passengers and property" as shall be "offered for transportation at the place of starting, or at the junction of other railroads, and at siding or stopping places." There is no provision here requiring railroads to erect station houses or platforms or to keep station agents. The sufficient accommodation which shall be furnished is for "transportation," and the section immediately thereafter, namely, section 1037, provides the penalty for violation of the section referred to, in the following terms: "Sec. 1037. In case of the refusal of such corporation or its agent to take or transport any passenger or property as provided in the preceding section, or in case of the neglect or refusal of such corporation or its agents to discharge or deliver passengers or property at the regularly appointed places, under the laws which regulate common carriers, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of action." The penalty here im-

posed for a violation of the provisions of section 1037 is simply "in case of the refusal to take or transport or in case of the neglect or refusal to discharge or deliver." Here, then, in the section providing the penalty for a violation of the duty, in which it must be supposed that the punishment imposed would be co-extensive with the duty violated, the provision is a punishment for a refusal to transport alone, and it cannot be inferred from this section of the statute that any obligation has been thereby or therein provided requiring the railroads to provide depots for passengers awaiting transportation.

Upon a statute of similar character in New York, which is identical in its terms in all material points, the supreme court of that state has declared that: "The power of the company to provide such buildings is, under the statutes, a permissive one only. If the corporation chooses to exercise it, it may. The statute does not exact it. It specifies certain things which the company shall not do. It specifies many things which it shall do, as, among others, 'start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice.'" The opinion of the court, after reciting the statute, proceeds to say that: "The statute is peremptory as to many matters, but it nowhere says that for its intending passengers or waiting freights cover by building of any kind shall be provided. As to that the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors." *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856. And the duty of locating station houses and warehouses is not one which, in the absence of express statutory provision, the courts have undertaken to impose upon railroad companies or compel the erection of. It was said by the supreme court of the United States in *Northern Pac. R. Co. v. Washington Terr.*, 142 U. S. 492, 12 Sup. Ct. 283, that: "The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals." And, further, that: "The defendant's charter enacts that the road shall be constructed with all the necessary draws, culverts, stations, and all other appurtenances. The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the

discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and termini of its road." The measure of duty from the railroad companies, as here stated, is that which may be refused to passengers, and the measure of duty is not the same to the employé of the road. As an employé of the plaintiffs in error's company, the defendant in error was familiar with the fact that there was no platform, warehouse, or station agent at Yukon. *Henry v. Railway Co.*, 49 Mich. 495, 13 N. W. 832; *Finnell v. Railroad Co.*, 129 N. Y. 669, 29 N. E. 825; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835. He had been employed for a number of days on the line, had passed the point many times, and accepted and continued in his employment, and had notice of all the conditions as they existed. As to the defendant in error, the railroad company was under no legal obligations to furnish sufficient accommodations for property, such as trunks, at all stopping places established within the territory for receiving or discharging such property, nor is it liable to the defendant in error for any failure to furnish such accommodations at the town of Yukon for the purpose of receiving and discharging such property, and the instruction complained of was, therefore, erroneous.

The court was asked by the defendants to give the following instruction, which was refused, and excepted to by the defendants: "You are instructed that, as the plaintiff knew that the defendants had no depot or agent at Yukon, and knew what the defendants' custom or habit was in regard to unloading and leaving trunks and baggage at the town of Yukon, and knew that the trunk was unloaded at Yukon in the forenoon of the day in question, the plaintiff assumed whatever danger there was or might be to him on account of unloaded trunks, and of the trunk in question, the plaintiff assumed whatever danger there was or might be to him on account of unloaded trunks, and of the trunk in question at Yukon, as one of the ordinary risks, hazards, and dangers incident to his employment, which were, or in the very nature of things could have been, as well known to him as to the defendants; and if you find that the injury to plaintiff resulted from the fact of the defendants' permitting the trunk to remain upon their right of way at Yukon during the day in question, you are instructed, as a matter of law, that such injury was the result of the risks, dangers, and hazards incident to plaintiff's employment, and which were known to him, or could have been known to him; and he cannot recover in this action." This instruction should have been given. It states the law upon the proposition, which is that when the defendant took employment with the railroad company he took it with a knowledge of the fact that there was no station, no platform, and no station agent at Yukon, and that the baggage would have to be handled in the manner which is described in the statement of facts in this case; and that, if there was any peculiar lia-

bility to injury in consequence of the conditions existing there, he accepted his service from the railroad company with a full knowledge of such liability to injury, and to the extra risk which was as apparent to him as to the railroad company, if it existed at all. The rule is well established, and is applicable in this case. It has been variously expressed in the cases and text-books. It was said in one case that: "When a master employs a servant to do a particular work with a particular kind of implement or machine, the servant agrees to use in the service that particular kind of implement or machine; and if, under such circumstances, harm comes to him, it must be held to have been taken into consideration by him as among the risks he assumed in the service." *Railway Co. v. Davis*, 54 Ark. 393, 15 S. W. 896. And in another that: "If the railway company was guilty of negligence, the plaintiff must also have been guilty of negligence, for he had the same means of knowing the condition of the tracks in that vicinity as the company had, and he was as competent to determine their safety or unsafety as the company was, and therefore he cannot recover. If it is negligence, and injury results, then no recovery can be had, because of the culpable contributory negligence of the servant; but, if it is not negligence on the part of the servant, then neither can it be negligence on the part of the master. What the servant may lawfully do without negligence, the master may lawfully hire him to do without negligence. The master cannot be bound to take greater care of the servant than the servant takes of himself. There cannot be negligence on the part of the one and not on the part of the other, where both are capable of understanding the danger, and both are fully informed as to all the facts." *Rush v. Railway Co.*, 38 Kan. 129, 12 Pac. 582. It was said by Judge Cooley in the case of *Piquegno v. Railway Co.*, 52 Mich. 40, 17 N. W. 232, that: "A stick, a stone, a piece of baggage, or freight lying near the track might, in like manner, cause a brakeman to stumble and fall, and the company, at its peril, would have to provide against the likelihood of such a casualty. So stringent a rule has never been applied to railroad companies, nor could it be without making them insurers against a species of accident which could seldom occur without carelessness on the part of the person injured." And it was said in *Clark v. Railway Co.*, 28 Minn. 129, 9 N. W. 581, that: "If a servant accepts service with a knowledge of the position of structures from which he has occasion to apprehend danger, he cannot require the master to make changes so as to obviate danger, or hold him liable for damages in case of injury." And it was held in another case that the "servant assumes the dangers from causes open to observation by him, and which it required no special training or skill to foresee were likely to occasion him harm, even though at the time of injury he

was in the performance of duties which he did not contract to render." The instruction which was refused manifestly contained the law which should be applied to the facts in the case, and the law upon this proposition was not given elsewhere in the instructions of the court. It was, therefore, reversible error to refuse the request, and the petition in error will be sustained upon that ground.

The plaintiff in error also requested an instruction to the court in the following language, that: "The court instructs the jury that the plaintiff was the fellow servant of the engineer in charge of the train in question; and if you find that the engineer, McClelland, saw the trunk as the train was going west in the afternoon, in time to have stopped the train, and to have prevented the accident which it is alleged caused the injury, the plaintiff cannot recover." To this instruction, as proposed, after striking out the words, "the plaintiff cannot recover," the court added the following words: "And if you further find from the evidence that said engineer knew, or by the exercise of ordinary and reasonable care should have known, that said trunk was in such position as to be struck by said train, in time to have stopped said train, and prevented the collision and the injury alleged in plaintiff's petition; and if you further find from the evidence that said engineer was the only proximate cause of the injury complained of,—then the plaintiff cannot recover." Under the petition as amended, under the opening statement of counsel for the plaintiff, and under the evidence in the case, the only other proximate cause of the injury complained of under consideration in the case at all was the "neglect and failure on the part of the defendants to furnish sufficient accommodations in the way of platform, depot, and warehouse for the property offered for transportation to it at the town of Yukon." The amendment of the court, therefore, again introduced the absence of the station and warehouse facilities as a proximate cause upon which the jury might render a verdict, which was erroneous. While we do not determine that the instruction as presented by the defendants correctly states the law, it has been declared by the supreme court of the United States in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, that: "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. It is not necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, because persons standing in such a relation to one another as did this plaintiff and brakeman and the engineer are fellow servants, according to the very great preponderance of judicial authority in this country. They are employed and paid by the same master. The duties of the two bring them to work at the same place

at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object,—the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service. Neither can maintain an action for an injury, caused by the negligence of the other, against the corporation their common master." *Herbert v. Butler*, 97 U. S. 319; *Griggs v. Houston*, 104 U. S. 553. It was said in *Pleasants v. Fant*, 22 Wall. 121, that "It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from the ignorance of the rules of law and evidence in the conduct of the trial." In *Gowen v. Harley*, 12 U. S. App. 574, 6 C. C. A. 190, and 56 Fed. 973, it is said that "It is the duty of the trial court at the close of the evidence to direct the jury for the party who is clearly entitled to recover, where it would be its duty to set aside a verdict in favor of his opponent, if one were rendered." It is unnecessary to treat other errors which have been assigned. The case will be reversed and remanded, with direction to enter judgment for the plaintiffs in error.

KEATON, J., having presided in the court below, not sitting; all the other justices concurring.

SIGMAN et al. v. POOLE.

(Supreme Court of Oklahoma. July 30, 1897.)
APPEAL—CASE-MADE—RECORD—EXTRINSIC FACTS.

1. The trial court has no power to make an order extending the time originally granted for the making and serving of a case-made after such original extension of time has expired.

2. Extrinsic facts, which deprive the trial court of jurisdiction to grant an order extending the time within which a case-made may be prepared and served, the record being indefinite and uncertain upon the question, may be shown in this court.

(Syllabus by the Court.)

Error from district court, Cleveland county; before Justice H. W. Scott.

Action by George Sigman and W. H. Ferguson, partners as Sigman & Ferguson, against W. B. Poole. From a judgment for defendant, plaintiffs bring error. On motion to dismiss. Sustained.

T. E. Berry and Williams & Newell, for plaintiffs in error. Fisher & Hennessey, for defendant in error.

KEATON, J. On May 28, 1897, the defendant in error filed in this cause a motion to dismiss same, which, omitting the formal parts, is as follows: "Comes now the defendant, W. B. Poole, and moves the court to dismiss the above-entitled cause for the following reason, to wit: That on the 28th day of June, A. D. 1895, the court overruled plaintiff's mo-

tion for a new trial in said cause, and on said day granted plaintiff thirty days to make case-made, ten days to suggest amendments, and five days notice of settling and signing case-made, which time expired on the 17th day of August, A. D. 1895, and there was no other or further order made by said court or the judge thereof extending the time for making case-made until the 18th day of October, 1895, long after the time granted for making case-made had expired. A certified copy of said order last mentioned is hereto attached as a part hereof, marked 'Exhibit A,' and that said order shows on its face that the time granted for making and serving case-made had expired, and that the court at the time of making said order last mentioned had lost jurisdiction of said cause, and could not make a valid order extending the time of making case-made. A copy of all the proceedings had in said court in relation to making and serving case-made and extending time of serving and making case-made are hereto attached, as a part hereof, marked 'Exhibit A.' Wherefore defendant asks that this case be dismissed at the cost of plaintiffs." In support of said motion, counsel for defendant in error also file and submit the following certificate of the clerk of the district court of said county, to wit: "In the Supreme Court of the Territory of Oklahoma. George Sigman and W. H. Ferguson, partners as Sigman & Ferguson, Plaintiffs, v. W. B. Poole, Defendant. Certificate of Clerk. Territory of Oklahoma, Cleveland County—ss.: I, Ed. L. Duun, clerk of the district court in and for the 3rd judicial district in and for the county of Cleveland, territory of Oklahoma, hereby certify that on the 18th day of May, A. D. 1897, I made a full examination of the records in my office, and of all the papers filed in said cause, in relation to all the proceedings had in said cause in the district court of Cleveland county, territory of Oklahoma, and find from said examination that the records of said court and the papers filed in said cause show the following, to wit: The judge's docket, on page 164, shows the following: 'June 28, 1895, motion for new trial overruled. Ex. allowed. 30 days to make case 10—5.' That thereafter, on the 18th day of October, 1895, the court made the following order, to wit (omitting the caption): 'Now, on this 18th day of October, A. D. 1895, the above-entitled cause came on to be heard on motion of plaintiff for an extension of time in which to make case for supreme court, and for good cause shown said time is hereby extended until November 20, A. D. 1895, and ten days thereafter to suggest amendments, and five days to serve case thereafter. Said extension to date from date of last extension. H. W. Scott, Judge.' The records of the proceedings of said court had in said cause on the 18th day of October, 1895, show the following, to wit: 'It is ordered by the court that the time to make a case be, and the same is, extended 30 days from expiration of last order extending time.' And the records of the proceedings of said court show that

the above order, which is signed by the judge, was copied in the records of the proceedings of said court. And I further certify that the above contains a true and correct copy of all the proceedings had in said court in said cause in relation to granting time to make case-made or extending the time thereof, and that my records do not show that any other orders extending the time for making case were ever made by the court, or the judge thereof, and no other orders were ever filed in said cause extending the time for making case except the orders herein mentioned. in witness whereof I have hereunto set my hand this 18th day of May, A. D. 1897. Ed. L. Dunn, Clerk District Court, by John Franning, Deputy. [Seal.]

From the record, or pretended case-made, filed in this court on behalf of plaintiffs in error, it appears that their motion for a new trial was overruled and final judgment entered against them by the lower court on the 23th day of June, 1895, and said case-made was served on defendant's counsel on November 20, 1895. The only portions of said case-made showing, or purporting to show, any extension of time by said court for the purpose of allowing plaintiffs in error to prepare and serve same is that contained on page 24 thereof, and is as follows: "Territory of Oklahoma, County of Cleveland—ss.: In the District Court within and for Said County and Territory. Sigman and Ferguson, Plaintiffs, v. W. B. Poole, Defendant. Judge's docket, on page 164, among other things, shows as follows: 'April 27—95, verdict for the defendant, motion for new trial filed. June 1, passed to adjourned term. June 28—95, motion for new trial overruled. Ex. allowed. 30 days to make case, 10—5.'" We find nothing in the record that purports to be an order extending the time for plaintiffs to make and serve their case-made after that of June 28, 1895, conceding that the portion of the record above set out shows such an order on that date. It is true that there is a statement immediately following the above portion of the case-made, which purports to be a transcript of the judge's docket, in the following language: "That thereafter, and before the expiration of time to make and serve case, the above time was extended by the court by his order to November 20, 1895, in which to make and serve a case-made in above cause and court." But the certificate of the clerk, filed in support of the motion to dismiss, shows that said order extending time to November 20th was made on the 18th day of October, 1895, and this is evidently the same order referred to in said statement above quoted. If not, then the order of extension, if any was, in fact, made before the expiration of the time first allowed within which to make and serve said case, should have been set out in the case-made, or, at least, should be properly presented to this court now in opposition to the motion to dismiss, which said motion was duly served upon counsel for plaintiffs in error on the 27th day of May, 1897. We do not wish to be under-

stood as holding in this case that a statement in a case-made, which is duly signed and settled by the trial court, can be contradicted by extrinsic evidence in this court, but where a statement in such a case-made merely refers to an order of the trial court, as in this case, without setting out the order, or giving the date thereof, we think the order itself, or a duly-certified copy thereof, should be considered by us as explaining or modifying such statement to the extent of showing conclusively the date on which said order was made, and the contents of same. Such orders can only be made by the court, or by the judge thereof, at chambers, while within his district; and, in either event, they should be on file or of record in the office of the district clerk of the county, or their absence accounted for in some legal way.

The only important question to be decided in this matter is whether or not such a showing as that made in support of the motion to dismiss this cause can be considered by us, and we have determined that it is proper for our consideration, upon the ground that it shows a want of power or jurisdiction in the trial court to make the order extending the time which he assumed to make on October 18, 1895. See *Dunn v. Travis* (Kan. Sup.) 26 Pac. 247, wherein it is said: "A motion to dismiss the case was filed and considered by the court at the May sitting in 1889. That motion was then overruled (no opinion) on the ground that the recitations in the record could not be controverted, but that ruling is now reconsidered and modified to the extent that questions of jurisdiction may be examined, and, if it is shown that the court or judge at chambers has made an order that neither the court nor judge at chambers had the power to make, the want of jurisdiction may be shown to impeach the record. It is established beyond question now that at the time the judge made the order extending the time for the service of the case-made and its settlement and signing the same was made in the state of Illinois, while the judge was away from this state on a visit to that state. The order extending the time is therefore a nullity, as it will not be seriously contended that he could make judicial orders while absent from his district. The case not having been served and settlement made within the time originally granted by the court for that purpose, we cannot review it. It is recommended that the petition in error be dismissed." For the reasons stated, the motion to dismiss the petition in error is sustained, and the cause dismissed, at the cost of plaintiffs in error. All of the justices concurring.

STATE v. VIRGINIA & T. R. CO. et al. (No. 1,495.)

(Supreme Court of Nevada. Sept. 3, 1897.)

TAXATION OF RAILROADS—FISCAL YEAR—ASSESSMENT—METHOD OF VALUATION—PENALTIES—ENFORCEMENT.

1. The fiscal year, for the purpose of taxation of railroads, commences on January 1st.

2. The rule being that the value of a railroad for the purpose of taxation is its net earnings capitalized at the current rate of interest, a jury is justified in finding that the rate to be used in the computation is the current rate of interest on investments, and not that on temporary loans.

3. The net earnings of a railroad, forming the basis of valuation for taxation, are determined by deducting the necessary expenses, under reasonably economical and prudent management, from the gross earnings under similar management.

4. A reduction of \$13,839 was made in the pay roll of a railroad, in May, 1896. It was shown that no more officers or employes were necessarily required in 1895 than in 1896. *Held*, that it was permissible for a jury, in determining the reasonable operating expenses for 1895, to find that the actual expense could reasonably have been reduced \$13,839.

5. The penalties imposed by St. 1891, p. 150, § 48, providing that "in all suits brought for the collection of delinquent taxes * * * the judgment shall be entered for 25 per centum in addition to the tax of 10 per centum thereon and costs," are enforceable, although the assessment was excessive, under St. 1895, p. 39, declaring that, "where the defense is based upon the ground that the assessment is above the value of the property, the defense shall only be effectual as to the proportion of the tax based upon such excess, but in no case shall an entire assessment be declared void."

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Suit by the state against the Virginia & Truckee Railroad Company and others for the collection of taxes. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

W. E. F. Deal, for appellants. T. V. Julien, Dist. Atty., F. H. Norcross, and Torreyson & Summerfield, for the State.

BELKNAP, C. J. This is the second appeal in this case. 46 Pac. 723. Appellant made the statutory statement to the assessor, fixing the value of its main and side tracks in Washoe county at \$131,800. Notwithstanding this, it was assessed at \$254,200. The answer alleged that the assessment was out of proportion to and above the actual cash value of the property, in compliance with the statute permitting this defense. St. 1895, p. 39. The jury found the value to be \$212,200. This is exclusive of rolling stock and other property valued at \$19,000, concerning which there was no controversy. Judgment was entered upon the verdict, together with penalties, and from the judgment and an order denying a motion for new trial an appeal has been taken.

The record of the former trial does not show that any point was made touching the time of the commencement of the fiscal year,—whether in July or January. It seems to have been assumed upon that trial that it commenced upon the 1st day of July, for the purpose of taxation of railroads. The district court instructed the jury that the fiscal year, for the purpose of taxation, commenced upon January 1st, and there does not appear to be any serious contention concerning the correctness of the instruction.

Upon the former appeal it was decided that the value of the railroad for the purposes of taxation should be determined mainly by its net earnings capitalized at the current rate of interest. In that case it was shown without contradiction that the current rate of interest was 8 per cent. per annum. In this it was shown that the rate for loans was not lower than 8 per cent., but for investments the rate was 6 per cent. Money or capital laid out in a permanent form, as in the construction of a railroad, the jury may have concluded, was in the nature of an investment, and not of a temporary loan, and the rate of interest should be the same as investments command. There was evidence to support either view of the case, and as all intendments must be taken in support of the verdict, in the absence of an express finding to the contrary, we conclude that the jury found the rate of interest to be 6 per cent. per annum.

Appellant claims that its net income, as shown by its books, was not greater than \$28,038.58. Respondent, in support of the judgment, claims that items omitted by appellant should be included in its income, and that a greater income should be taken as the basis of capitalization. It will only be necessary to consider one of these matters. A reduction of the pay of the officers and employes of the company was effected in the month of May, 1896, by which the operating expenses of the road were reduced at the rate of \$13,839 per annum. It was shown without contradiction that appellant did not necessarily require more officers and employes in the year 1895 than it did in the year 1896. Under this showing it was competent for the jury to have found that the operating expenses of the year 1895 could have been, by economical management, reduced to the rate that had been subsequently established in 1896. The instruction given to the jury by the court upon its own motion upon this subject appears to be entirely unobjectionable. It is as follows: "You are instructed that the net income of a railroad company, when necessary to be determined for purposes of taxation, is the difference between the gross receipts and necessary expenses under reasonably economical and prudent management. By 'reasonably economical and prudent management' is meant a management conducted with that care, diligence, and attention which an ordinarily prudent and careful person, qualified to perform such, would take and exercise if the property so managed was his own. In any particular case the gross receipts to be considered for said purpose is not necessarily the receipts which were in fact received, but such receipts as would be received under a reasonably economical and prudent management; and the expenses to be deducted in order to determine the net income is not necessarily the expenses which were in fact incurred, but such expenses as would be incurred under a reasonably economical and prudent management." Adding the sum of \$13,839 to \$28,038, we have as the net income of the road, in round num-

bers, \$42,000. This sum, capitalized at 6 per cent., represents about \$700,000 as the value of the entire road. Washoe county's proportion is about \$260,000. As the value of the entire property in the county as fixed by the jury did not exceed \$232,100, the property was not overvalued.

It is claimed that the penalties imposed by the statutes in tax cases are not legally enforceable in the present case, because the assessment was rendered void by the verdict. Under the act of March 9, 1895 (St. 1895, p. 39), it is declared that, "where the defense is based upon the ground that the assessment is above the value of the property, the defense shall only be effectual as to the proportion of the tax based upon such excess, but in no case shall an entire assessment be declared void." And section 48 of the Revenue Law (St. 1891, p. 150) requires that "in all suits brought for the collection of delinquent taxes, as provided for in the preceding section, the complaint and summons shall demand, and the judgment shall be entered for twenty-five per centum in addition to the tax of ten per centum thereon and costs; and such tax, penalty and costs shall not be discharged, nor shall the judgment therefor be satisfied except by the payment of the tax, original penalty, costs, and the additional penalty herein prescribed in full." These provisions of the statutes answer appellant's contention.

Other points were argued by counsel, but, in the view we take of the case, they are not necessary to be considered. The judgment and order are affirmed.

BONNIFIELD and MASSEY, JJ., concur.

(9 N.Mex. 113)

NEW MEXICO NAT. BANK v. BROOKS.

(Supreme Court of New Mexico. Aug. 25, 1897.)

GARNISHMENT—NOTICE—JUDGMENTS—RES JUDICATA—AFFIDAVIT OF EXEMPTION—CONCLUSIVENESS—NECESSARY EXPENSES—RIGHT TO JURY TRIAL.

1. Judgment having been rendered against defendant and process of garnishment served on one of his debtors, defendant's counsel drew the garnishee's answer in the proceeding, and defendant himself delivered it to the garnishee, with instructions to file it within the time allowed. *Held* that, though it did not appear that defendant knew that the answer was actually filed, yet he had ample notice of the proceedings, and no service of notice was necessary to make the judgment therein binding upon him.

2. A final judgment having been rendered against a garnishee after ample notice to defendant, defendant, three months thereafter, claimed that the property garnished was exempt. *Held*, that by failing to plead the exemption before such judgment he had lost his right to plead it, the question being *res judicata*.

3. An affidavit by a debtor whose earnings have been garnished, affirming that the earnings are exempt because necessary for the support of himself and family, is not conclusive, but may be traversed by the garnisher.

4. The question of the right of property to exemption from garnishment may be tried before a judge without a jury in the absence of any statute prescribing the procedure.

5. The amount garnished was \$400, earned by defendant during two months, and his total salary for those months, as well as for several months previous and subsequent thereto, was nearly \$500 per month, while his minor sons earned \$50 per month. The total expenses of the family averaged about \$300 a month. *Held*, that the money garnished was not necessary for the support of the family.

Error to district court, Socorro county; before Justice H. B. Hamilton.

Action by the New Mexico National Bank against George L. Brooks. After judgment for plaintiff, garnishment proceedings were instituted to satisfy the same, and judgment was rendered therein for plaintiff. Afterwards, on intervening petition of defendant, the attached fund was held exempt, and plaintiff brings error. Reversed.

On June 6, 1894, the plaintiff, the New Mexico National Bank, recovered a judgment in the district court for Socorro county against the defendant, George L. Brooks, for \$10,734.32 and costs. On April 27, 1896, execution was issued directed to the sheriff of Bernalillo county, who called upon defendant to pay the same, or to show sufficient goods, chattels, effects, and lands whereof the same might be satisfied, which defendant failed to do, and the sheriff, failing to find property of defendant, at the request of plaintiff served the Atchison, Topeka & Santa Fe Railroad Company with garnishment process. On June 2, 1896, the said railroad company entered its special appearance, and moved to quash the garnishment proceeding. On June 6th this motion was overruled, and the garnishee was ruled to answer plaintiff's interrogatories within 10 days. The garnishee accordingly filed its answer, showing that it was indebted to the defendant, Brooks, on account of his salary as its live-stock agent for the months of April and May, 1896, in the sum of \$400, said salary being \$200 per month. On June 20th the court rendered judgment against the said garnishee for the \$400, admitted to be due defendant by its answer. It was afterwards shown that the defendant, Brooks, had actual notice of these garnishment proceedings, having been promptly notified by the garnishee; that the garnishee's answer was drawn up by the defendant's attorneys, and that defendant himself took said answer to the attorneys of the garnishee with the request that it be filed in time. But it is not shown that defendant knew when garnishee's answer was filed. On October 2, 1896, the defendant, Brooks, filed his petition claiming the money for which judgment had been rendered against the garnishee as exempt, for the reason that it was his personal earnings, and necessary for the support of himself and family. The court thereupon ordered a stay of execution as against the garnishee until the matter could be heard, and defendant thereupon filed a motion to set aside the judgment against the garnishee, or to perpetually stay execution on the same. On October 12th the court overruled this motion, but ordered the money due

from the garnishee to be paid into the registry of the court, and allowed the defendant, Brooks, 10 days in which to file his claim for the same. The defendant accordingly filed his claim for said money as exempt, and on November 6th the court entered an order, over the objection and exception of the plaintiff, permitting the defendant to intervene, and to be heard upon his claim of exemption as to the money collected from the garnishee, and setting the matter down for hearing, the defendant's right of exemption being denied by plaintiff. On December 7th the court made an additional order setting the matter down for hearing, to which plaintiff also excepted. The plaintiff then demanded a jury trial as to the defendant's right of exemption, which the court refused, and plaintiff excepted. The matter came on for trial before the court January 2, 1897, the court holding that the burden of proof was on the plaintiff to show that the money was not exempt. The court found that the money collected from the garnishee, and then in the registry of the court, was necessary for the support of defendant and his family, ordered that it be allowed as an exemption, and paid over to defendant. Plaintiff filed a motion for a new trial, which was overruled, and thereupon sued out a writ of error.

James G. Fitch and Summers Burkhart, for plaintiff in error. Warren, Fergusson & Gillett, for defendant in error.

LAUGHLIN, J. (after stating the facts). There will be but four propositions considered in this case: First. Whether the final judgment against the garnishee was *res adjudicata*. Second. Did the court below rule correctly in permitting plaintiff to traverse defendant's affidavit in his intervening petition? Third. Was plaintiff entitled to trial by jury? And, fourth, was the finding of the court supported by the evidence?

The plaintiff in error contends that the judgment rendered against the garnishee is *res adjudicata*, and that, therefore, the court was without any jurisdiction to grant the defendant's intervening petition. It is admitted that the counsel for defendant, Brooks, knew that process of garnishment had been served on the garnishee railroad company, and that his counsel drew up the answer to the garnishment proceedings, and that defendant, Brooks, delivered the answer so drawn up to the counsel for garnishee, and cautioned them to be sure and file it within the time prescribed, and that he knew that the answer was forwarded to the proper officer of the garnishee railroad company to be signed, but that he (defendant) did not know when it was filed in the court, and that defendant, Brooks, took no further notice of the garnishee proceedings until the 2d day of October, 1896, and more than three months after the final judgment had been rendered against the garnishee. The defendant contends (1) that he was a neces-

sary party to the garnishment proceedings, and that he was not so made a party thereto; and (2) that it was the duty of the garnishee to claim the exemption for him, the said defendant, in its answer. With respect to the first proposition, the statute provides as follows, to wit: Section 1945, Comp. Laws 1884: "The plaintiff may exhibit in the cause, written allegations and interrogatories at the return term of the writ, and not afterwards, touching the property, effects, and credits attached in the hands of any garnishee. The garnishee shall exhibit and file his answer thereto, on oath, during such term, unless the court for good cause shown shall order otherwise. In default of such answer, or of a sufficient answer, the plaintiff may take judgment by default against him, or the court may, upon motion, compel him to answer by attachment of his body." Section 1946, Comp. Laws 1884: "Such judgment by default may be proceeded on to final judgment in like manner as in cases of the defendant in actions upon contracts, but no final judgment shall be rendered against the garnishee until there shall be final judgment against the defendant." The statute is silent as to the necessity of any process or notice to the defendant after judgment final against him on execution. But it does provide that judgment shall not go against the garnishee until after final judgment against the main defendant. As before stated, the defendant had notice that garnishment proceedings had been served upon the garnishee, but it is not shown how he received such notice. However, he procured the answer for the garnishee to be drawn by his own counsel, delivered the same to the counsel of the garnishee, and cautioned them to see that it was filed seasonably. He had several conversations with one of the counsel for the garnishee about the matter thereafter, yet he failed to make any claim for exemption for more than three months. While he might not have known when the answer was filed, we are of opinion that he had ample notice of the garnishment proceedings, and sufficient opportunity to come in and make his exemption claim before entry of the judgment final against the garnishee. The judgment against the garnishee recites as follows, to wit: "And it appearing to the court by the answer of the said garnishee that the said garnishee is now indebted to the said defendant, George L. Brooks, in the sum of four hundred dollars, which said sum is now due and owing to said defendant on account of his salary as livestock agent for said garnishee for the months of April and May, A. D. 1896, it is therefore considered by the court that the plaintiff, the New Mexico National Bank, do have and recover of the said garnishee, the Atchison, Topeka & Santa Fé Railway Company, the said sum of four hundred dollars so due and owing from the said garnishee to the said defendant, George L. Brooks, as aforesaid." The counsel for defendant, on October 12, 1896, filed a motion to vacate this judgment, and the

court, on the hearing, denied the motion, and the judgment stands unmodified, and not appealed from. We are of opinion, and so hold, that this judgment is a finality, and a complete bar as against the defendant, Brooks; and that the court was without any jurisdiction to make the order on the 2d day of January, 1897, requiring the money then in the hands of the clerk to be paid over to the said defendant, Brooks. Exemption is a personal right, and the party wishing to avail himself of that right must make his claim and assert it seasonably. The defendant should have filed his claim before judgment final against the garnishee. This he did not do, and he lost his personal right. "If a judgment debtor suffer property or credits of his to be subjected to garnishment, making no exception or objection till the garnishee has been condemned to pay or deliver for execution, his right of exemption is lost." *Waples, Attachment*, 527. *Randolph v. Little*, 62 Ala. 396, is a garnishment proceeding similar to the case under consideration, and it was held that the court had no jurisdiction to order the money paid over to the defendant in the original judgment, who failed to file his claim for exemption until after judgment against the garnishee. The court said: "As we have said above, the circuit court had jurisdiction to discharge the garnishee, or to render judgment against him. After the judgment was rendered against the garnishee, that court had no authority to make the order that the money, when collected, should be paid to *Russeau*. That order was without jurisdiction, is void, and is hereby vacated." It was held in the case of *Miller v. Sherry*, 2 Wall. 237,—a case in which the defendant in the original judgment filed his claim for a homestead after final decree had been entered approving the sale of the homestead,—as follows: "In regard to the homestead right claimed by the plaintiff in error, there is no difficulty. The decree under which the sale was made to *Bushnell* expressly divested the defendant of all right and interest in the premises. It cannot be collaterally questioned. Until reversed, it is conclusive upon the parties, and the reversal would not affect a title acquired under it while it was in force." In the case of *Rector v. Rotton*, 3 Neb. 171, in which the defendants claimed for the first time a homestead right to a tract of land sold under a foreclosure sale, on a proceeding for the confirmation of the sale, the court said in commenting on this point: "But I have said the right secured to the head of a family by the homestead act is a personal one, and, being personal, it may, of course, be waived. It may be lost, even where no contract has been made respecting it, by not claiming the protection of the statute at the proper time. * * *

The rule of law, applicable alike to proceedings in equity and actions at law, undoubtedly is that, after a judgment or decree in rem against him, it is too late for a party to the record to assert any claim to the property,

either as a homestead or otherwise, which might have been made and determined in that suit. Were it otherwise, it would be quite difficult to put an end to litigation." In *Perkins v. Bragg*, 29 Ind. 507, the court, in commenting on the exemption statute of that state, said: "The question involved in the case is, can an attachment defendant, after judgment and an order of sale of the attached property, claim it as exempt from sale on the final process issued on such judgment? In *State v. Manly*, 15 Ind. 8, it was held in the negative. It is claimed that that ruling is wrong. The statute on the subject is this: 'That an amount of property not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied.' It is argued that this provision is broad enough to and does embrace final process on judgments in attachment, in which there is an order for the sale of attached property. The order of attachment only reaches lands and tenements, goods and chattels, of the defendant, subject to execution. Whether the property attached is subject to execution is res adjudicata after judgment in attachment. The judgment against the property is a judgment in rem, and is as conclusive as a judgment against the person." The rule laid down in *State v. Manly*, supra, was affirmed. See, also, *Slaughter v. Detiney*, 15 Ind. 49; *Sibbald's Case*, 12 Pet. 492; *Bank v. Beverly*, 1 How. 134; *State v. Bermudez (La.)* 2 South. 425; *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517. This doctrine has been repeatedly affirmed by the supreme court of Pennsylvania under a statute similar to our own. In *Bair v. Steinman*, 52 Pa. St. 423, that court held that: "Though a debtor is entitled to the statutory exemption of \$300 worth of his estate as against the process we call attachment execution, he is to obtain it, as in other cases, by demanding it of the officer when the process is served, or within a reasonable time thereafter. * * * If, as in this instance, he fail to make a demand, a subsequent plea of his rights will not avail him. This was ruled in *Strouse's Ex'r v. Becker*, 44 Pa. St. 206, and we do not see that there is anything else in the case." *Jones v. Tracy*, 75 Pa. St. 417. We think the case of *Muzzy v. Lantry* (Kan. Sup.) 2 Pac. 103, is clearly distinguishable from the case at bar in this: In that case the defendant to the original suit appeared, and filed his affidavit in due form, and claimed the money in the hands of the garnishees before any judgment was obtained against them; and the court properly held that the money was exempt from execution process under the statute, and ordered the garnishees to pay the money due from them to the original defendant in the first instance, and no judgment was entered against them in favor of the plaintiffs. That is a very different case from the one under consideration. Defendant in error

cites *Mull v. Jones* (Kan. Sup.) 5 Pac. 388, as authority in support of his contention that the judgment in this case is not *res adjudicata*. In that case the plaintiffs, Mull & Son, obtained a judgment against the defendant Brown, and about a year thereafter instituted garnishment proceedings against the garnishee defendant Jones, and at the trial it was found that Jones, the garnishee, was indebted to defendant Brown, and the garnishee was directed to pay the money into the justice court, which he refused to do, and the plaintiffs, Mull & Son, instituted proceedings under a statute of that state to recover the money from Jones, the garnishee. The plaintiffs contended in that case that the order by the justice of the peace on the garnishee to pay the money into court was conclusive on the garnishee, but the court held that it was not, on the decision in the case of *Board v. Scoville*, 13 Kan. 17. In speaking of such orders made by a judge pro tem. of the district court, and by justices of the peace, the court say: "Neither of said orders is a judgment. The making of them is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is, in effect, only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights, and the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action." That decision was based on section 490 of the Code of Civil Procedure of Kansas, which directs that the garnishee pay the money found due from him into court, and is not a final judgment against the garnishee and in favor of the plaintiff. In the case at bar the judgment of the district court was final, and the plaintiff was authorized to recover the sum of \$400 from the garnishee, and this judgment was in compliance with the statute (section 1948, Comp. Laws 1884): "If by the answer not excepted to or denied, it shall appear that the garnishee is possessed of property or effects, of the defendant, or is indebted to the defendant the value of the property or effects, or the debt, being ascertained, judgment may be rendered against the garnishee." In *Mull v. Jones*, supra, the contention was between the plaintiffs and the garnishee, and was decided upon the theory that it was the duty of the garnishee to disclose that the money in his possession due the defendant was exempt, and therefore not subject to execution; and in that case it was expressly held that: "While exemption is, in a certain sense, a privilege, and one which may be waived by the person entitled thereto, yet it is a privilege which continues in a debtor until he waives the same. It will hardly be contended that the defendant has forfeited or waived that privilege until he has had notice of the garnishment proceedings. If, upon notice, he should expressly waive the

exemption, or if, after notice, he should neglect and refuse to assert the privilege and claim the exemption, it possibly might be treated as an implied waiver of his right which would protect the garnishee, in case he should pay over the money or deliver the property, from any subsequent action brought by the debtor against him to recover the same." That is exactly what we hold the defendant, Brooks, did in this case,—that he had full notice of the garnishment proceedings, and procured his counsel to prepare and draw the answer for the garnishee, and refused to assert his exemption claim, and then for more than three months after the final judgment against the garnishee neglected to make any claim of his privilege of exemption.

We are of opinion that the principle is well established upon reason and authority that under statutes similar to our own a final judgment in favor of the plaintiff and against the garnishee, after notice to the defendant of the garnishment proceeding, in whatsoever way obtained by him, and his failure, neglect, or refusal to assert his personal privilege of the right of exemption seasonably, is *res adjudicata*. The position taken by defendant in error that he was a necessary party to the garnishment proceeding, and should have been served with some kind of process notifying him of that fact, is untenable. He was already a party to the judgment against him, and was in court for all purposes pertaining to the enforcement of that judgment. When the execution was placed in the hands of the sheriff of Bernalillo county for collection, he called upon the defendant to pay it, which he refused to do. He then demanded that the defendant point out property to be levied upon. This the defendant refused also to do. The sheriff then served the garnishment proceeding upon the agent of the garnishee railroad company. This was all the statute required the execution plaintiff to do. There is no statute requiring anything else to be done, and in the absence of a statute it is not necessary to give defendant in execution any further notice. 8 Am. & Eng. Enc. Law, 1127; *Phillips v. Germon*, 43 Iowa, 101. It has been held in many states that the garnishee must protect the exemption rights of his creditor under the exemption statutes of those states, but, as the garnishee is not a party to this case, we refrain from expressing any opinion upon that question.

2. Defendant in error contends that the affidavit filed by him claiming the exemption was conclusive, but the court permitted plaintiff to traverse and deny the facts set up in it; and we think this is the proper practice, and that the court did not err in this ruling. If an affidavit made by a defendant, claiming that the money or property garnished is exempt, and necessary for the support of himself and his family, should be held not traversable, then all parties to the proceeding would be concluded from inquiring into the truth of such allegations, and any defend-

ant might then claim and hold anything he might swear was exempt property. The exemption statute was never intended for such a purpose, but it only gives a personal privilege to claim and hold the things named in the statute; and whether the things claimed in the affidavit are within the purview of the statute is the very matter to be determined in a proper manner, and this can be done only upon the traverse of the truth of the affidavit.

3. Did the court commit error in denying plaintiff's demand for a jury to try the issues raised upon the affidavit of defendant and the traverse of the truth by the plaintiff? The difficulty which first confronts us with respect to the plaintiff's right to have the issue raised by his traverse tried by a jury is that this is not an original action between the parties, but is a supplemental proceeding on the execution, and is in the nature of a substitute for a creditors' bill at common law. *Freem. Judgm.* § 327. The issues and proceedings are informal, and the judge may order the witnesses before him, and hear the proofs, or he may refer the matters to a referee to hear and take the proofs, and report to the judge; and, so long as we have no statute prescribing any specific method of procedure of this nature, this proceeding affords a complete remedy, broad in its scope, and one of which neither party may justly complain, as its sole purpose is to bring the judgment debtor before the court or judge at chambers, for the purpose of inquiring into his business affairs, and to purge his conscience as to his ability, willingness, or unwillingness to pay his debts. It is true that it is a summary and effectual one, but it is an inexpensive and speedy remedy in its nature, and so it must necessarily be, for the reason that the right of exemption is purely statutory, and in the nature of an action in rem. And we have no statute prescribing a method of inquiry into the conscience of the execution debtor when his property is taken under garnishment proceedings, or as to his ability or willingness to pay, or as to how much of the property so garnished is necessary for the support of himself or his family, and by this proceeding the court is enabled to so do, and to reach the res. *McCullough v. Clark*, 41 Cal. 208; *Adams v. Hackett*, 7 Cal. 187; *Freem. Ex'ns*, §§ 392-395, and authorities there cited. We therefore hold that the court below did not err in refusing plaintiff's demand for a jury trial.

4. The last question for consideration here is, did the court err in finding that the money garnished was necessary for the support of the defendant or his family during the time specified? The defendant, Brooks, filed his affidavit on October 2, 1896, in which he stated that he was a resident of the territory, the head of a family consisting of himself, his wife, and two children, who were dependent upon him and his earnings for support, that the money garnished was his personal earnings for the months of April and May, 1896,

and was necessary to the support of himself and his family. These facts were traversed by the plaintiff, and upon the issues so joined the court set the matter down for hearing at chambers, without a jury, over the objections of the plaintiff. The statute under which the defendant claimed his right of exemption is as follows, to wit: "Sec. 6. The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear by affidavit of the debtor, or otherwise, that such earnings are necessary to the support of such debtor, or of his or her family, and such period of three months shall date from the time of issuing any attachment or other process, the rendition of any judgment, or the making of any order, under which any attempt may be made to subject such earnings to the payment of a debt." *Laws 1887*, p. 73. The question presented for determination in the district court under this statute is this: Was the money garnished necessary to the support of the defendant or of his family? The court heard the testimony orally, and the plaintiff called the defendant, Brooks, who testified that he was a resident of the territory, and the head of a family consisting of himself, his wife, and two children, and that the money garnished was his personal earnings as salary due him from the garnishee as live-stock agent of the garnishee railroad company for the months of April and May, 1896, and that such earnings were necessary for the support of himself and his family, during that time. He also testified that he was earning during those months \$200 per month from the garnishee railroad company, and \$100 per month as assistant general manager of the Aztec Land & Cattle Company, Limited, and \$16.65 per month as secretary of the Western Union Cattle, Land & Irrigation Company, and \$40 per month as manager of Grant Bros.' cattle business, and \$125 per month as assignee of the Caulkins Cattle Company; making his personal earnings per month for the months of April and May, 1896, \$481.65. He also testified that his children consisted of two sons, at that time 19 and 17 years, respectively, and that the eldest was earning a salary of \$50 per month; thus making the total personal earnings of defendant and his son during the two months in question \$531.65 per month. It further appears from defendant's testimony that these salaries had been earned for some months prior to and subsequent to the said months of April and May, but it is not shown that each of said salaries was paid promptly at the end of each month, but it is not denied that any of them were not paid within a reasonable time thereafter; and that he lived in a house then belonging to his wife. The defendant also testified that these earnings during this time were necessary to the support of himself and his family dependent upon him in the style and mode of living to which he and his family had been accustomed, and that the expenses for the support of himself and his

family for any given year were about \$3,600. The court found that the money garnished was necessary to the support of the defendant, Brooks, and his family, and ordered that it be paid by the clerk of the court to the defendant. We are of the opinion that the court below erred in finding that the money so garnished was exempt under the statute, because it appears from the defendant's own testimony that his expenses for himself and his family for any given year were about \$2,000 less than his own personal earnings, besides the \$600 per year the personal earnings of one of his sons. We do not think the facts disclosed by this record warrant the finding of the district court. The legislature, in conformity with public policy now generally prevalent, enacted the exempting statute to encourage the formation of the family relation by conferring upon the heads of household privileges to protect their families against want in the event of misfortune, but it was never intended that these generous provisions should be prostituted to the encouragement of extravagance, and the evasion of just indebtedness by indulgence in luxurious living. The statute exempts the personal earnings of the debtor entitled to its benefits to the amount necessary for the support of his family, and courts in administering the law should take into due consideration the facts and circumstances of each case. An allowance ample for a household of simple and moderate habits would be inadequate for one accustomed to abundance, and it would be not less harsh to deny to the latter means commensurate with their reasonable necessities than to fail to accord to the former a liberal proportion of his earnings. In the case at bar it is manifest from the facts in the record that the defendant was earning at the time under consideration about \$2,000 per year more than the sum required and necessary for the support of himself and his family. It is a matter of common knowledge that \$3,600 is more than ample and sufficient to support any average family in comfort and ease. The judgment of the lower court is reversed, and remanded, with costs of this proceeding against the defendant, with directions to the court below to direct the clerk to pay to the plaintiff in error, the New Mexico National Bank, the \$400 now in his hands, less the costs of the garnishment proceedings.

SMITH, C. J., and COLLIER and BANTZ, JJ., concur.

(9 N. Mex. 130)

In re ROE CHUNG.

(Supreme Court of New Mexico. Aug. 25, 1897.)

PHYSICIANS AND SURGEONS—POLICE REGULATIONS—ENFORCEMENT—IMPRISONMENT FOR DEBT—JUSTICES OF THE PEACE—JURISDICTION—PROHIBITION.

1. Act Feb. 27, 1895, prescribing a penalty against one practicing medicine or surgery without a certificate obtainable by passing an exam-

ination satisfactory to the board of health, is a valid exercise of police power.

2. Act Feb. 27, 1895, provides that the territory can, in "an action of debt," recover a forfeiture prescribed, where one has practiced medicine or surgery without a required certificate. *Held*, that the further provision that defendant may be imprisoned for a failure to pay a judgment rendered in such action is a legal method of enforcing the regulation, as a fine is not a debt in the sense that there can be no imprisonment therefor.

3. St. 1889, p. 12, providing that for all fines an imprisonment may be suffered at the rate of \$1 per day, when read into Act Feb. 27, 1895, providing for the enforcement by imprisonment of a judgment for a forfeiture of \$100, recoverable in a justice's court, repeals Comp. Laws, § 2321, providing that a justice of the peace cannot sentence for a period longer than 30 days to a sufficient extent to give justices of the peace jurisdiction to imprison until such \$100 forfeiture is satisfied.

4. A writ prohibiting the trial of a cause will not be issued where judgment has been regularly rendered, though it has not been formally entered.

Application of Roe Chung for a writ of prohibition to H. H. Ribble, justice of the peace. Denied.

Wycoff & Moore, for petitioner. R. W. D. Bryan and S. Burkhart, for respondent.

COLLIER, J. The application for a writ of prohibition was made in vacation to the Honorable H. B. Hamilton, one of the justices of this court, under section 2006 of the Compiled Laws of New Mexico, 1884, who, instead of granting the writ, and making it returnable to the next regular term of this court, ordered a rule to issue to respondent, H. H. Ribble, justice of the peace, for him to show cause at the beginning of this term, why such application should not be granted. This court decided to treat this application, as if it were made to the court in term time, and accordingly the matter is before us on the application and the answer.

Without setting out at large the averments in either, we will consider the following questions raised by the counsel for petitioner and respondent: (1) Assuming the act of the legislative assembly of New Mexico "to regulate the practice of medicine," etc., approved February 27, 1895, to be a rightful subject of legislation, can the penalties prescribed be legally enforced? (2) Has a justice of the peace court jurisdiction in an action to recover the penalty for a first offense? (3) Does it appear that the causes the trial of which is sought to be prohibited relate to subsequent offenses?

While some attack is made upon this class of legislation as invalid, it is so well established that it is not only a rightful, but a most frequent, subject of legislation, that we have concluded, despite such attack, to assume this much, and content ourselves with an extract from the decision of *Williams v. People*, 121 Ill. 87, 11 N. E. 881, as follows: "It is the common exercise of legislative power to prescribe regulations for securing the admission of qualified persons to professions and callings demanding special skill, and no-

where is this undoubtedly valid exercise of the police power of the state more wise and salutary, and more imperiously called for, than in the case of the practice of medicine. It concerns the preservation of the health and the lives of the people." Our statute is very liberal in respect to the requirements for obtaining a certificate legally authorizing the holder to practice medicine in this territory, graduation and diploma not being necessary if examination satisfactory to the board of health be passed,—a provision more liberal, perhaps, than should be in a matter so vital to the interests of the public, to whom such a certificate accredits the holder. This seems quite a relaxation of the rule much more stringent in some other jurisdictions. It is objected by counsel for petitioner that there is a provision requiring the recovery of a penalty in an action of debt, which is converted into a fine in proceedings to enforce its collection. In other words, they say that a civil action eventuates in a judgment in a criminal case. The reply to all this, or at least one of the replies, is that such a statute comes under the police power of the state, and it is frequently the case that imprisonment is embraced as a part of the judgment. The most familiar illustration of this occurs in the enforcement of fines imposed for a violation of municipal ordinances. Thus, under the head of "Municipal Corporations" (section 1625, Comp. Laws 1884), we find that all actions to recover a fine or penalty under any ordinance shall be brought in the name of the city or town as plaintiff; that (section 1627) the first process shall be a summons, special provision being made for it being begun; otherwise, if a fine is imposed, order may be made for commitment until the fine and costs are paid. Scarcely any one disputes the validity of such an ordinance, and it is certain that a proceeding begun by a city as plaintiff is not criminal, but at most only quasi criminal. It is stated by Justice Harlan in the case of *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, "that the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced—whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected—are merely matters of legislative discretion." In the face of this authority the question is reduced merely to a consideration of the legality of the imprisonment clause as a means of enforcing the fine recovered. About this we entertain no doubt. An action of debt with the territory as a party suing for the use of the board of health is fully as much an effort to enforce a law quasi criminal as is an action by a municipality as plaintiff, imprisonment being the means of enforcing judgment against all offenders. Both actions are for the enforcement of the police regulations of the territory, and fines are not a debt in the sense

that there is no imprisonment therefor. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257; *Hardenbrook v. Town of Ligonier*, 95 Ind. 70; *Charleston City v. Oliver*, 16 S. C. 47; *Ex parte Hollwedell*, 74 Mo. 395; *Ex parte Reed*, 4 Cranch, C. C. 582, Fed. Cas. No. 11,634. It is our view, therefore, that there is no inconsistency between recovery and enforcement of the fine which prevents, in any sense, their standing legally together.

The second question we have proposed to consider is, is there jurisdiction in the justice to proceed? The statute provides that any person practicing medicine or surgery without a required certificate "shall for each and every instance of such practice forfeit and pay to the territory of New Mexico the sum of one hundred dollars for the first offense and two hundred dollars for each subsequent offense, the same to be recovered in an action of debt before any court of competent jurisdiction." It is not disputed that a justice of the peace court has jurisdiction in an action for the recovery of \$100 or less; but counsel say that a justice of the peace cannot sentence for a longer period than 30 days, and therefore, it not being jurisdictional to enforce the fine by imprisonment the required length of time, this ousts all jurisdiction to proceed in the first instance. The only authority counsel have is that a statute enacted in 1876, and found in the *Compiled Laws* in section 2321, thus limits the imprisonment. It is sufficient to say that, if this argument prevailed, the law they cite should be held irrepealable. The statute of 1880 (page 12)—a later statute—says that for all fines and costs imprisonment may be suffered at the rate of one dollar per day until the days amount to the fine and costs. It is only liberal and just that the act of 1880 should be read into the act of 1895, as we believe must have been the intention of the legislature.

This brings us to the last inquiry we have proposed to ourselves, viz. do the causes whose trial is sought to be prohibited relate to subsequent offenses? If they do affirmatively appear to be suits or prosecutions for subsequent offenses, it is contended that nevertheless the plaintiff could waive demanding more than the amount recoverable for a first offense. Remission of a part of a claim simply to obtain jurisdiction, and without consent of a debtor, is generally held not to be allowable, though there are authorities both ways upon this question. We see no necessity for determining this question, however, as our conclusion depends upon other grounds. These proceedings were within the jurisdiction of the court, so far as appears on the face of the record. The actions sought to be prohibited were yet undetermined, or they were already determined. If they were determined before notice of the writ of prohibition, there is, of course, an end of this case. If they were not determined, then upon the trial the petitioner would have a complete remedy

at law by showing by evidence that they were subsequent offenses, if in fact they were. It is our view, however, that the answer of the respondent shows that judgment had been regularly rendered, but not formally entered, in this cause, before notice of the writ of prohibition, and this application might have been dismissed on that ground. As, however, the question seemed one of public importance, we preferred to give these views. The application for the writ of prohibition will be denied, and it is so ordered.

SMITH, C. J., and LAUGHLIN, HAMILTON, and BANTZ, JJ., concur.

(9 N.Mex. 136)

HORSE SPRINGS CATTLE CO. v. SCHOFIELD.

(Supreme Court of New Mexico. Aug. 25, 1897.)
RECEIVER'S SALES—VACATION—MISTAKE—RIGHTS OF PURCHASER.

1. In the foreclosure of a mortgage against a cattle company, its president was appointed receiver by stipulation. Afterwards, on his statement that it was impossible to tell the number of the cattle on the range, that he did not believe there were 1,000 head, and that it would be to the best interests of all parties to sell the cattle for \$7,000, the court, with the consent of the mortgagee, allowed the cattle to be sold for such sum. On motion of the company to set aside the sale, witnesses estimated the number of the cattle from 1,300 to 2,000 head, which were worth on the range about \$9.25 apiece. *Held*, that the sale should have been set aside, as the purchaser was enjoying an unconscionable advantage by the sacrifice of the property through mistake.

2. Where a receiver's sale of cattle is set aside for the reason that it was based on material errors as to number and value of cattle sold, the purchaser is entitled to reimbursement of the money paid by him, with interest, and his costs and expenses, including solicitor's fees expended in defending such sale.

Appeal from district court, Bernalillo county; before Justice N. C. Collier.

Action by John W. Schofield against the Horse Springs Cattle Company. From an order denying a motion to set aside an order authorizing a receiver to make a sale, defendant appeals. Reversed.

In a proceeding to foreclose a mortgage upon certain cattle and real estate of the Horse Springs Cattle Company, one George Smith, its president, was appointed receiver, on the stipulation of the parties. This stipulation, which was signed by Smith for the company, authorized the receiver to round up such cattle as could be marketed, and dispose of them at public or private sale; the contract for the sale of such cattle to be first submitted to the court for approval, or to receive the written assent of Schofield, representing the mortgagee. Under that stipulation, an order of court was made March 28, 1894, authorizing Smith, as receiver, to gather the cattle, and contract for the sale of the mortgaged property "to the best advantage"; such contracts to be submitted to the court for approval, unless assented to in writing by Schofield. Act-

ing under this order, a number of cattle were gathered from time to time, and sold by the receiver. On January 16, 1896, the receiver, Smith, made an application for leave to sell the remainder of the cattle then on the range for \$7,000, range delivery. In this application the receiver represented that it would be to the interest of all parties to accept the offer of \$7,000 which he had received; that it was impossible to state how many cattle there were, but he did not believe there were 1,000 head; that a sale upon the range would save considerable expense; and that he had submitted the proposition to complainant, Schofield, who was willing it should be accepted. On the same day an order of court was made, reciting that the cause came on to be heard on this petition of the receiver, and that complainant, by his solicitor, appeared, and consented to it. The receiver was authorized to accept the offer, and report his doings to the court. On April 4, 1896, a motion was filed by the Horse Springs Cattle Company, praying the court to set aside the order authorizing Smith to make this sale for \$7,000 upon the following grounds: (1) Said order was improvidently made, and without notice to or knowledge of the defendant, the Horse Springs Cattle Company, or the attorneys, solicitors, officers, directors, or stockholders thereof. (2) There was at the date of said petition and order a much greater number than 1,000 head of cattle belonging to defendant, the Horse Springs Cattle Company, and branded "Z-P," in the charge of said receiver, upon the lands or ranches of said defendant company. (3) The amount of \$7,000, alleged to have been offered to said receiver for said Z-P cattle, is a wholly inadequate and insufficient price for the same, and said cattle could have been, and can now be, readily sold for a much greater sum in cash than \$7,000.

At the time this motion was filed, no report had been made by the receiver as to his action under the order, but in a report which appears to have been sworn to on April 20, 1896, the receiver reports that on January 17th he sold the cattle to one H. A. Hayes for \$7,000 cash, had received payment therefor, and had paid over the purchase money to Schofield on the mortgage debt. On October 27, 1896, the court required the company to give bond in the sum of \$15,000, conditioned that in event the sale should be vacated the cattle shall realize on resale such sum in addition to \$7,000 as will be sufficient to pay costs of resale and costs of receivership from January 16, 1896. The cause was referred to an examiner, to take proofs as to the number and value of the cattle and all material facts in regard to the sale. The examiner took a large mass of testimony, and on June 7, 1897, the court heard the case on the testimony so taken, and found that defendant had failed to establish any of the grounds set forth in its motion, and the motion was overruled. Final decree has been entered. The question was brought here on appeal.

H. L. Warren, for appellant. Childers & Dobson, for appellee.

BANTZ, J. (after stating the facts). The testimony upon this motion was taken by an examiner, so that on appeal this court acts on the same information possessed by the court below. Oral testimony was not usually delivered by the witnesses before the chancellor, and hence the rule that on appeal the whole case on the law and the facts is considered, and, so far as it is essential to a proper decision, an examination of the evidence will be made. 2 *Fost. Fed. Prac.* 3474; *In re Neagle*, 135 U. S. 42, 10 Sup. Ct. 638. It is undoubtedly true that weight should be given to the findings of the chancellor, coming, as they do, on appeal, clothed with the presumption of correctness in their favor, and that mere differences of opinion upon doubtful questions of preponderance of evidence would not justify us in overturning them. *Loring v. Atterbury* (Mo. Sup.) 39 S. W. 773; *Richardson v. Payne* (Ky.) 30 S. W. 879. We are not required to determine in this case how far an appellate court will review findings in such cases. In this case the proofs tended to establish the grounds alleged in motion, or some of them, and no testimony was produced to the contrary. These proofs the court below was not at liberty to disregard, except so far as they were discredited in themselves or by other testimony. The appellant introduced some six witnesses, who were more or less familiar with the company's cattle upon the range, and who estimated the number at from 1,300 to 2,000 head. The valuation put upon these cattle was about \$10.25 on board of cars at Magdalena, at a cost of less than \$1 per head. Some of this testimony as to number and value was not entitled to much weight, but some of it was given by credible witnesses, qualified to estimate the number and testify to value; and such testimony was not incompetent. It was the best and only way, under the circumstances, by which the court could ascertain the truth. The receiver, Smith, merely estimated the number in his report, and says that it was "impossible for him to state how many cattle remain on said ranch," but did not "believe" there were more than 1,000 head. It was upon that representation by the receiver, and upon the representation as to the best price obtainable (about \$7 per head), that the court authorized the sale. We think that the evidence shows that the receiver, Smith, unduly underestimated the number of these cattle, and that to allow this sale to stand for \$7,000 would result in a loss to the mortgagor of at least \$7,000, if not a much larger sum. It was argued in favor of the purchaser that it was the duty of appellant to be vigilant, and, after vesting discretion in the receiver by the stipulation of March 24, 1894, to sell at private sale, complaint could not be heard now. But, even though the parties and the court had given

the receiver the widest latitude of discretion, if the court should become advised that, either from mistake or other cause, the receiver was disposing of the property at a sacrifice, it would become the duty to stay his hand. The stipulation, however, directs Smith to "round up such cattle as can be marketed," and these were the cattle he was authorized to dispose of at private sale,—cattle of a definite number, actually gathered. It did not authorize him to sell at private sale all of the company's cattle, unnumbered and scattered over the range; and it may not be unfair to assume that appellant trusted to the stipulation as the limit of its consent. We do not, however, regard the stipulation as the material thing, the important thing being that, if the receiver was abusing his authority, it was the duty of the court to interpose. This duty did not depend upon proof of corruption or bad faith, but, even though the receiver acted by mistake of fact, it would be equally the duty of the court to protect the estate which it was administering. The receiver was trustee for all parties in interest. It was his duty to see that the property realized the highest sum, and it was the duty of the court to see that he did. *McGown v. Sandford*, 9 Paige, 290; *Brown v. Frost*, 10 Paige, 243. There is a clear distinction between sales made under execution and sales in a proper sense called "judicial," made under decrees in chancery. In the latter case the court, in a measure, is the vendor. *Anderson v. Foulke*, 2 Har. & G. 355. In such cases the court decreeing the sale has greater power over it, and the grounds of interference are not so strict. *Daniel, Ch. Prac.* 1285. This was carried so far that formerly in England the court would open the bidding upon a 10 per cent. increase over the bid of the purchaser. This practice has not, however, been approved in this country, and it is perhaps well settled that mere inadequacy in price at public sales where the parties are adults will not be sufficient to deprive the purchaser of the fruits of his bargain. In *Blackburn v. Railroad Co.*, 3 Fed. 689, the court say: "The best solution of the subject seems to be to hold closely to the public policy which protects the sales against instability, by refusing to set them aside unless the price offered in advance is so great in proportion to the bid already made that it affords substantial evidence that for some perhaps unknown reason the property has been greatly undersold; so much so that the purchaser has not simply a bargain with a fair margin of profit, but an unconscionable advantage of the parties for whose benefit the sale has been made." In *Williamson v. Dale*, 3 Johns. Ch. 292, where the mortgagor had been innocently misled by the mortgagee as to the time of sale, Chancellor Kent ordered a resale, observing: "There is no imputation of any unfair intention of the plaintiff or his solicitor, or of any unfair conduct at the sale (public); but I think that, under

the circumstances, the defendants were innocently misled, without any culpable negligence to them." See, also, *McGown v. Sandford*, 9 Paige, 200; *Brown v. Frost*, 10 Paige, 243. In *Anderson v. Foulke*, 2 Har. & G. 356, Chancellor Bland, after alluding to the English rule in holding that it did not obtain in Maryland, says: "But in this state, as well as in England, if there should be made to appear, either before or after the sale has been ratified, any injurious mistake, misrepresentation, or fraud, the bidding will be opened, the reported sale will be rejected, or the order of ratification will be rescinded, and the property again sent into the market and resold." In *Deford v. Macwatty* (Md.) 33 Atl. 488, the court say: "The mistake or surprise or omission of duty or misconduct or fraud, such as will justify the interference of the court, will depend upon the particular circumstances, and, in dealing with all such questions, it must be borne in mind that sales of this kind are made by the court, through the receiver, as its agent, and made in behalf of the interests of all parties concerned"; and where, through some mistake, the sale would, if consummated, result in serious sacrifice of the property, it will set the sale aside, and order the property resold. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 680, and *Schroeder v. Young*, 161 U. S. 337, 16 Sup. Ct. 512, were cases where the property had been sold at public sale on execution, and the question arose in new and distinct proceedings. In *Graffam v. Burgess* the general proposition is laid down that if, in addition to inadequacy of price, there be other circumstances throwing a shadow upon the fairness of the transaction, the courts will seize upon them to declare the sale invalid. In *Schroeder v. Young* the court say: "While mere inadequacy of price has rarely been held sufficient, in itself, to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy is so gross as to shock the conscience."

We are of the opinion that the evidence shows that the order authorizing the receiver to sell these cattle was based upon great and material errors as to the number of cattle and to the reasonable value thereof, and that to refuse to set the sale aside would result in permitting the purchaser to enjoy "an unconscionable advantage" by the sacrifice of the property through such mistake. When Mr. Hayes bid upon this property, he submitted himself to the jurisdiction of the court as to all matters connected with the sale, and relating to him in the character of purchaser. *Requa v. Rea*, 2 Paige, 339; *Kneeland v. Trust Co.*, 136 U. S. 93, 10 Sup. Ct. 950. A resale should be granted, but out of the purchase money received from the sale the former purchaser, Hayes, shall be repaid the purchase price heretofore paid by him, and interest thereon at 6 per cent. per annum

from the 17th day of January, 1896, and also his reasonable costs and expenses of defending the sale heretofore made to him, including his solicitor's fees in this and the court below. *Williamson v. Dale*, 3 Johns. Ch. 283; *Duncan v. Dodd*, 2 Paige, 101. These costs and expenses will be ascertained and taxed by the court or judge of the Second judicial district. The cause is therefore reversed and remanded, to be proceeded with in accordance with this opinion.

SMITH, C. J., and LAUGHLIN, J., concur.

McKENNON v. COTNER et al. (AMERICAN FIRE INS. CO. OF PHILADELPHIA, Garnishee).

(Supreme Court of Oregon. July 31, 1897.)

STATUTES—ENACTMENT—LEGISLATIVE JOURNAL.

An enrolled act, signed by the proper officers, and filed in the office of the secretary of state, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, as it will be presumed that the vote by which such amendment was adopted was reconsidered, and the amendment defeated.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Garnishment proceedings by J. D. McKennon against H. C. Cotner and another, defendants, and the American Fire Insurance Company of Philadelphia, garnishee. A demurrer to the answer of the garnishee was sustained, and it appeals. Reversed.

On March 17, 1894, the plaintiff recovered a judgment against the defendant Cotner for the sum of \$93.70, and under an execution issued thereon the sheriff levied, by garnishment, upon a sum of money alleged to be due from the American Fire Insurance Company to Frances Cotner under a fire insurance policy covering a dwelling house belonging to her, which had been destroyed by fire. The answer of the insurance company to the notice of garnishment being unsatisfactory, the plaintiff procured an order requiring it to appear before the court for examination touching its liability, and thereupon served written allegations and interrogatories, to which the company answered, setting up as a defense (1) that by the terms of the policy no action could be maintained thereon until the assured had made due proof of loss in accordance therewith, and that this provision had neither been complied with nor waived at the time of the service of the garnishee process upon it; and (2) that in any event the amount due or to become due from it to Frances Cotner under the policy in question could not be levied upon under execution, because the property covered thereby was her homestead, and exempt from judicial sale by virtue of the act of the legislature of this state approved February 21, 1893 (Laws 1893, p. 93). To this answer a demurrer was submitted and sustained, and,

the garnishee refusing to plead further, judgment was rendered against it, from which this appeal is taken.

W. W. Hindman, for appellants. J. W. Knowles and J. D. Slater, for respondent.

BEAN, J. (after stating the facts). From the statement of facts it will be observed that two questions are presented by this record for decision: First, whether, under an insurance policy conditioned that the company shall not be liable thereon until due proof of loss is made, the company can be charged as garnishee in an action against the policy holder before the required proof has been made or the loss adjusted; and, second, whether what purports to be an act of the legislature of 1893 to exempt homesteads from attachment and judicial sale is a valid law of the state. The consideration of the last question naturally takes precedence over the other, because it is conceded that, if the act referred to is a valid law, this proceeding cannot be maintained, and the judgment must be reversed. The contention of the plaintiff is that the enrolled act in the custody of the secretary of state, although appearing upon its face to have been regularly passed by the legislature and approved by the governor, is a nullity, because an amendment to the original act, providing that it should not go into effect until January 1, 1894, which appears to have been adopted by the legislature, is not in such enrolled act. The journals of the legislature show that the act in question, designated as "House Bill No. 46," was introduced in the house, regularly passed by that body (House Journal, p. 238), and duly transmitted to the senate, where, upon its third reading, on February 16th, it was by unanimous consent amended by adding section 8, which provides that the act shall take effect and be in force from and after the 1st day of January, 1894, and, as so amended, was duly passed (Senate Journal, p. 782). The original bill, with the amendment, was then returned to the house; and on the same day the amendment was concurred in by that body, and the bill ordered enrolled. House Journal, p. 928. No further reference to the bill is to be found in the journals of either house, except the entries therein showing that on February 17, 1893, it was duly signed by the presiding officers thereof (House Journal, p. 946; Senate Journal, p. 801); and the enrolled act so signed was approved by the governor, filed in the office of the secretary of state, and published among the laws of the session of 1893, but does not contain section 8. And the question here presented is whether this enrolled act, thus authenticated, shall be deemed a nullity because it does not contain the amendment referred to; and this involves the inquiry as to what extent the validity of an enrolled act in the custody of the secretary of state, and appearing upon its face to have become a law in the manner provided by the constitution,

may be impeached by the journals of the legislature. Upon this point there is great conflict in the authorities. One view is that the legislative journals must affirmatively show conformity to the requirements of the constitution in the passage of the bill through its several stages, or else it is not a law. Another view is that the enrolled act, signed by the proper officers and filed in the office of the secretary of state, is to be deemed regularly enacted, and cannot be impeached by reference to the legislative journals. And a third view is that the mere silence of the journals as to matters not required by the constitution to be entered therein will not invalidate a law, but it will be presumed in such case that the enrolled act, as filed in the office of the secretary of state, if signed by the presiding officers of the two houses, was regularly passed, but, if the journals affirmatively show that in fact it did not pass, the courts will refuse to recognize it as a valid law. The authorities bearing upon this question will be found collated and arranged by states in a footnote to *Feld v. Clark*, 143 U. S. 661, 12 Sup. Ct. 495. The question was before this court in *Currie v. Southern Pac. Co.*, 21 Or. 566, 28 Pac. 884, and *State v. Rogers*, 22 Or. 348, 30 Pac. 74; and the rule there applied is that, when it appears from the journals of the legislature that the enrolled act filed in the office of the secretary of state did not in fact receive the requisite number of votes in either house for its passage, the courts will refuse to regard it as a valid law, but the absence of an affirmative showing in the journal to that effect does not affect its validity. In other words, in order to impeach the validity of such an act it must affirmatively appear from the legislative journals that it did not in fact receive the approval or the constitutional number of the members of the legislature. Mere silence of the journal is not sufficient. Within this rule, we think the act in question must be regarded as valid. It nowhere appears in the journal that it did not pass in the form as actually signed by the presiding officers, and now on file in the office of the secretary of state. It is true, the journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act; but the vote by which such amendment was adopted may have been reconsidered, and the amendment defeated. At least, the courts are bound to presume such to have been the case. The enrolled act, as filed with the secretary of state, is signed by the officers of the house and the senate required by the constitution to sign all bills and joint resolutions passed by their respective bodies, and is therefore officially attested in the manner required by the organic law as one that has regularly and duly passed the legislature, and this attestation must prevail unless the contrary conclusively appears by the journals of their proceedings. *State v. Francis*, 28 Kan. 724. The constitution requires all bills and joint resolu-

tions to be signed by the presiding officers of the respective houses. Article 4, § 25. And their signatures must be given full force and effect, and import absolute verity, unless affirmatively contradicted by the journals which the constitution requires to be kept. It follows that in our opinion the homestead law is not invalid for the reason urged in this case, and the judgment of the court below must be reversed and the cause remanded, with directions to overrule the demurrer to the answer of the garnishee.

STAHL et al. v. OSMERS et al.

(Supreme Court of Oregon. July 31, 1897.)

PARTNERSHIP—FIRM CREDITORS—RIGHTS.

The right of a simple contract creditor of a partnership to have the assets of the firm first applied to the payment of firm debts does not amount to a lien upon the property, but is a mere equity, which vanishes when the partners part with their interest in the property.

Appeal from circuit court, Morrow county; Stephen A. Lowell, Judge.

Suit by Mrs. J. H. Stahl and others against Dan Osmers and others. From decree for defendants, plaintiffs appeal. Affirmed.

The object of this suit is to compel the vendees of partnership property acquired from the individual partners to account for and apply the proceeds thereof to the payment of partnership debts. The facts are practically undisputed, and the only controversy is about the application of the law thereto. On July 6, 1893, the defendants Dan Osmers and Mat Hughes were partners in the saloon business at Heppner, and were the owners of a stock of wines, liquors, and cigars of the alleged value of \$800, and were insolvent. On that day the partnership property was attached for the individual debt of Osmers at the suit of Ruehl, and under an execution on a subsequently recovered judgment his interest therein was sold to the defendant William Hughes for the sum of \$200. On the day following the attachment, the other partner, Mat Hughes, sold and transferred all his interest in the firm property to the defendant John Hughes for the sum of \$600, who, together with the purchaser at the sheriff's sale, took possession of the entire partnership property, and disposed of it for their own use and benefit. The plaintiffs,—who are creditors of the firm of Osmers & Hughes,—having reduced their claims to judgment, and an execution having been issued thereon, and returned nulla bona, began this suit on March 10, 1894, to compel the defendants and John Hughes to account for and apply in payment of their judgment the proceeds of the property formerly belonging to said partnership. The decree of the court below was in favor of defendants, and plaintiffs appeal.

Frank Kellogg, for appellants. Rea & Lyons, for respondents.

BEAN, J. (after stating the facts). The complaint charges fraud in the sale and transfer by the defendant Mat Hughes of his interest in the partnership property to his co-defendant, John Hughes. But this allegation is wholly unsupported by evidence, and therefore the only question for determination on this appeal is whether simple contract creditors of a partnership have such a lien upon the assets of the firm as will enable them to follow and subject such assets, or the proceeds thereof, to the payment of the firm debts after all partners have parted with their interest therein. Upon this question there is some conflict in the adjudged cases, but the great weight of authority favors the doctrine that the firm creditors have no lien in their own right upon the partnership effects, and no direct right to compel their application to firm, in preference to individual debts. The right to compel such an application of partnership assets is generally regarded as an equity the partners have as between themselves, but, so long as it exists in any of the partners, the creditors may, by a sort of subrogation to the right of the partner, compel its enforcement and by this means obtain an application of partnership property to their demands. The right of the firm creditor in this respect is, however, a derivative one only, and not held or enforced in his own right; in other words "the equities of the creditors can only be worked out through the equities of the partners." From these premises it necessarily follows that, unless a partner is in condition to enforce such right, the creditors cannot do so. The quasi lien, as it is sometimes called, of the creditor, being at best only the resultant of his debtor's lien, it of course cannot exist after the debtor had himself ceased to have any lien from which it could be derived. The leading case upon this subject is, perhaps, that of *Case v. Beauregard*, 99 U. S. 119, in which it was held that transfers made by the individual members of an insolvent firm of their interest in the partnership assets terminated the equity of any partner to require the application thereof to the payment of firm debts, and was, therefore, a complete bar to a bill filed by the partnership creditors for that purpose. But probably no clearer enunciation of the doctrine is to be found than that of Mr. Justice Matthews in *Fitzpatrick v. Flannagan*, 106 U. S. 654, 1 Sup. Ct. 374. He says: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through

which it is derived, remains; that is, so long as the partner himself 'retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.' Such was the language of this court in *Case v. Beauregard*, 99 U. S. 119, in which Mr. Justice Strong, delivering its opinion, continued as follows: 'It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*.' Hence it follows that 'if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.'" And in *Schmidlapp v. Currie*, 55 Miss. 600, the rule is admirably stated by Mr. Justice Chalmers as follows: "The firm creditors at large of a partnership have no lien on its assets any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts and individual property to individual debts, is only a principle of administration adopted by the courts where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus, where upon a dissolution of the firm by death or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to so marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned shall be applied to the liabilities of its separate owner, so that

neither class of creditors shall be allowed to trespass upon the fund belonging to the other until the claims of that other shall have been satisfied. This right of the creditors is, therefore, really the right of their debtors, and inures to them derivatively from the debtors. Hence it is said that the lien or quasi lien of the creditor 'is worked out through the partners,' the meaning of which is that the firm creditors may demand the primary application of the firm assets to the payment of their debts, because each one of the partners would have a right to demand this as against his co-partners." This doctrine is likewise supported by the following authorities: 2 Bates, Partn. § 824; T. Pars. Partn. § 246 et seq. and note; *Huiskamp v. Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 849; *Goldsmith v. Elchold*, 94 Ala. 116, 10 South. 80; *Jones v. Fletcher*, 42 Ark. 423; *Woolen Mills v. Conklin*, 26 Iowa. 422; and many others which it is not deemed necessary to cite. The courts of New York (*Menagh v. Whitwell*, 52 N. Y. 146), and perhaps those of another state or two, seem to hold to a contrary doctrine, but they are decidedly in the minority, and we are not sufficiently impressed with the soundness of the reasons upon which their decisions are founded to follow them in opposition to what we conceive to be the great weight of authority. Applying the doctrine stated to the case in hand, the solution is clear. It is admitted by the complaint that the entire right and interest of each of the partners in the firm of *Osmer & Hughes* in the partnership property had been sold and transferred long prior to the commencement of this suit, and that neither of such partners had any interest therein at the time the suit was commenced, and hence, under the rule stated, it cannot be maintained. The decree must therefore be affirmed, and it is so ordered.

STATE v. COUPER.

(Supreme Court of Oregon. July 31, 1897.)

INDICTMENT—VARIANCE—DIRECTION TO ACQUIT.

1. Before the court can instruct that there is a fatal variance between an indictment for larceny, and the proof as to description, it must be able to determine either that there was no competent evidence bearing on the subject, or that it was so weak that a verdict against defendant would necessarily be attributable to passion or prejudice.

2. The court should not direct an acquittal unless there is no competent evidence tending to show accused guilty, or unless the evidence is so weak that a conviction would be attributable to passion or prejudice.

Appeal from circuit court, Union county; Stephen A. Lowell, Judge.

E. J. Couper was convicted of larceny, and he appeals. Affirmed.

T. H. Crawford, for appellant. Jas. A. Fee and H. E. Courtner, for respondent.

WOLVERTON, J. Defendant was indicted for the larceny of a certain heifer calf of the

value of \$10, the personal property of Florence Dobbin. The property was further described in the indictment as follows: "Which said calf had an artificial ear mark, to wit, a slit in the right ear of said calf." At the close of the testimony for the state the defendant moved the court to direct the jury to return a verdict of acquittal, because—First, there was a total failure of proof tending to show that the property stolen was a "heifer calf marked with a slit in the right ear"; and, second, the proof submitted touching the crime charged was insufficient to go to the jury. Of these in their order. It is sought to invoke the rule laid down by Mr. Greenleaf, that where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved, as they have been made by the pleader, essential to the identity. 1 Greenl. Ev. § 65. And it is contended that, although it was unnecessary for the indictment to have contained an allegation that the calf was a "heifer," or that it was marked "with a slit in the right ear," but having alleged these conditions as descriptive of the thing stolen it was incumbent upon the state to give evidence tending to establish the descriptive matter as alleged, otherwise there would be a fatal variance. However that may be, we think there is testimony in the record tending to support all the requirements of the rule contended for. It was shown by competent witnesses that Mrs. Florence Dobbin was the owner of a light red cow branded with a reversed D on the left hip, and marked with a slit in the right ear, and dewlap cut up and out; that in the latter part of April, 1896, the cow gave birth to a heifer calf of Durham stock, dark red in color, with white spot in its forehead, some white on its belly, and tail tipped with white. The cow and calf were kept about the premises of Mrs. Dobbin until the latter part of May or the first of June, when the calf was marked with a slit in the right ear, and both were driven to another range, some 10 or 12 miles distant, and about the same distance from the place occupied by the defendant. The cow and calf were seen together upon this range by two parties in July. The calf was described as being fat, and was identified by the color and mark as the calf marked in the latter part of May or first of June at the premises of Mrs. Dobbin. About the 20th or 25th of August they were again seen together in defendant's pasture, with other cattle, some belonging to defendant and some to other parties. The cow was identified as light red, and branded as indicated above, and the calf described as a dark red heifer calf of square build, fat, and apparently of Durham stock; no ear mark was noticed, however. On the 15th day of September the defendant took to J. B. O'Toole's butcher shop in La Grande a heifer calf butchered and "hock dressed," as it was

termed by the witnesses, which was explained as meaning that the head and legs below the knee joints and entrails had been removed. The calf was described as red in color, pretty well bred in the Durham, square build, and fat, and about six months old,—between five and seven months,—and resembled the calf seen with the Dobbin cow in August in size and shape. It was taken to Russell & Willard's shop, and there one-half of it was dressed out and the other half hung up in front of the shop, with hide attached. While in this condition witnesses examined the carcass, and also the hide after its removal, and described it as dark red in appearance with the tip of the tail white, and some white on its belly, and gave it as their belief that the calf was the one seen in the defendant's pasture, and marked in the latter part of May or first of June at the premises of Mrs. Dobbin. On September 16th, the cow was seen at the premises of the defendant, without the calf, bawling, and with swollen udder, and some three or four days thereafter was taken to the premises of Mrs. Dobbin, and identified as being her cow, and the mother of the calf marked in the latter part of May or first of June. That there is here some evidence to go to the jury upon the question touching the alleged descriptive facts that the calf was a heifer, and marked with a slit in the right ear, there can be no dispute. Before the court could say to the jury that there is a variance in respect to this descriptive matter contained in the indictment, it ought to be able to determine that there was no competent evidence at all bearing upon the subject, or that it was so weak that a verdict against the defendant would necessarily be attributable to passion, prejudice, or partiality. The same rule is applicable touching the sufficiency of the testimony for this purpose as where it is sought to have the jury return a verdict of not guilty on the ground of insufficiency of testimony to establish the crime charged. In *State v. Jones*, 18 Or. 260, 22 Pac. 842, Strahan, J. says: "Where the state proves enough to require the defendant to produce evidence in his own behalf, such a direction would be improper. As soon as enough is shown to require the defendant to enter upon his defense, and to introduce evidence, it is the province of the jury to weigh the evidence, and to pass upon the credibility of the witnesses. A direction to acquit in such a case would be an invasion of the province of the jury, and could not be sustained." See, also, *State v. Pomeroy* (Or.) 46 Pac. 797. The jury could reasonably infer from this testimony that the calf bore the marks which the indictment set forth as descriptive of it, and was properly submitted for their consideration. The same may be said touching the testimony submitted to establish the crime charged, and this disposes also of the second ground assigned in support of the motion for the direction of a verdict of acquittal. Affirmed.

HOWARD v. RECKLING et al.

(Supreme Court of Oregon. July 31, 1897.)

PUBLIC LANDS—MORTGAGE OF HOMESTEAD CLAIM.

The homestead act (Rev. St. U. S. § 2206), providing that no lands acquired thereunder "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," merely prevents the appropriation of the land in invitum to the satisfaction of such debts, and does not prevent the homestead claimant, after issuance of the final certificate, and before patent, from giving a mortgage on the land for a debt then contracted or theretofore existing.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Suit by William H. Howard against Ferdinand Reckling and others. Demurrer to answer was sustained, and defendants appeal. Affirmed.

King & Saxton, for appellants. Frank L. Moore, for respondent.

WOLVERTON, J. This is a suit to foreclose a mortgage on a homestead claim executed by the patentee thereof to plaintiff March 8, 1895, to secure certain indebtedness by him then contracted. The defendants answered, setting up as a defense thereto that final proof touching said premises was made October 3, 1894, and that the patent was not issued until July 17, 1896, and, therefore, that the premises could not be subject to the payment of such indebtedness. To the answer a demurrer was interposed and sustained, and the action of the court in this regard constitutes the only assignment of error. The sole question thus presented is whether a homestead claimant may lawfully incur his claim with a mortgage to secure indebtedness contracted subsequent to the date of the final certificate and prior to the issuance of the patent. The homestead act provides, among other things, that no lands acquired under its provisions "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Rev. St. U. S. § 2206. This provision of the statute was manifestly designed for the protection of entry men, and to prevent the appropriation of the land in invitum to the satisfaction of any debts incurred anterior to the issuance of the patent therefor. It is not a limitation or restriction upon any rights the settler may acquire in the land, nor does it operate as a disability forbidding the sale or transfer of his interest therein. It was, as is said by Beach, J., in *Nycum v. McAllister*, 33 Iowa, 374, "intended as a shield for his protection, and is not a weapon for the destruction of any of his rights." The authorities seem to be uniform in this interpretation of the statute, and, in so far as we have been able to find any case in point, they all hold that after the issuance of the final certificate, and before patent, the claimant may execute a valid mortgage upon the land to secure a debt contracted at the time or theretofore existing. *Nycum v. Mc-*

Allister, supra; *Orr v. Ulyatt* (Nev.) 43 Pac. 916; *Boggan v. Reid* (Wash.) 20 Pac. 423; *Townsend v. Lenton*, 30 Minn. 528, 16 N. W. 421; *Spies v. Neuberg*, 71 Wis. 279, 37 N. W. 417; *Kirkaldie v. Larrabee*, 31 Cal. 435; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Lewis v. Wetherell*, 36 Minn. 386, 31 N. W. 356; *Lang v. Morey*, 40 Minn. 306, 42 N. W. 88; *Cheney v. White*, 5 Neb. 261; and *Jones v. Yoakam*, Id. 265. It is sought to distinguish these cases as not applicable to the question in this jurisdiction, because it has been determined here that a mortgage is not a conveyance, but creates a lien only upon the land mortgaged; but several of the cases cited are from states whose courts hold the same doctrine, and the purpose of the statute being to prevent the appropriation of the land against an unwilling party, and not where it has been voluntarily incumbered by him, it is clear that there can be no distinction in the principle, as there is none under the authorities. Let the decree of the court below be affirmed.

In re MURRAY et al.**BROWN v. MacRAE.**

(Supreme Court of Oregon. July 31, 1897.)

ASSIGNEES FOR CREDITORS—ACCOUNTING—PRACTICE—APPEAL—OBJECTIONS NOT RAISED BELOW.

1. An assignee for creditors, having discharged the duties of his trust, is entitled, upon filing his final account, to have it settled and adjusted, and all objections thereto passed upon and determined separately. Hence an order disallowing the account in toto is error.

2. Irregularities in the verification and filing of objections to the final account of an assignee in insolvency cannot be urged for the first time on appeal.

Appeal from circuit court, Grant county; Morton D. Clifford, Judge.

Final accounting of Kenneth F. MacRae, assignee of Murray Bros., insolvent. Upon objections by A. L. Brown, creditor, the account was rejected, and assignee appeals. Reversed.

Emmett Williams, for appellant. Everett Hicks, for respondent.

BEAN, J. This appeal brings up for review a decree of the circuit court of Grant county, made in the matter of the final account of Kenneth F. MacRae, as assignee of Murray Bros., formerly partners doing business as stockmen and ranchers in Grant, Harney, and Malheur counties. MacRae was appointed in November, 1891, assumed control and management of the estate January 1, 1892, and filed his final account on May 31, 1894, showing a balance on hand of \$4,256.70, of which he asked to be allowed the sum of \$3,390.37 for his personal services as assignee, and \$866.33 as a balance due for the services of his attorneys. After several ineffectual attempts to bring the matter of the account to a hearing, January 10, 1895, was fixed as the time for hearing objections thereto, and for the

settlement thereof, of which due notice was given. On the 18th of January, 1895, one of the creditors of the estate filed objections to many items in the assignee's final account, specifying with considerable detail the grounds of such objections. Nothing further, however, appears in the journal of the court in reference to the matter until May, 1896, when the court filed a decision wherein he makes some findings of fact to the effect that the estate had been extravagantly and wastefully managed, but did not pass upon any of the objections made to the final account, except such as pertained to the matter of the allowance to the assignee for his personal service and for the balance due his attorneys. On the 26th of May the assignee filed a motion, supported by affidavit, for a rehearing, and a re-examination of the matter, and for leave to file a supplemental report. This motion was allowed, and on October 7, 1896, a supplemental report, explanatory of the final account, and in answer to the objections thereto, setting out at great length and with much detail the transactions of the assignee, was filed by him, and the whole matter argued and submitted. On February 8, 1897, the court again filed what are denominated findings of fact and conclusions of law, but which, like the former findings, did not pass upon or determine the specific objections made to the assignee's final report, or undertake to settle his accounts. Upon these findings a decree was rendered that "the final account and report and the supplemental account and report of the said assignee be, and the same are hereby, rejected and disallowed; that the said assignee be, and he is hereby, allowed the sum of \$309.37, in addition to the amount already received by him as per his said final account and report, for his services as such, and the remaining sum now in his hands belonging to the said estate, to wit, the sum of \$3,906.58, the said assignee is hereby ordered to forthwith distribute pro rata among the creditors of the estate, and that each creditor have and recover of and from the said assignee his costs and disbursements, taxed at the sum of \$——." From this decree the assignee appeals, and, in our opinion, his appeal must prevail. Having discharged the duties of his trust, and filed his final account, he was entitled to have it settled and adjusted, and the specific objections made thereto passed upon and determined. This was not done, but an order was entered disallowing the account in toto, and ordering the distribution of the funds then in his hands, less the sum of \$390, which he was permitted to retain for his own services; so that, as the matter now stands, the assignee must go to the expense and trouble of filing another final account notwithstanding the fact that the one on file is a full and complete account of his doings as assignee. The estate has been settled, and it only remains for the court to settle and adjust the accounts of the assignee. The proper practice would have been for the court below to have tried and determined the

issues made by the objections to the final account, and either allowed it in whole or in part, and in that manner ascertained the sum with which the assignee is properly chargeable, and the amount for which he is entitled to a credit, and thereby settled and adjusted his account so that when he complied with the decree he would be entitled to a discharge and order exonerating his bondsmen. The final account of the business, together with the books, vouchers, and records on file, show all his transactions and his receipts and disbursements with particular and commendable clearness, and upon these records and the objections made to the final report he is entitled to have the matter adjusted, and not be compelled to begin over again. Although the court may have been of the opinion, from its examination of the record, that the estate had been extravagantly managed or wasted, or that the assignee had failed to account for all the property coming into his hands, or had paid out money for which he was not entitled to a credit, it was not authorized on that account to disallow and reject his final account in toto. It should have tried out the disputed questions either from the record, if that could have been done, and, if not, from extraneous testimony, and made such a decree of final settlement as, in its opinion, the facts justified.

It is claimed that the objections were not filed in time, and are not properly verified, but questions of that kind cannot be made in this court for the first time. The case was argued and submitted twice to the court below on the assumption that the objections were properly filed. The only question in the case is the settlement of the final account of the assignee, and as this involves questions of fact which cannot be determined in this court from the record before us, it necessarily follows that the decree must be reversed, and the cause remanded to the court below, with directions to adjust and settle the final account of the assignee; and it is so ordered.

BARR v. RADER.

(Supreme Court of Oregon. July 31, 1897.)

ATTORNEYS AT LAW—AUTHORITY.

The general power of an attorney to act on behalf of his client does not authorize him to accept an acknowledgment of indebtedness of the garnishee of the judgment debtor in satisfaction of a judgment in the client's favor.

Appeal from circuit court, Grant county; Morton D. Clifford, Judge.

Action by Emmet Barr against George Rader. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover damages for the alleged wrongful seizure, detention, and sale of certain personal property. The facts are: That on November 14, 1892, the defendant George Rader, by consideration of the circuit court of Grant county, obtained a judgment

against the plaintiff, Emmet Barr, for the sum of \$114.24, and caused an execution to be issued thereon, in pursuance of which J. D. Combs, sheriff of said county, by direction of Rader, served a notice of garnishment upon Messrs. Harrer Bros., who, in answer thereto, admitted that they were indebted to Barr in the sum of \$75, which would become due on July 30, 1893. That the sheriff thereafter collected from Barr the sum of \$52.75, and, considering the answer of the garnishees as payment pro tanto, gave him a receipt for the amount of the judgment, and returned the execution. That an alias writ was issued, commanding the sheriff to satisfy the balance due on the judgment, in pursuance of which that officer, by direction of Rader, levied upon a stallion and a hack, the property of Barr, and on July 10, 1893, sold the latter for \$39.50, and applied the amount so received to the expenses incurred on the execution; and on the same day, having collected from Harrer Bros. the amount admitted by them to be due Barr, the stallion was surrendered to its owner, and the writ returned fully satisfied. Barr thereupon commenced an action against Combs and Rader, which resulting in a judgment in his favor, the same was on appeal to this court reversed, and a new trial ordered. *Barr v. Combs*, 29 Or. 399, 45 Pac. 776. The cause being remanded, the trial court, in obedience to the mandate, gave a judgment of nonsuit in favor of Combs; but upon the new trial the jury returned a verdict against Rader for the sum of \$300, and, a judgment having been rendered thereon, he again appeals, assigning as error the action of the trial court in admitting certain evidence, refusing to grant a judgment of nonsuit as to him, and in giving certain instructions.

L. Kearney, for appellant. Thornton Williams, for respondent.

MOORE, C. J. (after stating the facts). The right of the plaintiff to maintain this action depends upon the authority of the sheriff to accept, as payment pro tanto upon the judgment in the original action, the certificate of Harrer Bros. to a notice of garnishment, acknowledging their indebtedness to Barr. The plaintiff contends that the sheriff, on his behalf, entered into a contract with Rader by which it was agreed that the amount so admitted to be due from Harrer Bros. to Barr should be indorsed as a payment on the writ, while the defendant insists that no such agreement was consummated, and that, the amount so admitted to be due from Harrer Bros. to Barr not having been paid, he had the right to issue the alias writ under which the levy, detention, and sale complained of were made. The evidence tends to show that Harrer Bros. had been negotiating with Barr to lease from him a pasture, but, before any agreement to that effect had been entered into, the sheriff, with the execution in his possession, by direction of Rader's attorney applied to them

for a statement of the transaction, and, being informed that no agreement had been made, the notice of garnishment was not served. Harrer Bros., however, had another conference with Barr, who agreed to lease the pasture to them in consideration of their agreement to pay \$75 on the judgment rendered against him. This agreement having been consummated, the sheriff thereupon served the notice of garnishment, to which Grant Harrer, for the firm, furnished a certificate, to which he subscribed his name, thereby admitting the indebtedness, upon obtaining which the officer took the same to the office of Lucien Everts, Esq., attorney for Rader, where he also found the latter, in whose presence it was agreed that the certificate should be signed by the firm name, whereupon the sheriff obtained the signature of Harrer Bros. and returned the same to Everts. It also appears that Barr and Harrer Bros. had not agreed upon the time when the rent of the pasture should be paid, and when the notice of garnishment was served the latter agreed with Everts that it should become due July 30, 1893. We have given a synopsis of the testimony to explain an instruction of the court as follows: "I also charge you, gentlemen of the jury, that in this case a person like Mr. Rader, who is a judgment creditor in this execution, can either act for himself or by his duly-authorized agent. An agent is a person authorized by another to act for him, and, if you believe from the evidence in this case that Mr. Everts was the regularly employed and acting attorney for Mr. Rader in this transaction, any agreement or any contracts made between these parties, Mr. Barr and Mr. Everts, in that capacity, would be the act of Mr. Rader, and he would be responsible for them, and would be bound by the acts of his agent." An exception to this instruction having been taken, it is contended by counsel for the defendant that an attorney has, by virtue of his general retainer, no authority to satisfy a judgment without payment thereof in money; that while Rader might have accepted Harrer Bros.' certificate to the notice of garnishment as part payment of the judgment, Everts, as his attorney, had no power to do so without special authority from his client to that effect; and that, if plaintiff would rely upon Everts' right to bind his principal, the burden was upon him to show that the authority existed. "The plaintiff's attorney," says Mr. Freeman in his work on Executions (2d Ed., § 108), "has, by virtue of his general employment in the case, power to direct and control the execution, though he cannot satisfy the writ except upon payment to him of the full amount thereof in money, unless the plaintiff has given him special authority to compromise the debt or accept satisfaction in something not a legal tender. The burden of proving such special authority is upon the party claiming under it, for it will never be presumed." In *Smock v. Dade*, 5 Rand. (Va.) 639, an execution was returned

indorsed, "Not executed, by order of plaintiff's attorney." An alias writ having been issued, the defendant moved to quash the same, contending that the amount for which the judgment was given had been paid to plaintiff's attorney, and in support of the motion gave in evidence a memorandum signed by the latter, as follows: "Received 25th November, 1822, from Col. Laurence T. Dade, one hundred and fifty-four dollars and seventy cents, in money; also, the bond of William Quarles for one hundred and seventy dollars and thirty-nine cents, payable in four months, and a draft on Anthony Buck for three hundred dollars, after ten days' sight, which, when paid, will be in full of the execution of James Smock and Peter Smock against him in Orange county court. Edmond Banks, Attorney." The trial court, on this evidence, having quashed the writ, an appeal was taken; and Summers, J., in reversing the judgment, says: "The authority of the attorney to receive payment of the debt which he is employed to recover we think well settled; but, that authority, in our opinion, does not extend to its commutation without the assent of the client. In relation to Quarles' bond, we regard Banks as the attorney of Dade, not of Smock. On giving an acquittance or receipt for the money, he must have represented the former, not the latter. It was a new engagement, in which all his authority was derived from Dade. To him he must have looked for compensation, and to him he was accountable. To extend the authority of the attorney beyond this limit, without a general discretionary power from the party employing him, would carry the responsibility of the first client into transactions far beyond the first engagement, and which might be induced solely with a view to the profit of the attorney or the accommodation of the debtor." In *Herрман v. Shomon*, 36 Am. Rep. 261, Messrs. Schulenberg & Co. recovered judgment against the defendant, and thereupon assigned the same to plaintiff, who caused an execution to be issued thereon, in pursuance of which a levy was made upon the defendant's stock of goods. Shomon thereupon commenced this suit to restrain proceedings under the writ, claiming that he had delivered to the attorney of Schulenberg & Co. a county warrant, which was received as payment pro tanto on the judgment. A trial was had, and the court, having found that the judgment had been paid before the issue of the execution, gave a judgment as prayed for, in reversing which Brewer, J., says: "There is no pretense that the plaintiffs in the judgment knew of the action of their attorney, authorized or ratified it, or that he had any special directions or authority in the matter. He had simply the general authority of an attorney in the collection of a judgment. But this general authority is to receive money only in payment. He can neither sell, assign, nor compromise a judgment, nor receive notes, warrants, goods, chattels, or land in payment.

Receiving a county warrant is simply exchanging a judgment claim against a debtor for a claim against a county. It matters not that the debtor is insolvent, and the warrant valid and valuable. The attorney is employed to collect; that is, receive the money due on the judgment, and not to trade the claim for anything apparently or in fact more valuable. The authorities in this direction are clear and abundant." To the same effect, see, also, *Freem. Ex'ns* (2d Ed.) § 108; *Weeks, Attys. at Law*, §§ 240, 242; 3 Am. & Eng. Enc. Law (2d Ed.) 363, and notes; *Freem. Judgm.* (2d Ed.) § 463. The instruction complained of is, under these authorities, clearly erroneous; and, such being the case, we are compelled to reverse the judgment and order a new trial.

(32 Or. 126)

STATE v. PORTER.

(Supreme Court of Oregon. July 31, 1897.)

CRIMINAL LAW—CONFESSIONS—HOMICIDE—EVIDENCE—THREATS—INSTRUCTIONS—GOOD CHARACTER.

1. Statements by accused, admitting that he purposely committed the homicide, are, strictly speaking, "confessions."

2. Clothing introduced in evidence is sufficiently identified when it is shown that the victims of homicide were buried in the clothes worn when killed; that the coroner afterwards exhumed the bodies, and removed the clothes; and that he identified the clothes offered in evidence as the clothes so removed.

3. The killing of three persons having taken place in close proximity to one another, and constituting one transaction, the clothing of two victims, displaying the gunshot wounds, and indicating direction thereof, will be admitted in evidence on a trial for the murder of the other victim, as proving matters forming a part of the res gestæ.

4. In a trial for murder, the prior threats against the accused, of a person not present at the time of the killing, are not relevant matter to prove that accused acted in self-defense.

5. An instruction that accused is "permitted" to testify is not erroneous because of the use of the word "permitted," although the privilege of testifying is a matter of absolute right guaranteed by statute.

6. An instruction touching the law of self-defense, that the danger "must be absolute, imminent, and unavoidable, or the defendant must, from all circumstances, have honestly believed it to be so" is not erroneous or misleading when accompanied by a full explanation by the court.

7. The court instructed the jury: "Defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt. If, however, you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your mind that defendant, previous to the commission of the alleged crime, had sustained a good reputation as a peaceable and law-abiding citizen." *Held*, that this instruction does not limit or confine the consideration of reputation to the case where the jury are still in doubt after the consideration of all other testimony.

8. An instruction, if wrong, will be deemed harmless to accused if it be in strict accord with the defense relied upon by him.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Kelsey Porter was convicted of murder in the first degree, and he appeals. Affirmed.

C. E. Cochran, J. M. Carroll, and C. F. Hyde, for appellant. John L. Rand, Dist. Atty., and T. H. Crawford, for the State.

WOLVERTON, J. The defendant was convicted of having committed the crime of murder in the first degree by killing one Joseph Benjamin Mache, whose wife and son, named respectively Mary E. Mache and Benjamin Mache, Jr., he also killed at the same time. The bodies of the latter had each a gunshot wound thereon of a nature to produce death almost instantly, and upon the body of Joseph Benjamin Mache there were found three gunshot wounds and a fracture of the skull, as to which latter there is some uncertainty touching the cause that produced it. Either one of two of the wounds upon the body, or the one upon the head, was sufficient to produce death. One of the questions most strenuously urged here involves the instructions of the court respecting certain statements of the defendant tending to connect him with the commission of the crime with which he was charged. The objection goes to the use made by the court of the term "confession" in connection with such statements. To be clearly understood, it is necessary to recite some of the testimony relating thereto. Henry Oliver testified, in substance: That on January 1, 1896, the day of the homicide, he and his brother, Charles Oliver, met Mr. Baker and the defendant about six miles from the defendant's place, where the homicide occurred. That Baker said to the witness: "I guess you had better go down to Mr. Porter's place. Porter has done up the Mache family. You and Charlie had better go down there;" and that the witness asked defendant for some directions, to which he replied, "You will find them at the barn." Continuing, the witness further stated: "I went down to Porter's place. I found the sleigh down at the creek. Found Mrs. Mache sitting in the sleigh, with her shoulders turned a little to the right; she being dead. I found Mr. Mache at the right-hand corner of the sleigh, in the creek. He was dead, lying in the water. I found Ben Mache, Jr., next. He was about forty or fifty yards up the slope from the other bodies, where he fell. The imprint looked as if he had fallen upon his back. I found a gun [revolver] by Ben, Jr., with the muzzle down in the snow. After examination, I found three empty shells occupying three chambers of the gun, and one empty chamber and two cartridges in the chambers." On redirect examination the following was elicited: "Q. Did Mr. Porter tell you anything at any time how old man Mache was,—what he was doing at the time he shot him? A. Yes. He talked on the road coming down here about the case, and at one time said he shot the old man Mache. Q. What did he say at that time to you about how Mr. Mache was at the time he

killed him? A. He said he saw the old man Mache was shot, and he started there towards the sleigh. I believe he said he started to run down to the sleigh,—towards them,—and the old man jumped out of the sleigh, and run towards him, and he shot him." H. J. Baker testified, in substance, that he saw the defendant on the morning of the 1st, before 9 o'clock. He came to witness' place on horseback; was much excited; had a gun with three cartridges and one empty shell in it. Witness then responded to interrogatories as follows: "Q. You may state to the jury what he said. A. He said he had ruined the Mache family. Q. What else, if anything, did he say then? Go ahead and tell the conversation that occurred at that time,—all the conversation you had with him. A. He said he had killed young Ben Mache, and I said, 'Did you kill the old man?' and he said, 'I did.' I said, 'For God's sake, you didn't kill the old lady, Mrs. Mache?' He said, 'I killed her too.' And I asked why he did that, and he said he got so scared, as soon as he saw them, that when Ben shot at him he shot at Ben, and killed the old woman; and I asked him why he killed the old man, and he said he saw Ben running down the road, and he shot at him and hit the old man. Q. What else did he say? A. After he started for town, he said he was in a hurry to get a doctor. He thought she was only hurt. She was sitting up in the sleigh. I asked why he didn't go and see, and he said he was in a hurry to get the doctor." On cross-examination witness stated that the accused said he fired the shots from the shed, and gave as a reason why he did not give up the gun to witness at once that "he was afraid of being shot by this man Rockwood." Charles Oliver testified as follows: "Q. You may state to the jury what, if anything, he said about the homicide. A. He said so much that I can't remember all of it. He made one remark that after he got down off the barn, and the sleigh had stopped down there at the creek, he went down there to see what was the matter with them, or something to that effect. While there, the old man started at him with his hands up, and he says, 'If you want it, I'll give it to you,' and shot him right there." The defendant, being called as a witness in his own behalf, testified, in substance: "I think it was on Wednesday when the trouble occurred. That morning, after feeding the stock, I went down and shoveled the snow off my barn. It was just a little bit after I had been at the barn for the purpose of shoveling snow before the Maches came along. Prior to this time we had had some difficulty with reference to some harness which Ben Mache, Jr., and William Rockwood stole from me. When I got back from looking after the harness one day, Mr. Mache and his wife came down through my place. They stopped right close to my stable, and the old man disputed my word, called me a liar, and I told him that I wanted him to keep off my place,

and not bother me any more. The Maches and Rockwood would go through there most every day, and this man Rockwood was implicated with these other parties, and was what caused me to get the gun in the first place on account of his being there,—this Rockwood,—for Bob Haynes was telling me about what Rockwood said, that he and Ben Mache was going to set me afoot, and put a bullet hole in me. When I got home, Rockwood came along, and he slipped his hand back on his pistol, and threatened to shoot me. He said, 'God damn you, I have been hunting for you; and I will fix you with my Winchester if you don't run.' That morning of the trouble I climbed upon the stable with my gun. I understood that Rockwood was going to take a gun that morning to raffle it off, and I was afraid of him. I laid my gun upon the ribs beside the rafters. I had not been there very long,—perhaps a minute or two,—when they came. I saw them down below, and they came through, and I picked up my gun, and went out on the west shed,—this shed that is near where they came along. The road passes close to it, and I stood on the shed with my gun in my hand, down by my sides. The old man drove up, and we commenced talking. I said, 'You please quit coming through here. You throw my fence down, and let the stock out.' Says he, 'You lie; you lie,' and swore again, and says: 'This is a public highway through here, and you needn't try to keep us out. We will kill you if you do.' Just then I seen something glitter off to my left side, and I turned to look that way, and I saw it was a pistol right there, and Ben Mache was pointing it right at me, and as I looked round the pistol went off with a bang, and I raised my gun to shoot at the boy, and he struck out on his horse, and run down a little to left as he started. He was in a hurry to get away, and was grabbing at the reins. I think the pistol is what caused the horse to shy; and as the horse ran down the road, running from side to side,—from one side of the road to the other,—I was shooting at the boy, and when the old folks got killed he ran right in line with them, so that in shooting at him I hit the old folks. I made no demonstration of any kind with my gun up to the time Ben Mache shot at me. I was just holding it in my hand. I had no intention of killing the old man and his wife, and they would not have been killed if Ben had not fired those two shots at me first."

Other evidence shows that the body of Ben Mache, Jr., was found 310 feet distant from the shed, and the bodies of Joseph Benjamin and his wife 420 feet from the same point, and that the shooting was done with a Winchester rifle. Three exploded shells were found at the shed, and two within six or eight feet of the sleigh. The court instructed the jury as follows: "Evidence of oral confessions, admissions, or statements of defendant are admissible against him on the trial of a criminal action; but if you believe from the circumstances proven that the defendant

may not have clearly expressed his own meaning, or witness misunderstood, such confessions or admissions should be viewed with great caution. In this case, if you believe from the testimony and the circumstances that the confessions or admissions were correctly and understandingly made by the defendant, and that his language is correctly remembered and accurately given by the witness, then such confessions or admissions are entitled to weight, the same as other testimony. The confessions or admissions of a defendant may be given against him on a trial for crime, but such confession is not sufficient alone to warrant conviction without some other proof that the crime has been committed; that is, that the body of the offense—that is, the fact of the killing—must be proven by other evidence."

It is contended that the jury might have been misled by the court's use of the term "confession," that it was erroneously employed as synonymous with the word "admission," and that under the testimony it was inapplicable and misleading, and hence there was no warrant of law for its employment in the instruction. It has been decided by this court that the word "confession" is not a synonym of "admission." *State v. Heidenreich*, 29 Or. 381, 45 Pac. 755. Mr. Greenleaf has indicated the distinction in general use. He says: "In our law, the term 'admission' is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgments of guilt." 1 Greenl. Ev. § 170. Later on, in speaking of "confessions," he says: "Extrajudicial confessions are those which are made by the party elsewhere than before a magistrate or in court; this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied." *Id.* § 216. Mr. Stephens has defined "confession" as "an admission, made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime." See *Steph. Dig. Ev.* 52. Underhill adopts the same definition. *Underh. Ev.* § 88. The learned authors of the *American and English Encyclopedia of Law* (volume 3, p. 439) define it as "a person's admission or declaration of his agency or participation in a crime, and is restricted to acknowledgments of guilt." Mr. Wharton has given us a more elaborate discussion of the subject. He says: "Extrajudicial confessions * * * may be adduced either as admissions of guilt or as admissions of isolated facts from which guilt may be inferred. When offered for the former purpose, they have no weight unless they were made intentionally and in sincerity. * * * To the credibility of a confession of guilt, therefore, it is necessary that there should be an animus confitendi, or intention to speak the truth as to the specific charge of guilt. Such intention, however, is not essential to attach

credibility to admissions of particular facts in themselves indifferent, but which go to make up a case on which guilt is assumed to rest. * * * A confession of guilt is of no weight unless it is a shorthand admission of facts. An admission of an incidental fact is of no weight unless it afford a basis for an induction of guilt. The first is inoperative unless, as an answer to a particular offense charged, it implies a specification which is sufficiently exact to sustain a conviction. The second is inoperative unless it is supported collaterally by a series of other facts from which guilt may be cumulatively inferred. The first is, 'I am guilty of this,' and this implies an admission of all the acts constituting guilt. The second is, 'Such an act, part of a complicated web of circumstances, is true,' and this involves the examination of all other relevant circumstances." Whart. Cr. Ev. §§ 626, 628. From these authorities we take it that the admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. Of the latter character were the admissions in the *Heidenreich* Case. The defendant admitted that he was, or had been, in possession of cattle alleged to have been stolen; but the admission was made in connection with a statement of exculpatory circumstances explaining his possession, which were entirely consistent with his innocence. His guilt was not deducible from his admissions without the presence of other facts and circumstances necessary to be proven in connection with his possession to establish the crime charged, and hence it was held that the court erred in characterizing such admissions as confessions. Very similar in nature is the case of *People v. Velarde*, 59 Cal. 457, as is also *Fletcher v. State*, 90 Ga. 468, 17 S. E. 100. Another case is *State v. Red*, 53 Iowa, 69, 4 N. W. 831. The defendant was tried on a charge of murder. His admissions to the effect that he had in his possession jewelry of the murdered woman were put in evidence, and the court characterized them as confessions, and this was held to be error. The appellate court said: "The fact of the possession of the goods raised a powerful presumption of his guilt of the murder. But his admission of such possession was in no sense a confession of guilt." *Dumas v. State*, 63 Ga. 600, comes nearer the border line. It was shown that defendant had admitted that he was present when the deceased was shot, but protested his innocence of any participation in the crime, and it was held to be error for the court, in its instructions, to refer to the admissions as "confessions of guilt." See, also, *Covington v. State*, 79 Ga. 687, 7 S. E. 153, and *Fletcher v. State*, 90 Ga. 469, 17 S. E. 100. In each of these cases, and others we

might cite, the facts admitted may have been taken as entirely true, and still be consistent with perfect innocence. In other words, they fall short of constituting the crime charged, and while the admissions may have furnished strong proofs against the accused, yet they were fragmentary, and, unless complemented by other proofs necessary to the establishment of the offense, guilt could not be predicated upon the admissions. The inference of guilt may have been strong, but guilt itself could not be a concomitant, or a resultant condition proceeding from the acts admitted. But the facts admitted in the case at bar are of a different character. The defendant admitted to Baker that he had killed the old man Mache, and, when asked why he did it, he said he was scared because Ben, Jr., had shot at him, and as he saw Ben running down the road he shot at him, and killed the old man. Again he stated to Charles Oliver that after he got down off the barn, and the sleigh had stopped at the creek, he went down to see what was the matter with them, and that while there the old man started at him with his hands up, and that he shot him right there. Henry Oliver testifies that: "He [defendant] said he saw the old man Mache was shot, and he started there towards the sleigh. I believe he said he started to run down to the sleigh, —towards them,—and the old man jumped out of the sleigh, and run towards him, and he shot him." Here are direct admissions of the killing of Joseph Benjamin Mache by the accused, and, indeed, this much was conceded at the trial. But the admissions go further. They concede that the killing was purposely done. This is apparent from the statements made to the two Olivers. His statements to Baker, however, embraced the narration of acts designed to present an excuse for the killing which are, in effect, that while defending himself against an assault of Ben Mache, Jr., he, by accident, killed the old man. The admissions are somewhat contradictory, but were designed to be exculpatory, no doubt, rather than inculpatory. A killing purposely and maliciously done, without deliberation or premeditation, is murder in the second degree. Malice may be implied from a killing purposely done without extenuating circumstances to palliate the offense, and the admission of such a fact under the conditions named would, in effect, be an admission of guilt, as it is the necessary resultant condition proceeding from the acts admitted. Again, his statement that he shot at the boy while he was scared, and acting in self-defense, and killed the old man, when taken in connection with other circumstances of which there was evidence, viz. that the boy was killed more than a hundred yards from the point where the accused was standing, suggests a state of facts from which the inference of guilt involving the crime of manslaughter might have been drawn. But beyond all this his statements while on the witness stand contain admissions of fact which import deliberation and premeditation involving

the crime of murder in the first degree. So that there is substance in his admissions which import guilt touching all the degrees of murder.

The instructions, however, were given with reference to admissions before the trial, and it is in that light that we design to consider them, and it is sufficient that the admissions involve any degree of the crime charged. The court very carefully instructed the jury touching the different degrees of murder; and a confession of either degree, with proof of the corpus delicti, would be sufficient upon which to base a verdict of the crime involved. A homicide may be either justifiable or excusable, but these are defenses which the accused must interpose. And if his admissions involve either degree of murder, unless justification or excuse is shown, he must stand convicted of the degree involved. And the question of the greatest difficulty seems to arise where the admissions are both inculpatory and exculpatory; that is to say, where the acts admitted involve a crime, but a justification or excuse is offered in the same connection. The reasoning of counsel seems to be that, because of the exculpatory matter, there can be no concession of guilt, and hence that the statements or admissions cannot amount to a confession. But the concessions of facts which import guilt come first. These are always inculpatory, and it is only when the exculpatory matter is adduced that he is relieved from the onus of guilt which the facts imply. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, "I am guilty of this;" and this imports the admission of all the acts constituting guilt." Whart. Cr. Ev. § 628. It is necessary, however, that the accused should speak with an animus confitendi, or an intention to speak the truth touching the specific charge of guilt; and when he, with such intention, narrates facts constituting a crime, the guilt becomes matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions. Exculpatory statements, made in the same connection, if believed, may excuse or justify, but do not reduce the declaration from a confession to an admission only. This is in accord with the idea expressed in the books that confessions must be taken as a whole, and, if one part of a conversation is relied upon as proof of a confession of a crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; and he is not confined to so much only as is explanatory of the part proved against him by the state, but is permitted to give evidence of all that was

said upon the occasion relative to the subject-matter in issue. 1 Greenl. Ev. § 218. We think that what was said by the accused prior to the trial to the witnesses Baker and the two Olivers might properly be denominated confessions, and hence that the use by the court of the term "confession" or "confessions" in its instructions was not error. In any event, it is clear that the jury was not misled by its use in the light of the very full, lucid, and self-explanatory instructions of the learned trial judge when taken as a whole.

Upon the trial, certain clothing of Ben Mache, Jr., and Mrs. Mache was offered in evidence by the prosecution for the purpose of locating and determining the direction of gunshot wounds upon their persons, to which objection was interposed upon the grounds—First, that it was not identified; and, second, that it was incompetent to introduce the clothing of the son and wife on a charge of killing Joseph Benjamin Mache. The bodies were all shown to have been buried in the clothing worn at the time of homicide, except that the overcoat of Benjamin Mache, Jr., was removed, and this garment was not offered. Some 22 days after the burial, the bodies were exhumed for the purpose of examination by the coroner, and it was then that the clothing was removed, under the direction of that officer. Thenceforward it was disposed of under the direction of himself and other officers, and when produced at the trial was identified as that removed from the exhumed bodies. Under these circumstances the objection was properly overruled, tested by the first ground therefor. Nor is the objection tenable upon the other ground. The killing of the three persons took place in close proximity with one another, and constituted a series of events of but one and the same transaction, and the killing of the son and wife was an essential circumstance surrounding the event which resulted in the death of the old man. Indeed, a consecutive and intelligent narrative of events beginning with the first assault and ending with the last homicide could not be made without recounting the incidents, circumstances, and conditions attending the death of both the son and wife. They were concomitant events, and the one could not be told without involving the other, and a segregation would leave the narrative incomplete. So that the circumstances and conditions attending the death of any one or more of these individuals constitute part of the *res gestæ* attending the death of any other, and, this being so, it was proper, as being part of the *res gestæ*, to admit the clothing of Benjamin Mache, Jr., and Mrs. Mary E. Mache to be offered for the purpose of locating and determining the direction of the gunshot wounds upon their persons, and thereby fix, if possible, the direction from which the accused was firing when the old gentleman was wounded or killed.

The defendant called as a witness in his behalf William Hansaker, who testified, in sub-

ance: That he went to the Mache place, and stayed all night with Rockwood. That Mr. Mache, the old gentleman, had been to the valley that day, and told him that he had a few words with Porter; that he was talking to him about losing a cow or heifer; that he had asked Porter if he had found her yet, and, Porter having answered in the negative, that Mache said to him, "I guess you damn lie; you never lose no cow;" and that Porter ordered him off the place, and that Rockwood said he would go through there (meaning Porter's place) whenever he pleased, and the old man said he would tear the fence down, and go through there, and the courts could not stop him. That Ben Mache, Jr., came in, and asked the witness to go with him to Porter's, and have a "touch of high life." All were present, including Rockwood, when Ben asked witness to go up to Porter's. That the witness never saw Rockwood after that prior to the homicide. He was then asked, "Did you have any conversation with him [Rockwood] in relation to Porter?" which, upon objection, the court would not permit to be answered. The counsel thereupon stated that if witness had been permitted to answer he would have said "that two days prior to the homicide said Mr. Rockwood, in speaking of the defendant, Porter, stated that he was on Porter's place two days before the homicide was committed, on horseback, armed with a six-shooter, and that he got off from his horse, and run Porter in his own dwelling house." Thomas Ludiker testified, in substance, that he had a conversation with Ben Mache, Jr., in December some time, and that Ben said that Porter had forbid his father and Rockwood from going on the place, and made his threats that he was going to forbid him from going on. Then follows a statement of some threats of Ben against Porter. The witness further testified that Ben said Porter had accused him and Rockwood of taking his harness, and that he had called Porter down for it, and abused him, and that he and Rockwood had hauled up their (meaning the Mache's) winter's wood. By further interrogatories, which were overruled. It was proposed to show that on the morning of the killing Rockwood was on the premises, armed with a 44 Winchester rifle; that he made some threats, and the nature thereof; and that he was acting in concert with the Maches. The defense also proposed to show by Robert Haynes that Rockwood said to him on the 20th of December that Porter had accused him and Ben Mache of stealing harness, and that they would just like to meet the — out there, and that, if they could meet him, he would beat his damn brains out with a six-shooter, and that this was communicated by Haynes to Porter. The purpose of this testimony, introduced and offered as claimed by counsel, was to put the jury in the place of the accused so far as possible, so that they might determine whether he acted under a reasonable apprehension of an assault from

the Maches, or, in other words, whether his acts were influenced by Rockwood's conduct in connection with the acts of Ben Mache and the old gentleman. The rule has become settled in this state that, "in order to justify a homicide on the ground that it was committed in self-defense it must appear that the defendant, at the time he caused the death of the deceased, was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that it was necessary for him to strike the fatal blow, or to perform such other act causing the death of deceased, in order to avoid the death or great bodily harm which was apparently imminent." *State v. Morey*, 25 Or. 250, 35 Pac. 655, and 36 Pac. 575. See, also, in support of this doctrine, *Kerr*, *Hom.* § 166. Previous threats of the deceased against the accused, or previous unfriendly acts towards him, are permitted to be shown for the purpose of establishing a reasonable ground for belief or apprehension by the accused that he was in danger of death or great bodily harm at the time of the homicide. From such testimony the jury are to become the judges whether, under the circumstances, there was ground for a reasonable belief in the mind of the accused that he was then in such danger. Now, from the defendant's statement as a witness in his own behalf it appears that he saw the deceased, with his wife, riding in a sleigh, pass through the bars some little distance from the barn, and that Ben Mache, Jr., came through at the same time on horseback, and that no other person was with them; that they came directly along the road from the bars to the barn; that in the meantime he took up his rifle, and stepped around on the shed adjoining the barn, and the altercation took place as they came by, and that Ben Mache, Jr., shot first. These conditions, if true, were calculated to arouse in the mind of the accused a reasonable apprehension of danger to his person, and the prior threats of Ben Mache, Jr., were pertinent to the inquiry, as they might have had some influence in superinducing such apprehension. But it is clear that Rockwood's acts and threats, whatever they may have been, unconnected with the Maches, could not have superinduced apprehension upon this occasion, as it was admitted that he was not present, and could not have taken any part in the assault. There was an offer in general terms to prove that Rockwood was acting in concert with the Maches, but how, it was not made apparent; all the threats and acts of the Maches, and all those of Rockwood where connected with them, having gone to the jury. If he had been present and participating in the fray, the conditions would have been different. In that case his prior acts and threats might reasonably have been said to have had some bearing upon his participation at the time, and to have superinduced apprehension in the mind of the accused, and caused him to act as he did upon the occasion. There is simply no

relevancy between the prior threats and acts of Rockwood sought to be introduced and the acts of the accused at the time of the homicide, and hence it was not error to exclude the testimony. The instructions of the court touching the question were fully as favorable to the defendant as he could ask.

Among other things, the court instructed the jury as follows: "Under the statute of this state a defendant in a criminal action is permitted to be a witness in his own behalf, and the jury are to be the exclusive judges of the weight and credibility to be given his testimony." Exceptions were taken to the use of the word "permitted," the defendant having the absolute right to testify in his own behalf. No question is made but that such was his right, and the term "permitted" was not used to express an idea antagonistic thereto, but rather to express the statutory right that was guaranteed to him; and no doubt the jury so understood it, and hence the instruction was not erroneous.

Again, the court instructed the jury, touching the law of self-defense, that the danger "must be absolute, imminent, and unavoidable, or the defendant must, from all the circumstances, have honestly believed it to be so"; and it is claimed that it was error for the court to tell the jury that the danger "must be absolute, imminent, and unavoidable." This expression was, however, coupled, and very properly so, with the alternative expression above quoted, which, with other language used in the same connection, intelligently informed the jury that the defendant might also have acted upon appearances if they were such, under the circumstances and surroundings, as to reasonably imbue his mind with the belief or apprehension that it was necessary to act as he did in order to avert the impending assault upon him, whether actual or apparent. The explanation was full, and the jury could not have been misled by the language complained of, and error cannot be predicated upon said instruction.

Touching upon the effect of good character as a fact proven in the case, the court instructed the jury as follows: "The defendant in this case has offered evidence tending to show his character as a peaceable, law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt, or that he would commit such a crime. If, however, you believe from the evidence beyond a reasonable doubt that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that defendant, previous to the commission of the alleged crime, had sustained a good reputation as a peaceable and law-abiding citizen." The defendant requested the following instruction, which was refused, viz.: "The court further instructs you that proof of good character may be sufficient of itself to create a reasonable

doubt of defendant's guilt, although no such doubt would have existed but for such good character." The gravamen of defendant's objection to the instructions given is that the court virtually withdrew from the jury the evidence of good character except for the purpose of resolving a doubt which the other testimony in the case may have left in the minds of the jury touching the guilt or innocence of the accused; and that such instruction, without that asked and refused, was faulty, and prejudicial to him. As an abstract proposition of law, the instruction requested is no doubt correct, but the form is vicious unless confined to a given case. Under certain circumstances and conditions, such may be, and undoubtedly is, the effect of good character proven, but as a general rule applied to all cases it cannot be so treated. The rule of general application is that evidence of good character is always admissible in favor of the defendant in a criminal action, and it should be weighed and considered in connection with all the other evidence in the case in determining the guilt or innocence of the accused; and, when so considered, if there exists in the minds of the jury a reasonable doubt as to his guilt, he should be acquitted (*Com. v. Cleary* [Pa. Sup.] 19 Atl. 1017; *Edgington v. U. S.*, 17 Sup. Ct. 72; *State v. Henry*, 5 Jones [N. C.] 65; *People v. Ashe*, 44 Cal. 288; *People v. Raina*, 45 Cal. 292; *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130; *State v. McMurphy*, 52 Mo. 251; *Jupitz v. People*, 34 Ill. 516); and this rule was practically adopted in *State v. Garrard*, 5 Or. 216. Under the rule, good character of the prisoner, when proven, becomes a fact in the case, a circumstance tending in a greater or less degree to establish his innocence; and it is not to be put aside by the jury in order to first determine whether the case is of doubtful sequence before laying into the scales such fact or circumstance. It may, when thus considered with other evidence in the case, leave the mind of the jury impressed with a reasonable doubt, or it may be sufficient within itself to engender such a doubt while without it the other evidence may be convincing, and its value is matter for the determination of the jury under all the existing circumstances and conditions surrounding each particular case. See *People v. Ashe*, *Edgington v. U. S.*, and *State v. Donovan*, *supra*. The instruction given, when properly understood, is not subversive of the rule. The court first tells the jury that good character is a circumstance tending to show the improbability of the defendant's guilt of the crime charged. Such being a part of the evidence in the case, the court further says, "If, however, you believe from the evidence beyond a reasonable doubt that the defendant committed the crime in question, then that it would be their duty to convict even though they believed his good character had been proven. The latter clause of the instruction does not eliminate from their consideration the fact or circumstance of good character. As a simple declaration, the jury

were told that the good character of the defendant should not stand in the way of conviction if the evidence in the case showed him to be guilty beyond a reasonable doubt. Touching the latter clause of the instruction, the case of *State v. Henry*, supra, is much in point. Battle, J., in speaking for the court, says: "Such a remark, properly understood, does not withdraw the consideration of character from the jury. It presupposes that the testimony of character has been duly weighed by them, and it can legitimately operate only as a caution to the jury. Thus the testimony is not of itself to preponderate over all the other facts and circumstances given in evidence, and thus produce an acquittal, merely because the party charged had previously borne a good character." In *State v. McMurphy*, supra, the court say: "In all cases, whether the evidence of guilt is circumstantial or positive, the good character of the accused is proper evidence to go to the jury on the plea of not guilty. If, however, the jury is satisfied of the prisoner's guilt from all the other facts and circumstances detailed in the evidence, his good character cannot be looked to as a ground of acquittal." This language is even stronger than that in which the instruction is formulated, and the court was not in error in adopting the course pursued.

Another objection is made and exception saved to the court's instruction to the effect that the homicide of the three Maches was all one transaction. If it be conceded that the instruction was wrong, as a matter of law, under the facts as they really existed, it could not have injured the defendant, as he based his defense upon the theory that Ben Mache, Jr., assaulted him first, and that in resisting the assault the old gentleman was killed unintentionally, his death resulting from a continuous transaction commencing with the assault of the young man upon the accused. So that the instruction was in strict accord with his line of defense, and of this he cannot complain. These considerations affirm the judgment of the court below.

TURNER et al. v. COLE et al.

(Supreme Court of Oregon. July 31, 1897.)

WATER RIGHTS—GRANTS—ABANDONMENT.

1. The right to water for irrigation, when appurtenant to land, will pass with a grant of the land without mention being made thereof, although the grantor is not aware of the existence of the right.

2. An administrator does not abandon the water rights appurtenant to decedent's estate by mere nonuser during one irrigating season.

Appeal from circuit court, Malheur county; Robert Eakin, Judge.

Suit by A. W. Turner and another against J. L. Cole and others. From decree for plaintiff Turner, defendants and said Turner appeal. Modified.

J. L. Rand and J. J. Balleray, for plaintiffs.
L. B. Cox, for defendants.

WOLVERTON, J. The purpose of this suit is to determine the priority of conflicting water rights as between Turner, one of the plaintiffs, and the defendants Cole and Kendall and C. J. Gray. The plaintiff claims to have acquired his right by appropriation and use of the waters of Willow creek, diverted therefrom by means of two ditches, which tap the creek, one upon each side, in the S. E. $\frac{1}{4}$ of section 10, township 16 S., range 43 E., in Malheur county. Willow creek runs in a southeasterly course, and these ditches are so constructed that they encompass upon the north, east, and west the principal portion of plaintiff's lands. Within their compass are found, also, some road lands used by plaintiff, and adjoining his. The ditch through which Gray claims his appropriation taps said creek about $1\frac{1}{2}$ miles above those of plaintiff, and the Cole and Kendall ditch some 8 miles above. The questions to be considered are almost exclusively of fact, and, there being much conflict in the testimony, no good purpose can be served by attempting to harmonize it, and hence we will briefly state our conclusions without comment thereon.

Turner is now the owner of the S. E. $\frac{1}{4}$ of section 10, the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 14, township 16 S., range 43 E. His title thereto comes through mesne conveyances, the S. E. $\frac{1}{4}$ of section 10 from Jonathan Keeney, the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 14 from John A. Garvin, and the remainder from Edward W. Imbler, all of whom acquired from the government. Early in 1871 Fred Cable and Edward Price were settlers upon the tracts subsequently acquired by Keeney and Imbler, and the plaintiff was a settler upon a tract of 120 acres lying to the south and adjoining the Imbler tract. In March of that year Cable, Price, and Turner commenced the construction of the plaintiff's ditches, and upon their completion, probably in June following, diverted the water from Willow creek. By agreement each was to have a joint interest in the ditches and in the appropriation to be made thereby. The purpose for which the diversion was made is evidenced by a notice, signed by Price, bearing date April 3, 1871, and recorded in the county clerk's office at Baker City, May 6, 1871, whereby he claimed 1,200 inches of water, to run in a ditch then being constructed by him, for irrigating purposes. It is not claimed, however, that more than 500 inches of water were diverted or appropriated, and the plaintiff claims to have secured an appropriation of two-thirds thereof. It is clear that there was a diversion of water through these ditches prior to any appropriation by either of the defendants. The evidence does not establish any contractual relations between Cable and Keeney, either directly or indirectly, touching his settler's rights in the S. E. $\frac{1}{4}$ of section 10, and it is not apparent that Keeney ever acquired such rights from Cable. The testimony furnishes but a bare intimation that such was the case. Mr. Imbler was asked: "Do you know how much hay was cut on the place owned by Cable, and afterwards sold by

him to Keeney?" to which he replied: "No, sir; after Keeney got it, he cut quite a lot of hay." This is all the reference that is made to such a sale, and the answer does not establish anything regarding it. So that, in so far as the Cable appropriation is concerned, and that which is claimed to be appurtenant to the tract then occupied by him, there is a complete failure of proof by which to establish title in the plaintiff reaching back to the inception of the alleged right, and this disposes of one-half of the appropriation which he is now seeking to establish. As between Price and Imbler it is very satisfactorily shown that Imbler purchased the former settler's rights, and acquired from him a transfer of possession, which would carry with it whatever water appropriation was appurtenant thereto. *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13. The several deeds through which the plaintiff connects his title with that of Imbler make no special mention of the appropriation of any water right acquired through these ditches; but, if appurtenant to the land, it would pass with the grant in general terms. *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7. The Price or Imbler tract consists of 160 acres, and from what we can gather from the testimony as it comes to us, very nearly all of it lies under these ditches, and is susceptible of irrigation therefrom. In its wild state the land produced native grasses, principally what is known in that section of the country as "blue joint," "red top," and "rye grass." These grow upon low lands, where the water overflows in the late spring and early summer, in such abundance that they are cut for hay and fed to stock in the winter season. During the time that Imbler occupied the land, from 1872 to 1876, he sowed six or eight acres of timothy, since which time other tame grasses have been sown, until at the present time it produces principally timothy, red top, and alfalfa, and these are matured and cut for hay. The ditches have been utilized as a means of constructing a fence, for drainage, and for irrigation; but there is much conflict in the testimony touching the real purpose for which they were originally constructed. We think it has been shown, however, that drainage was necessary to good husbandry in the first instance, so as to control the water supply, but after that was accomplished the use of the water was as necessary to the production of the hay crop as before, and was supplied by means of the ditches. Mr. Reeves, a very intelligent witness, says, touching the land at the time Price lived on it: "There was a portion of the Price land, and a good deal other of Willow creek meadow land, that needed more draining than irrigation, but after you drained it, and turned this water off, by turning it on again it would produce more hay." Now, ever since the construction of these ditches the water has been utilized through them, for the irrigation of these meadow lands, with possibly an exception of a year now and then. The grasses have also been improved by supplanting them in a great measure with the tame varieties, so that the production

of hay from these premises has grown into a valuable industry. The water has also been put to other uses upon this land by means of said ditches. It has been used for irrigating gardens, for producing small quantities of grain, and for stock and domestic purposes; and we think there has been an appropriation of water through and by means of these ditches for a beneficial use that is appurtenant to the lands settled by Price, and afterwards patented to Imbler, and that such appropriation relates to the time of their construction. The extent of the appropriation must be determined by the quantity of water used, and the time of its use, as it is the policy of the law that none shall be permitted to go to waste when it can be appropriated for a beneficial purpose elsewhere. The season during which these meadow lands are irrigated begins in April or May, and terminates the latter part of June or the 1st day of July; and from a consensus of the testimony we find that they do not require the full supply needful for the production of crops upon the higher and drier lands in the vicinity, yet a substantial amount is necessary to a successful use thereof. During the remaining summer and fall months, however, there is less use for water for irrigation and domestic purposes. In view of these considerations, we think the plaintiff is entitled to an appropriation of 100 inches of water from Willow creek from the 1st of April to the middle of July, and 50 inches thereafter, prior in time and superior in right to any appropriation of the defendants.

It is contended that there was an abandonment by plaintiff's predecessors of this appropriation, and stress is laid upon the testimony of Glenn, who says, "I did not buy any water right, nor sell any, and knew nothing about any such right," and on Lockett, who says, "I did not buy any water right, did not claim any, and did not sell any." Glenn was the administrator of the estate of Jonathan Keeney from September, 1878, until some time in the winter of 1879, but, aside from this, never owned or possessed any interest in the lands, nor did he claim any, except that he says he traded Mr. Imbler a claim on the Owyhee river for his place on Willow creek, and had Imbler make his deed direct to Keeney. He testifies that, while he was such administrator, he superintended the management of the place, and that he made no use of the water during that time. The title of the land passed by deed from the Keeney heirs to Lockett, and not by administrator's deed. Glenn was without power or authority to relinquish or abandon the appropriation appurtenant thereto by a simple disclaimer of title, and his nonuser of the water for the short time he was in possession did not operate as an abandonment. Lockett bought the land in November, 1879, and sold it in January or February, 1880. He never had occasion to crop it, or to irrigate it, and what he now says pertains to his understanding of what he acquired and held by his deed, and what he transferred to his successor. There was no attempt made by him to relinquish any appro-

priation appurtenant to the land, nor does it appear that he ever had any such intention while in the ownership, without which "there can be no abandonment." *Wimer v. Simmons*, 27 Or. 1, 39 Pac. 6. Nor can such intent be inferred from the acts of Lockett while he owned the land. The acts of Glenn and Lockett do not constitute an abandonment, and the testimony, aside from theirs, tending to show nonuser from time to time is insufficient to establish it.

We have very carefully examined the testimony touching the prior appropriation claimed by the defendants, and we believe the findings of the court below are in accord therewith. The decree will be modified as indicated by this opinion.

(31 Or. 240)

GOLDSMITH v. CITY OF BAKER CITY.

(Supreme Court of Oregon. July 31, 1897.)

ACTION AGAINST CITY—CITY WARRANT.

The holder of a city warrant, payment of which has been refused for lack of funds, is not restricted to proceedings by mandamus, but may sue the city thereon, notwithstanding Code, § 352, providing that execution shall not issue on a judgment against a public corporation, but that on presentation of a certified transcript of the docket, and memorandum of the satisfaction thereof, the proper officer of the corporation shall draw an order on its treasurer for the amount of the judgment, which shall be presented and paid like other orders on the treasurer.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by B. Goldsmith against the city of Baker City. A demurrer was sustained to the complaint, and plaintiff appeals. Reversed.

This is an action against Baker City to recover the sum of \$2,403.28, alleged to be due upon certain city warrants issued to various persons and assigned to the plaintiff. The complaint contains 53 separate causes of action, and the averments of each being substantially the same, except as to the date, name, and amount, it will be sufficient for the purpose of the question involved to set out the allegations of the first cause of action, which are as follows: "That defendant is, and at all times herein mentioned was, a municipal corporation, incorporated, organized, and existing under and pursuant to the laws of the state of Oregon. That on October 1, 1890, the defendant executed and delivered to one Lene Small its certain warrant, in words and figures following, to wit: 'Class B. Baker City, October 1st, 1890. No. 75. \$1.25. To the Treasurer of Baker City, Oregon: Pay to Lene Small or bearer one and $\frac{25}{100}$ dollars, for 5 drills to Sept. 20. Fire,—and charge to the general fund. By order of the common council. S. B. McCord, Mayor. Wm. H. Packwood, Sr., Auditor and Clerk.' That on February 2, 1891, said warrant was duly presented to the treasurer of the defendant, and payment thereof then demanded. That payment was then refused, and said refusal was indorsed in words and figures following, to

wit: 'Presented Feb. 2nd, 1891. No funds. This warrant draws interest from this date at 8 per cent. per annum. Page 82, vol. ——. B. F. Murphy, City Treasurer.' That prior to the bringing of this action said Small sold said warrant, and, for a valuable consideration, assigned all his interest therein to plaintiff. That no part of said warrant, principal or interest, has been paid." The court below sustained a demurrer to the complaint on the ground that an action at law cannot be maintained on the warrants in suit, but that the remedy is by mandamus, and plaintiff appeals.

Walter S. Perry, for appellant. Will R. King, for respondent.

BEAN, J. (after stating the facts). By section 352 of the Code it is provided, in effect, that no execution shall issue on a judgment recovered against a public corporation of the state, but that upon the presentation of a certified transcript of the docket, and memorandum of the satisfaction thereof, the proper officer of the corporation shall draw an order on its treasurer for the amount of the judgment in favor of the person for whom the same was given, and which order shall thereafter be presented for payment and paid with like effect and in like manner as other orders upon the treasury of the corporation. In view of this provision of the statute, the defendant contends that the only remedy on a city warrant is by mandamus, because all the plaintiff could obtain on a judgment in his favor in an action at law would be another warrant issued in the manner provided by the statute, and he would therefore be in no better position than before. But, although no execution can issue on a judgment recovered against a municipal corporation, it does not follow that the holder of a city warrant like those in suit should be denied the right to sue the municipality thereon, and reduce his claim to a judgment. These warrants are but evidence of indebtedness, and constitute no final adjudication, as against the city, of the claims which they represent. They afford prima facie evidence that the city is legally indebted to the holder thereof, but do not conclude it on that point. They are, in legal effect, nothing more than nonnegotiable promissory notes of the city, open to all defenses in the hands of bona fide holders available as between the original parties. *Clark v. City of Des Moines*, 19 Iowa, 199; *Wall v. Monroe Co.*, 103 U. S. 77. As said by Mr. Justice Field in the case last referred to: "There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere prima facie, and not conclusive, evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the validity of the claims, and when this is conceded the instruments con-

clude nothing as to other demands between the parties." And to the same effect are 1 Dill. Mun. Corp. § 487; 1 Daniel, Neg. Inst. § 427; 1 Rand. Com. Paper, § 337. This being so, it would be competent for the defendant to urge their invalidity as a ground for refusing to pay the warrants in question; and, as an action at law is the simplest and most efficient way of determining that question, no good reason can be suggested why the plaintiff may not resort to it, and reduce his demands to judgment, if he is able to do so, and thus conclude defendant's liability thereon. The question as to what benefit he may derive from a judgment in his favor, or how he will proceed to enforce its payment, can cut no figure at this time. The right of action in the plaintiff, and the liability of defendant to suit, exist; and the courts cannot shut their doors against the plaintiff because he may have to resort to a proceeding by mandamus, in lieu of an execution, to enforce the payment of any judgment which he may recover. As said by Mr. Justice Cole in disposing of a similar objection in *Terry v. City of Milwaukee*, 15 Wis. 545: "It may be said that a party obtaining judgment against the city on one of these school orders will be in no better condition than before, but will have to resort to a mandamus to compel the city authorities to levy and collect a tax to discharge it. This may all be true, but it still affords no satisfactory reason why he should be deprived of his action upon the orders. The remedy may not advance him much towards realizing his money, but the courts cannot shut their doors against him on that ground. If they are just and legitimate claims against the city, he is entitled to his remedy, although that remedy may not be very effectual for the purpose for which it is invoked." And in *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 184, where the question was squarely presented as to whether a city should be sued upon a warrant drawn upon the treasurer by the proper officers, or whether the holder of the warrant must proceed by mandate, the court, speaking through Mr. Justice Elliott, says: "There can be no doubt as to the right of the holder of a corporation order or warrant to maintain an ordinary civil action upon it, nor can there be any doubt that he is not bound to resort to the extraordinary remedy of mandate. It is well settled that ordinary actions may be maintained against municipal corporations upon their contracts as well as for their torts. Demands against a municipal corporation may be reduced to judgment in like manner as similar demands against natural persons, and, where any ordinary civil action will attain this end, it is never necessary to resort to the extraordinary remedy of mandate. It is true that the public property cannot be seized upon execution, but this does not affect the right to sue and obtain judgment. It is one thing to obtain a judgment, and another thing to enforce its collection." This same rule is recognized,

either directly or indirectly, in the following cases: *Travelers' Ins. Co. v. City of Denver*, 11 Colo. 434, 18 Pac. 556; *Clark v. City of Des Moines*, 19 Iowa, 199; *International Bank v. Franklin Co.*, 65 Mo. 106; *Mills Co. Nat. Bank v. Mills Co.*, 67 Iowa, 697, 25 N. W. 884; *Knapp v. Mayor, etc., of Hoboken*, 38 N. J. Law, 371; *Simmons v. Davis*, 18 R. I. 46, 25 Atl. 691. The doctrine prevails generally in this country, that a judgment against a public corporation cannot be enforced by an ordinary execution, but, notwithstanding this fact, the conflict in the adjudged cases is not whether the holder of a city warrant may maintain an action thereon, but whether he must not do so, and reduce his claim to a judgment, before he is entitled to the extraordinary remedy of mandamus. In the courts of the United States a judgment at law is necessary to support such writ (*Davenport v. Dodge Co.*, 105 U. S. 237), and the same rule prevails in many of the states, while in others resort may be had to mandamus in the first instance. But, so far as we have been able to ascertain, the case of *Cloud v. Town of Sumas* (Wash.) 37 Pac. 305, stands alone in holding that the remedy on an ordinary city warrant is exclusively by mandamus, and that no action thereon can be maintained. And we are not sufficiently impressed with the soundness of the reasoning of the court in that case to follow it in opposition to the great weight of authority. The case of *State v. Dodge Co.*, 10 Neb. 20, 4 N. W. 370, would seem, at first glance, to announce the same doctrine as *Cloud v. Town of Sumas*; but this decision was predicated on the provisions of the statute authorizing the creation of the liability in suit, and therefore cannot be well regarded as in point in this discussion. It follows from these views that the court below was in error in sustaining the demurrer to the complaint, and the judgment must be reversed and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

STEEL v. FARRELL et al.

(Supreme Court of Oregon. July 31, 1897.)

TRIFLING ERRORS.

A decree erroneously giving plaintiff the amount of the interest on \$2.24 at 10 per cent. per annum for three or four years works no appreciable injury.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Suit by R. M. Steel against John Farrell and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. D. Slater and J. W. Knowles, for appellants. C. H. Finn, for respondent.

PER CURIAM. This is a suit to foreclose a mortgage upon certain real property. The material facts are: That on December 27, 1889, the defendants, John Farrell and Aman-

da, his wife, being indebted to the First National Bank of Island City, Or., in the sum of \$3,975.25, executed to it their promissory note for that amount, and, desiring to secure the payment thereof, and to obtain further credit, plaintiff, at their request, and for their accommodation, guarantied to pay the same, and also agreed that, if any payments were made thereon by the makers, he would be liable for such future advances as might be made to them by the bank at any time within three years, not exceeding the amount specified in the obligation; and in consideration for the liability thus assumed Farrell and wife executed to him a mortgage upon certain real property, conditioned that if they made default in the payment of said note or advances, and plaintiff was compelled to pay the same, or any part thereof, the amount so paid should become a lien upon the said premises, and be foreclosed in the manner prescribed by law. That on May 22, 1895, Farrell and wife owed the bank the sum of \$3,327.40, and, having made default in the payment thereof upon demand, plaintiff paid the same, and brings this suit to recover that amount and interest thereon at the rate of 10 per cent. per annum, and to foreclose the lien of his mortgage. The cause being at issue, a trial was had resulting in a decree as prayed for, from which the defendants appeal.

The defendants' counsel, having failed to file a brief at the time this cause came on for trial, obtained permission to make an oral argument, and submit their brief within 15 days, which have long since expired, without availing themselves of the privilege, notwithstanding which we have carefully examined the evidence, and conclude that it fully supports the findings of the trial court. The record shows that, in addition to the original debt, the defendants were charged with certain sums of money paid at their request on account of taxes levied upon the mortgaged premises, premiums paid for keeping the buildings thereon insured, repairs on the buildings, and the cost of a barn built upon said premises, which, at the time the mortgage was executed, were leased to certain persons, and, as additional security, defendants assigned to plaintiff these leases and the rents accruing thereunder, which, when collected, were credited upon the debt to the bank, and this credit was further augmented by money received from an insurance company on account of the loss by fire of a building erected upon the demised premises. Interest at 10 per cent. was computed upon the additional indebtedness, and a like rate allowed upon the credits until they exceeded the interest, when they were applied in reducing the principal. In one instance, however, under the date of April 13, 1892, a credit of \$41.05 is allowed on account of rent collected, while a charge of \$43.80 is made on account of interest, thereby increasing the principal, but in such a small degree as to work no appreciable injury. Based upon this computation, plaintiff was compelled to

pay the bank, under his guaranty, the sum demanded by it, which, at 10 per cent. interest, amounts to the sum awarded him in the decree. Counsel for defendants contended, at the argument, that the contract entered into between the parties was to apply the rents collected to the payment of the original debt, and, had this agreement been observed, and the amount received on account of insurance applied in the same manner, plaintiff's liability would have been discharged. Examining the mortgage executed by Farrell and wife, it shows that plaintiff not only guarantied the payment of the original debt, but also obligated himself to pay all other sums, not exceeding the original amount, that might be advanced by the bank for a period of three years from the date of the mortgage. A fair construction of the terms of this contract leads us to the conclusion that it was understood between the parties to it that, if defendants received additional sums from the bank, the rents so collected should be first applied to the payment of such sums. The original note became due six months after its execution, and bore interest from maturity at the rate of 10 per cent. per annum, and the same rate was charged upon all sums so advanced by the bank. While the contract does not particularly specify what rate was chargeable on account of these advances, yet it appears that defendants were aware of and practically assented to the computation at the rate adopted. It also appears that Amanda Farrell conveyed to plaintiff 160 acres of land which it is claimed he agreed to accept as a payment of the sum of \$1,000 on account of his assumed liability before it had attached. This land, at the time it was so conveyed, was incumbered with a mortgage, and also attached for the grantor's debt; and, while the evidence is quite conflicting, we think there was no agreement to accept this tract as a payment, but the plaintiff holds the legal title thereto in trust for this defendant upon the repayment of his debt and interest. We think the decree complained of is fully supported by the evidence, and hence it follows that it must be affirmed, and it is so ordered.

OGDEN CITY ST. RY. CO. v. WRIGHT et al.
(Supreme Court of Oregon. July 31, 1897.)

TRUSTEES—PERSONAL LIABILITY.

One signing a note "as trustee of" another is *prima facie* personally liable.

Appeal from circuit court, Union county; Stephen A. Lowell, Judge.

Action by the Ogden City Street-Railway Company against W. T. Wright and another. From a judgment for defendants, plaintiff appeals. Reversed.

This is an action by plaintiff, a corporation, against W. T. Wright and F. L. Richmond in their individual capacity to recover on two promissory notes, one of which is as follows:

"\$757.42. Portland, Oregon, May 30th, 1894. On or before 30th Nov., 1895, after date, without grace, for value received, I promise to pay Ogden City Street-Railway Company seven hundred and fifty-seven and $\frac{92}{100}$ dollars and interest thereon from date at a rate of eight per cent. per annum from date until paid, all in U. S. gold coin; and I further agree to pay all taxes and assessments which may be levied or assessed to the holder of this note on account thereof, and in case suit or action instituted to collect this note, or any portion thereof, to pay such further sum as the court may adjudge reasonable as attorney's fees in said suit or action. F. L. Richmond, as trustee of F. Nodine. W. T. Wright, as trustee of F. Nodine." The other note is identical in every particular with the foregoing, except that it evidences a promise to pay the sum of \$380.36, and is payable to the Utah Loan & Trust Company. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been sustained, judgment was rendered dismissing the action, from which the plaintiff appeals.

J. D. Slater, for appellant. Geo. H. Chamberlain and T. H. Crawford, for respondents.

PER CURIAM. The only question on this appeal is whether, upon the face of the notes, the defendants are personally liable. In the execution thereof they have designated themselves as trustees of F. Nodine, and, as a trustee is one who holds the legal title to property under an agreement, express or implied, to apply it and the income arising therefrom to the use and benefit of another (1 Pars. Cont. 122; And. Law Dict. tit. "Trustee"), it must be assumed, in the absence of the circumstances indicating a different relation, that they are simply the holders of the legal title to certain property in trust for Nodine. And upon this theory the sufficiency of the complaint must be determined. Now, the law is well settled, as stated by Mr. Parsons, that such a trustee "is bound personally by the contracts he makes as trustee, although designating himself as such; and nothing will discharge him but an express provision showing clearly that both parties agreed to act upon the responsibility of the funds alone, or some other responsibility, exclusive of that of the trustee, or some other circumstance clearly indicating another party who is bound by the contract, and upon whose credit alone it is made. The mere use by the promisor of the name of trustee, or any other name of office or employment, will not discharge him. Some one must be bound by the contract, and if he does not bind some other he binds himself, and the official name is then regarded only as describing and designating him." 1 Pars. Cont. 121. See, also, Taylor v. Davis' Adm'x, 110 U. S. 330, 4 Sup. Ct. 147. Many authorities are cited by the defendants to the effect that where it appears from the face of the instrument that the party

signing it acted in a representative capacity, and intended to bind his principal, and not himself, the courts will, in furtherance of justice, adopt such a construction as will effectuate the actual intention of the parties. But there is nothing in the record here to show that the defendants, in executing the notes, were acting as the agents or representatives of any one. They say they are trustees of a private individual, and a trustee is not an agent, and has no principal. As clearly pointed out by Mr. Justice Woods in Taylor v. Davis' Adm'x, supra: "An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is, therefore, the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee, or any other name of office or employment, will not discharge him." It is therefore manifest that the complaint states a cause of action against the defendants personally, and, if the facts and circumstances surrounding the execution of the notes are such as to change their apparent liability, it must be made so to appear by answer. The court below was in error in sustaining the demurrer to the complaint, and the judgment must be reversed, and the cause remanded, with directions to overrule the demurrer, and for such further proceedings as may be right and proper, not inconsistent with this opinion.

(31 Or. 164)

MINARD v. STILLMAN.

(Supreme Court of Oregon. July 31, 1897.)

ATTORNEY AS WITNESS—CONFIDENTIAL COMMUNICATIONS.

In an action against an attorney for money which plaintiff alleges defendant has converted to his own use, and defendant alleges he paid to others at plaintiff's direction, defendant cannot be excused from testifying to whom he made the payment on the ground of confidential communications, though the payment be considered a communication, and defendant was attorney not only for plaintiff, but for the parties to whom the payment was made.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Action by Mary K. Minard against A. D. Stillman. Judgment for defendant. Plaintiff appeals. Reversed.

The purpose of this action is to recover of the defendant a balance of certain collections made by him as attorney for plaintiff upon

fire losses on insured property consisting of a dwelling covered by one company, and household goods by another. It is alleged that defendant wrongfully concealed the receipt of such balance from plaintiff, and converted the same to his own use. The defendant admits the receipt of the same, but denies that it was concealed, or converted to his own use or benefit, and alleges that he paid it out by authority, and under the express direction of the plaintiff. The reply put in issue the affirmative allegations of the answer. The defendant became a witness at the trial in his own behalf, and testified, in substance, upon his examination in chief, that the agent and adjuster for the insurance companies represented to him that the drafts for the damages would be drawn payable to plaintiff, but that she was not to get a certain portion of the money, which represents the balance sued for, and that the adjuster did not want such balance to be placed in her hands. When asked why she was not to have such balance, he answered that it was an arrangement between the adjusters and special agents of the insurance companies in the matter of approving the loss. They had declined to approve the loss, and had threatened to arrest W. F. Minard, the husband of the plaintiff, for burning the building, and claimed that the household goods were not in the building at the time it was burned, and that W. F. Minard, who was acting as the agent of the plaintiff touching the adjustment and settlement, understood that such balance was not to be paid to him nor his wife. He further testified that he received the money through drafts upon San Francisco, which was deposited in the First National Bank to his credit, and that the balance in dispute was checked out by him to other parties, and that he received no part of it himself, or to his use or benefit; that when the whole amount was paid, the said W. F. Minard, the agent of the plaintiff, knew perfectly well that such balance was to be used in getting a settlement, and securing proof of these claims, and knew that he could not get them approved without it. On cross-examination he was asked to whom he paid such balance. This he declined to answer, saying it was a matter of confidence between these other parties, Minard, and himself. The court was thereupon requested to compel the witness to answer, which it declined to do upon the ground that the relation of attorney and client existed between the parties and the defendant. Defendant was then asked whether he had paid any part of it to Minard or his wife, and, having answered in the negative, Minard and his wife consented in open court to his testifying as to whom such balance was paid, and the witness continued: "I desire to state that I refuse to give that information, for the reason that this money was received and disposed of by me upon a matter of confidence. People that did not want to deal directly, and thought they could not deal safely with Ted [W. F.] Minard, dealt with me, and

the money was paid out. * * * I was acting as attorney in confidential relations with the other parties." Thereupon the court made the same order refusing to compel the witness to answer, to which an exception was taken and allowed, and, judgment having been rendered in favor of the defendant, the plaintiff appeals.

L. Kearney, for appellant. J. J. Balleray, for respondent.

PER CURIAM. The defendant contends that he occupies the position of attorney both for the plaintiff and the parties to whom he paid this balance; that the payments to such parties are in their nature privileged communications between attorney and client, and that he ought not to be compelled to make the disclosure. If it be conceded that this is a case wherein an attorney may properly represent all parties concerned in the settlement and adjustment, the rule seems to be well settled that in a controversy between such parties and a third person the attorney will not be compelled, without the consent of the parties, to disclose any communication made to him by them while in the exercise of such professional employment. *Root v. Wright*, 84 N. Y. 72; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858. Upon the other hand, the rule is as well settled that in a dispute between parties themselves the attorney is not inhibited from making such disclosures where the communication was made in the presence and hearing of all concerned, or was intended for the mutual information of all. *Michael v. Foll* (N. C.) 6 S. E. 264, 269; *Britton v. Lorenz*, 45 N. Y. 51; *Rice v. Rice*, 14 B. Mon. 417; *Carey v. Carey*, 108 N. C. 267, 12 S. E. 1038; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Gullick v. Gullick*, 89 N. J. Eq. 516; *Goodwin Gas Stove & Meter Co.'s Appeal*, 117 Pa. St. 514, 12 Atl. 736; *House v. House*, 61 Mich. 69, 27 N. W. 858; *In re Bauer's Estate*, 79 Cal. 304, 21 Pac. 759; *Hanlon v. Doherty* (Ind. Sup.) 9 N. E. 782. The reason of the latter rule is stated in *Rice v. Rice*, supra, which is, in effect, that as the parties are all present at the same time, or are entitled alike to the same knowledge, the matter communicated is not in its nature private, and consequently that, as between the parties, and in so far as they are or can be concerned, it cannot, in any sense, be deemed a subject of confidential communication made by one which the duty of the attorney inhibits him from disclosing to the other. And in conclusion *Simpson, J.*, says: "The statements of parties made in the presence of each other may be proved by their attorneys, as well as by other persons, because such statements are not in their nature confidential, and cannot be regarded as privileged communications." Now, the case at bar presents a condition of affairs in which there is a dispute between one of the parties and the attorney, and it is contended by the defendant's counsel that the attorney stands in the position of a stranger, and that

the rule should be applied as where the controversy is between one of the parties to the communication and a stranger. In this view we cannot concur. If it was a matter of common knowledge between the parties to the settlement as pertains to the persons to whom this balance was paid, the knowledge or the communications by which it was obtained by all cannot be considered as privileged in so far as the parties are concerned, and the attorney is not inhibited by any duty devolving upon him from communicating such knowledge from one to the other. The knowledge would be matter common to all, the attorney included, and for that reason is not privileged, as it concerns them all. So that in a controversy between one of the parties and the attorney the communication would be a matter of common knowledge between parties to that controversy, and the reason assigned why it is not privileged as between the parties to the settlement is equally as strong, and has like application as between one of the parties and the attorney. The court was therefore in error in not requiring the defendant to answer. The information which the plaintiff sought to elicit would seem to be pertinent to the issue, which was whether defendant had converted any of this money to his own use. He claims that he paid it to certain parties under the direction of the plaintiff, and it is, therefore, an important factor in the logical course of an examination touching the transaction to ascertain and know to whom it was paid, and was, therefore, proper subject-matter respecting which to pursue a cross-examination of the witness. The judgment of the court below will therefore be reversed, and the cause remanded for such other proceedings as may seem pertinent, not inconsistent with this opinion.

TALBOTT v. GARRETSON et al.

(Supreme Court of Oregon. July 31, 1897.)

PLEADINGS—AMENDMENT—RESTORING MORTGAGE—ENTRY OF DEFAULT JUDGMENT BY CLERK.

1. Under Code, § 101, providing "the court may, * * * before trial, in the furtherance of justice, * * * allow any pleading * * * to be amended by adding the name of a party, or other allegation material to the cause, and * * * it may * * * before the cause is submitted, allow such pleading * * * to be amended by striking out the name of the party or by correcting a mistake, * * * or when the amendment does not substantially change the cause of action or defense by conforming the pleading * * * to the facts proved," before trial a complaint may be amended by insertion of new and additional allegations material to the controversy, notwithstanding they may, in effect, constitute a new cause of action, though the original cause of action cannot be abandoned, and an entirely new and different one substituted. Thus, when the complaint seeks to enjoin sale of land on the ground that the judgment against plaintiff's grantor was void, an amendment may be had alleging the ownership by plaintiff of mortgages on the land prior and superior to the lien of defendant's judgment, and the cancellation thereof by mistake, and asking that the mortgages be restored.

2. A complaint alleging the conveyance to plain-

tiff of land by defendant's judgment debtor, the assignment to plaintiff of mortgages prior and superior to the lien of defendant's judgment, the subsequent cancellation and release of the mortgages, and that such releases were executed by mistake, and were not intended to release the mortgages, but only to give to plaintiff the interest and title of the mortgagee, and praying for restoration of the mortgages, must, to entitle plaintiff to the relief, allege that the releases were made in ignorance of the defendant's judgment.

3. Hill's Ann. Laws, § 249, authorizing the clerk, on application of plaintiff, where no answer is filed, to enter default of defendant, and enter judgment against him for the amount specified in the summons, is not void, as attempting to confer judicial power on the clerk.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Suit by H. C. Talbott against W. C. Garretson and others. Decree for plaintiff. Defendants appeal. Reversed.

This case was commenced on August 27, 1896, to enjoin the sale of certain land belonging to the plaintiff under an execution issued on a judgment against his grantor, J. L. Craft, and in favor of defendants Garretson, Woodruff, Pratt & Co., for the sum of \$4,000, rendered on April 1, 1896, on the ground that the judgment was entered without jurisdiction, and is absolutely void. The original complaint alleged title in plaintiff, the issuance of the execution on defendants' judgment, the levy thereof and the advertisement of the land for sale, the invalidity of the judgment, and prays for an injunction. After the issues had been made up, but before the trial, the plaintiff, by leave of the court, filed an amended complaint which contained substantially the same averments as the original, and, in addition, alleged that at the time the plaintiff purchased the land in question his father was the owner of two certain mortgages thereon, which were prior in time and superior in right to the lien of defendants' judgment, and which were duly assigned and transferred to him, and subsequently canceled and released; that such releases were made and executed by mistake, and were not intended to release or cancel the lien of the mortgage upon the premises, but for the sole and only purpose of conveying and giving to the plaintiff the right, interest, and title of his father therein. The complaint, as amended, prayed for a decree enjoining the threatened sale under execution, as in the original complaint, but, if that could not be done, that the mortgages be restored and the cancellation thereof annulled. The defendants moved to strike the amended complaint from the files on the ground that it set up a new and distinct cause of suit from that alleged in the original complaint, and, this motion being overruled, they moved to strike out all the allegations thereof in reference to the mortgages and their cancellation, on the ground that the facts thus stated were immaterial, and constituted no part of a cause of suit against the defendants. This motion was likewise overruled, and, upon issues being subsequently joined by answer and reply, the case was tried, and a decree rendered in favor of plaintiff, restoring the mortgages as

liens upon the premises in question superior in right to the lien of the defendants' judgment, and from this decree defendants appeal.

J. J. Balleray, for appellants. A. D. Stillman, for respondent.

BEAN, J. (after stating the facts). The defendants contend, at the outset, that the court had no right, as a matter of law, to allow the amended complaint to be filed, because it purposed to add a new and distinct cause of suit not embraced in the original complaint. The statute (Code, § 101) provides that: "The court may, at any time before trial, in the furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and, in like manner and for like reasons, it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended by striking out the name of any party or by correcting a mistake in the name of a party or a mistake in any other respect or when the amendment does not substantially change the cause of action or defense by conforming the pleading or proceeding to the facts proved." The construction of this section has been much discussed, and, while it must be regarded as settled that a new cause of action cannot be inserted by way of amendment on the trial (*Foste v. Insurance Co.*, 28 Or. 449, 38 Pac. 617), the question as to whether it may be done before trial has never been decided here, and the decisions elsewhere are conflicting. By one class of cases—of which *Board of Sup's v. Decker*, 34 Wis. 378, is an example—it is held that a party cannot, under the form of an amendment before trial, change the scope of his action, or insert a new cause of action. But it is believed that this view is not in harmony with the great weight of authority, or the reason and spirit of the statute. In New York, under a statute practically the same as ours, the courts, after apparent vacillation, finally established the rule that an amendment before trial, setting up a new cause of action or suit, is permissible if in furtherance of justice, but that the power to grant amendments upon the trial is restricted to such amendments as do not change substantially the cause of action or defense. 1 Rum. Prac. 284; *Brown v. Leigh*, 49 N. Y. 78; *Hatch v. Bank*, 78 N. Y. 487; *Freeman v. Grant*, 132 N. Y. 22, 30 N. E. 247. In *Brown v. Leigh*, supra, the original complaint was to compel the determination of conflicting claims to real property, but under a statute providing that any pleading may be once amended by the party of course without prejudice to proceedings already had the plaintiff served an amended complaint which set forth a cause of action in ejectment. This was stricken out on motion upon the ground that it embraced new and different cause of action from that set forth in the original complaint. From this order an appeal was taken, and Mr. Justice Grover, after referring to the fact that some of

the courts of the state had held that the statute only gave the right to amend and perfect what was previously set out in an imperfect manner, and that others had held that a new cause of action or defense might be set up, says: "I think the construction adopted in the former cases too strict, and subversive of the true meaning of the section in this respect. That gives a party power to amend any pleading once without imposing any restriction upon it. The term 'pleading' includes all the pleadings of both parties. The 'complaint' is the statement of the plaintiff's cause or causes of action. It is this statement or complaint that may be amended and perfected by the party so as to enable him to present his entire case upon trial. It is not confined to an amendment of such matter as has been defectively stated in the original complaint. The same remarks apply to the answer. This is a statement of the defense and of any counterclaim or claims. It is this statement that may be amended by the party so as to enable him to avail himself of all his defenses upon trial. It follows that new causes of action may be included in the complaint, and those in the original left out, and new defenses or counterclaims embraced in the answer. That this was the intention of the legislature clearly appears from the last clause of section 173, Code Proc. [which is similar to our section 101], by which the power of the court to grant amendments upon the trial by conforming the pleading to the facts proved is restricted to such amendments as do not change substantially the claim or defense. The insertion of the restriction shows that the legislature, in its absence, understood that such change might be made under the power conferred. There is no such restriction in section 172, nor upon the general power conferred upon the court to allow amendments conferred by section 173. Were the power to amend upon trial unrestricted, parties might be compelled to litigate matters of which they had no notice, and for which they were unprepared, and injustice thereby done; but there is no such danger where the amendment is made before trial, so that the adverse party may come fully prepared to meet." It is quite true, this decision was made under a section of the New York statute in substance the same as section 99 of our Code, but it was no more liberal as to the character of the amendment which may be made than the first clause of section 101, now under consideration. The only difference is that in the one instance the amendment may be made as a matter of course, while in the other it can only be done by leave of the court, and in furtherance of justice; and therefore the reasoning of Judge Grover in the case referred to is just as applicable to the case in hand, and to the proper construction of the first clause of section 101, as it is to the construction of the section of the New York statute which he was then considering. The section quoted plainly provides for two classes of amendments, one made before trial and the other after the trial has begun, and before the final submission of the case. In the former,

no limitation is placed upon the power of the court to allow an amendment except that it must be "in furtherance of justice," and, if a new allegation is added, it must be one "material to the cause"; while in the latter the power is restricted to such amendments as do not substantially change the cause of action or defense. It follows, we think, that it is within the power of the trial court to allow, before trial, an amended complaint to be filed containing a new cause of action or suit material to the subject-matter of the controversy then before the court. A plaintiff cannot, of course, abandon his original cause of action or suit, and substitute an entirely new and different one, because in such case the new pleading would not be an amendment, but a substitution for the original. But so long as the amendment is germane to the subject-matter of the controversy, we can see no objection to the court, in the exercise of a sound discretion, allowing the pleadings to be amended in the furtherance of justice by inserting new and additional allegations material to such controversy, although they may, in effect, constitute a new cause of action or defense. That this is the intention of the statute is, it seems to us, made manifest from the latter clause of the section under consideration, which specially restricts the amendments made on the trial to such as do not substantially change the cause of action or defense. This construction is in harmony with the rule governing the allowance of amendments, which has in view the determination of the actual controversy with as little expense and delay as possible. "While the parties are in court," says Chief Justice Strahan, "they ought to be permitted to shape their pleadings in such form as they may be advised, so as to present the real questions at issue that the same may be determined with as little delay and expense as possible. Nothing is ever gained by turning a party out of court, or compelling him to take a nonsuit, on account of some defect in his pleadings not discovered, perhaps, until during the progress of the case, when an amendment could supply the defect, and the action or suit be brought to an early determination." *Baldock v. Atwood*, 21 Or. 79, 26 Pac. 1058. As illustrating the power of the court, under a statute similar to ours, to allow the pleadings to be amended, the case of *Hatch v. Bank*, supra, is instructive. In that case the original complaint alleged, in substance, that plaintiff purchased of defendant what purported to be four United States treasury notes for \$1,000, which were counterfeited. Upon issues joined the plaintiff had judgment for the amount paid for the counterfeited notes, with interest; but, after this judgment had been paid and satisfied, the court granted a motion that it be opened, and the satisfaction thereof canceled, and that plaintiff be allowed to serve an amended complaint, adding an account setting forth the purchase of four other similar counterfeited notes, which it was claimed was omitted from the original complaint by mistake, on condition that the plaintiff refund and repay the amount

of the judgment which had been paid, and upon compliance with certain other terms and conditions, although the effect of such amendment was to avoid the statute of limitations. The order allowing this amendment was affirmed on appeal, the court, through Mr. Justice Danforth, saying that "it was going a great way to grant the relief sought, but the application was not without merit, and was one which, under a long series of authorities, the court had power to grant." Within this construction of the statute, supported by the authorities cited, the court had power to allow the amendment sought to be made in this case, although it would have added an additional ground for relief to that contained in the original complaint. It was not intended to change the real gist of the controversy between the parties, or the subject-matter of the litigation. The original purpose of the suit was to determine the rights of the respective parties and their priorities in and to the real property in question; and the allegation of any fact material to the controversy, either as a ground of relief or as a defense, could, within the discretion of the trial court, in our opinion, be permitted by amendment before trial. But nevertheless the statement of the new matter in the amended complaint as filed is clearly insufficient as a basis for the relief sought, because it is not alleged that the cancellation of the mortgages was made in ignorance of the defendants' judgment. It is unquestioned that a court of equity will, in a proper case, restore the lien of a mortgage canceled by mistake; but before it will do so it must be made to appear that at the time of the cancellation or release the mortgagee did not know of the intervening lien. This is so elementary that its mere statement is sufficient. Manifestly, a mortgagee who, with complete knowledge of the existence of another lien on the mortgaged premises, deliberately cancels and releases his security, cannot subsequently ask a court of equity to restore him to his original priority. For this reason the allegations of the amended complaint concerning the mortgages in question and their cancellation were wholly immaterial, and the motion to strike them out ought to have been sustained. Nor can it be said that this defect was cured by the verdict,—if it could be so cured,—because there is not a scintilla of proof in the record anywhere to show that the mortgagee did not know of defendants' judgment at the time he released his mortgage. It follows, therefore, that the court below erred in entering a decree giving the canceled mortgages priority over defendants' judgment, because there is neither allegation nor proof to support it. This being so, the only question remaining for discussion is as to the validity of such a judgment. The contention is that it is void because entered by the clerk in vacation, under section 249 of Hill's Ann. Laws, which provides that, if no answer be filed within the time specified within the summons, or such further time as may have been granted by the court, or judge thereof, the clerk, upon the application of plaintiff, shall enter the de-

fault of the defendant, and immediately enter judgment against him for the amount specified in the summons. The contention is that this statute is unconstitutional and void, because it attempts to confer judicial powers upon the clerk. But this point was made and decided adversely to the plaintiff's contention in *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537, and this decision has become a rule of property, and ought not at this late date be disturbed, whatever the view of the individual members of the court as now constituted may be upon the question here suggested. The decree of the court below is therefore reversed, and the complaint dismissed, without prejudice, however, to another suit to restore the canceled mortgages referred to in the amended complaint if the plaintiff shall be so advised.

(31 Or. 178)

FISK v. BASCHE et al.

(Supreme Court of Oregon. July 31, 1897.)

SETTLED ACCOUNT—REOPENING—BURDEN OF PROOF.

One who seeks to surcharge and falsify a settled account has the burden of establishing the facts alleged by him.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Suit by D. B. Fisk against P. Basche & Co. and others. Petition dismissed, and plaintiff appeals. Affirmed.

F. M. Saxton, for appellant. F. L. Moore, for respondents.

PER CURIAM. This is a suit for an accounting. The facts are that on April 21, 1888, plaintiff and one Henry A. Hyde, as partners, entered into a contract with defendants by which it was agreed that the latter would from time to time ship to them, at Prairie City, Or., certain goods, wares, and merchandise, which they agreed to sell and remit the proceeds, less 10 per cent. thereof, which they were to retain as their commission; that about April 1, 1889, Hyde assigned all his interest in this contract to plaintiff, who continued to carry out its terms until about October 1st of that year, when he had a settlement with the defendants, wherein there was found a balance against him of \$490, which he settled by delivering certain personal property to defendants in payment thereof. Plaintiff admits having received from defendants large quantities of goods, wares, and merchandise, and that he sold the same, but alleges that he delivered to them notes, accounts, money, and property far in excess of the value thereof; that defendants agreed to collect said notes and accounts, and render a statement thereof, and pay the plaintiff the amount which might be found due him on final settlement; that they collected about \$2,000 thereon, and applied the same to their own use, refusing to account with or pay to the plaintiff any part of the moneys so collected,—and also alleges such

other facts as to give a court of equity jurisdiction of the cause. The defendants deny the material allegations of the complaint, and, as a further defense, aver the accounting, settlement, and delivery of the property in payment of the amount so found to be due, as hereinbefore stated. The plaintiff, after denying the new matter set out in the answer, alleges in his reply that defendants falsely and fraudulently represented to him that after giving him credit for all moneys, notes, accounts and property so received he was indebted to them in the sum of \$1,400, and that, relying thereon and being deceived thereby, he had been induced to turn over to them money and property to that amount in settlement thereof; that thereafter, having learned that such representations were false, and that defendants were indebted to him in a large sum, he made a demand on them for an accounting and settlement of their dealings, but that they refused to comply therewith. The cause, being at issue, was thereupon referred, and the evidence taken, from which the court found that plaintiff and defendants had a settlement of their dealings, which was fair and complete, so far as it could ascertain from the data thereof then in the hands of either party, but that it was impossible to say from an inspection of their books, in the light of the oral evidence explanatory thereof, what sum, if any, was due either party, and thereupon rendered a decree dismissing the suit, from which the plaintiff appeals.

Plaintiff having alleged in the complaint that he never had an accounting with defendants, and having practically admitted in the reply that he had a settlement with them, which he seeks to avoid, it is contended by counsel for the defendants that to permit him to avail himself of the allegations of the latter pleading would be violative of the rule announced in the case of *Lillenthal v. Hotelling Co.*, 15 Or. 371, 15 Pac. 630, to the effect that a plaintiff in an action or suit must recover, if at all, upon the facts stated in his complaint. We have no disposition to controvert the rule established in that case, but, assuming that plaintiff's cause of suit is properly stated, we do not think the evidence submitted at the trial entitles him to the relief he seeks. The original statements of account, as prepared by plaintiff and defendants, and which were used in making, and furnished the basis of, their settlement, are in the record, and that submitted by the plaintiff contains the following item: "Horses, \$490." This is evidently the property delivered to defendants in settlement of the amount then found to be due them, and, while plaintiff seems to think that this item refers to a band of horses delivered for another purpose, he admits offering Basche \$50 to set aside the settlement and open the account. Just after this settlement was effected there was found to be due plaintiff from defendants the sum of \$100, as salary, which they

paid by check drawn on the First National Bank of Baker City, and thereupon obtained plaintiff's receipt, evidencing a payment "in full of all demands to date." The evidence shows that certain errors occurred in entries made by the defendants in their books, and that plaintiff had charged defendants with certain notes delivered to them, but failed to give them credit therefor upon their return to him for collection, so that they are charged with the notes, and also with the money obtained on account thereof. Assuming, as we have, that the pleadings presented the issue of surcharging and falsifying a settled account, the burden was on the plaintiff to establish the facts so alleged. *Hoyt v. Clarkson*, 23 Or. 51, 31 Pac. 198. In this respect he has signally failed, in consequence of which we are compelled to conclude, as did the trial court, that, if there be any amount due either party, it is not discoverable from a careful examination of the evidence; and hence it follows that the decree must be affirmed, and it is so ordered.

STRICKLAND v. GEIDE et al.

(Supreme Court of Oregon. July 31, 1897.)

STATUTES—REPEALS BY IMPLICATION—EVIDENCE—HARMLESS ERROR.

1. Act 1870 provided that no action should be maintained for trespasses by stock in any county except Umatilla county, unless the premises were properly fenced. Act 1872 provided that no action should be maintained for trespasses by horses and cattle in Umatilla and Wasco counties, unless the premises were lawfully fenced, but no express repeal of Act 1870 was made as to Wasco county. *Held*, that such act was repealed so far as Wasco county was concerned, leaving the common law in force in that county as to trespasses of all stock except horses and cattle.

2. Error in admitting testimony showing that the damage to plaintiff was \$500 will be considered harmless when the verdict for plaintiff is for only \$25.

Appeal from circuit court, Gilliam county; W. L. Bradshaw, Judge.

Action by H. C. Strickland against B. Geide and others. From judgment for plaintiff, defendants appeal. Affirmed.

W. H. Wilson and T. R. Lyons, for appellants. F. P. Mays, for respondent.

WOLVERTON, J. This is an action of trespass, wherein it is alleged that defendants unlawfully and willfully permitted their band of sheep to be herded, and unlawfully and willfully did herd said band, upon the premises and lands of plaintiff. The action was commenced in the justice court, and upon appeal to the circuit court, and trial there, judgment was rendered in favor of plaintiff, from which the defendants appeal to this court.

Upon the threshold of our inquiry touching the errors assigned, it becomes pertinent to determine the effect of certain statutes heretofore enacted relating to stock and fencing in respect of Gilliam county, from which

the action emanates. In 1870 the legislature passed an act regulating fencing and inclosures, and providing a remedy against stock breaking into such inclosures, but excluded Umatilla county from its operation. For the first trespass the owner is required to make reparation to the party injured for the true value of the damages sustained; and for every trespass thereafter double damages are recoverable before any court having cognizance; and for a third offense, from any animals breaking into such inclosures, the animals themselves may be taken into custody and kept at the expense of the owner until the damages are repaired. In October, 1872, the legislature passed an act entitled "An act in relation to trespass by cattle, and regulating fences in the counties of Umatilla and Wasco, in the state of Oregon." The first section provides that "no action shall be maintained for damages done by any horse, mare, gelding, mule, ass, jenny, foal, bull, stag, cow, ox, steer, heifer or calf, upon the premises of another, unless the person seeking such damage shall allege and prove upon the trial thereof that said premises were, at the time of the commission of said damage, inclosed with a lawful fence." Section 2 provides what manner of fence shall be deemed lawful, and section 3 gives the remedy. Any party injured by reason of any such stock trespassing upon premises or lands so inclosed may recover damages for such injury before any court having jurisdiction, and the animals trespassing may be at once taken and held as security for the payment of the damages and costs, provided that the person so holding such animals shall within three days notify the owner thereof in the manner prescribed. The question here is, how do these acts affect Gilliam county, which has since been created out of Wasco county, as it pertains to sheep? There is no doubt but that the act of 1870 applied to the territory comprising the county of Gilliam, and that sheep came within the purview of the act, so that it was necessary to fence against them, as well as other stock, if damages for trespass were to be insisted upon. *Campbell v. Bridwell*, 5 Or. 311. Now, it is contended by plaintiff that the act of 1872 repealed the act of 1870, in so far as it pertains to sheep within Wasco county, out of which Gilliam was since carved, and therefore that it is not necessary to show the existence of a lawful inclosure before damages can be recovered for trespass by this species of stock. The defendant combats this contention, and holds that such is not the effect of the act of 1872.

It is a rule of law, sanctioned by this court, that whenever two acts are repugnant, one inimical to the other, so that both cannot stand, the later will operate as a repeal of the earlier by implication, without any express words of repeal; and such will be the effect, even when they are not repugnant in all their provisions, if the new statute revises the subject-matter of the old, and is plainly intended as a substitute for the old in toto.

Insurance Co. v. Rikken (Or.) 48 Pac. 476, and *Little v. Cogswell*, 20 Or. 345, 25 Pac. 727. Such rule is not inimical to the doctrine that repeals by implication are never favored, nor that which gives effect to several statutes upon the same subject whenever it is possible to do so; and it is firmly established elsewhere. *Road Co. v. Allen*, 16 Barb. 15; *Roche v. Mayor*, etc., 40 N. J. Law, 257; *Davless v. Fairbairn*, 3 How. 636; *Murdock v. City of Memphis*, 20 Wall. 500; *Swann v. Buck*, 40 Miss. 268; *City & County of Sacramento v. Bird*, 15 Cal. 294; and *End. Interp. St. pars.* 200, 205. Manifestly, it was the intention of the legislature, by the act of 1872, to provide a substitute in toto for the former act, and to prescribe the only regulations requisite to be observed in the construction of fences within the territory comprised by Wasco county. The act specifies with much particularity how the different kinds of fences shall be constructed, and provides that no action shall be maintained for trespass by horses and cattle unless it shall be made to appear that the premises so damaged were inclosed with a lawful fence; and it is certain that the legislature contemplated no such absurdity as that a person residing in the county should build two kinds of fences in order to protect his inclosures from trespass by all kinds of stock, or that there should be one remedy for trespass by sheep and swine upon lands inclosed by one kind of fence, and another covering damages for trespass by cattle and horses upon lands inclosed by another kind of fence. It was contemplated, undoubtedly, that the act of 1872 should be the only legislative enactment touching or regulating the subject-matter thereof as it applied to that county, and this would leave the matter, as it pertains to stock other than cattle and horses, to rest where it did prior to any enactment upon the subject. That such is the proper inference of legislative intent is in some way corroborated by the fact that both Umatilla and Wasco counties are within the purview of the act, and, while the former fence law applied to Wasco, it did not apply to Umatilla, and it was probably contemplated that a law identical in its effect should apply to each of said counties. This interpretation seems to have been adopted in *Bileu v. Paisley*, 18 Or. 47, 21 Pac. 934. Such being the state of the law, we must turn to the common law to determine whether plaintiff has a remedy upon the complaint filed, and this question has been decided favorably to the plaintiff in *French v. Cresswell*, 13 Or. 418, 11 Pac. 62, upon a complaint identical in form, and reaffirmed in principle in *Bileu v. Paisley*, supra; and while, if this latter question was a matter of first impression, our decision might be different, we feel constrained to treat it now as stare decisis.

Another question is made upon the record touching the admission of certain testimony relating to the value of the lands before and after the trespass, in order to determine the amount of damages, the plaintiff testifying that

they were worth \$2,000 before and \$1,500 after, and, therefore, that he was damaged in the sum of \$500; but, whether the admission of this testimony was error or not, it is manifest that defendants were not materially damaged by it, the verdict being for \$25 only. In support of this view, see *French v. Cresswell*, supra.

Affirmed.

DE GREAYER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 561.)

(Supreme Court of California. Aug. 21, 1897.)

GUARDIANS—CUSTODY AND CONTROL OF ESTATE—INVESTMENTS.

1. Civ. Code, § 236, provides that a guardian is a person appointed to take care of the person "or property" of another. Section 247 provides that a guardian has power over the person "and property" of the ward, unless otherwise ordered. And section 249 provides that "a guardian of the property must keep safely the property of his ward, * * * and deliver it to the ward at the close of his guardianship." Code Civ. Proc. § 1753, provides that every guardian shall have the "management of [the ward's] estate," etc. Section 1754 provides that the guardian shall give bond "to dispose of and manage the estate according to law; * * * to render an account on oath of the property, estates, and moneys of the ward," etc. Section 1760 provides that "every guardian must * * * sue for and receive all debts due" the ward, etc. And section 1770 provides that every guardian must "manage the estate of his ward frugally," etc. *Held*, that under these statutes, as well as at common law, the guardian has the right to the custody and control of the ward's estate, and hence an order of court directing him to deposit such assets in a certain institution, from which they should be withdrawn only upon order of court, was void.

2. Code Civ. Proc. § 1792, providing that the court, on application of the guardian of any person interested, may authorize and require the guardian to invest the ward's money in real estate, or in any other manner most to the interest of all concerned, "and may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require," does not authorize the court to deprive the guardian of the custody and control of the funds of the estate by ordering that they shall be placed in a certain depository, and drawn out only on order of court.

Department 1. Writ of review to superior court, city and county of San Francisco; Coffey, Judge.

Petition by Septimus De Greayer, guardian, to review order of superior court of the city and county of San Francisco. Order annulled.

A. G. Bells, for petitioner. N. I. Cresswell, for respondent.

VAN FLEET, J. Certiorari to review an order of the superior court of the city and county of San Francisco, department 9. Petitioner is, by will of the father and appointment of the court, the general guardian of the person and estate of Harry Gardner De Greayer, a minor, the estate being in process of administration in said superior court. Be-

longing to the estate is a certain large sum of money distributed to the ward from the estate of his father, which at the time of distribution was on deposit by petitioner, in his capacity as executor of the will of the father, in the California Safe-Deposit & Trust Company. Upon the distribution of the fund petitioner was required to and gave an additional bond as guardian in double the amount of the fund, and an order was then made that said money be transferred on the books of the safe-deposit company to petitioner's account as guardian; but thereupon said court, of its own motion, and without other circumstance, made a further order that the said moneys "be held by said California Safe-Deposit & Trust Company subject to the order of this [said superior] court, and be paid out only as authorized by this court." It is contended by petitioner that this last order constituted an infringement upon his rights as guardian, which was beyond the power of the court, and that the order is void.

It is obvious at a glance that the effect of the order is, and manifestly was so intended, to deny to and deprive petitioner as guardian of the possession and control of such fund, and to that extent of the possession and control of the estate of his ward. That the law does not authorize such an interference with the possession and control of one standing in the relation of petitioner to the fund has, we think, been expressly determined in the very recent case of *In re Welch's Estate*, 110 Cal. 605, 608, 42 Pac. 1090, where, in considering an order of precisely similar import made in the estate of a deceased person, the court, speaking through Mr. Justice Temple, say: "I know of no law which authorizes a probate judge to direct an administrator where and how he shall keep the assets of an estate, and surely there ought to be no such law. The administrator is liable for their safety on his bond. If the court could lawfully take charge of them, it would deprive interested parties of this security. If goods are lost, it may be a question whether they have been properly cared for. If they have been placed where the judge has directed, and then lost, he will have prejudiced the case before the trial. Administrators cannot be deprived of the actual custody of the assets of the estate by such an order." Respondent expresses doubts as to the correctness of what is there said, even as applied to the office of administrator, but contends that in any event it has no bearing here because of "the vast difference at the common law between the functions of an administrator and those of a guardian." But we are pointed to no essential difference in the nature of the trust, either at common law or under our statute, affecting the question here involved, or which would render impertinent the considerations suggested in *Re Welch's Estate*. Whatever the differences in his rights and duties in other respects, a general guardian, at the common law, equally with an administrator or executor, was entitled to the

exclusive possession, with the general care and management, of the estate committed to his charge. *Woerner, Guardianship*, §§ 53, 55, 56, 61, 62; *Lee v. Lee*, 55 Ala. 590. And, indeed, in many other, if not most, respects there has always been great similarity between the powers and duties of a guardian in respect of the property of his ward, and an executor or administrator in the management of the estate of a deceased person. "Both classes of functionaries," says Mr. *Woerner*, "are treated in law in many respects like trustees holding a legal, but not beneficial, title to the property intrusted to their custody. Text writers and courts find it convenient to include executors and administrators in discussing the powers, rights, duties, and liabilities of trustees; and guardians—notably guardians in socage and testamentary guardians—were early recognized at common law and under the statute of Charles II. as trustees, with not a bare authority, but an actual interest, in their ward's estate." *Woerner, Guardianship*, § 53. And what was true in those respects at the common law is not less true under our statute. In fact, by the express terms of the statute, the guardian is given the possession, care, and management of the estate of his ward. *Civ. Code*, §§ 236, 247, 249; *Code Civ. Proc.* §§ 1753, 1754, 1769, 1770. And the powers there given and the duties imposed are such as in their essential nature are wholly at variance with the existence of the right in the court to take the custody and management of the estate out of the hands of the guardian into its own. Under these provisions, as it was at the common law, it is the guardian, and not the court, who is made responsible for the proper administration of the trust. He it is to whose custody the property of the ward is intrusted, and to whom the law and the ward alike look for its safe return. In the performance of his duties he is, it is true, in certain respects under the control and supervision of the court appointing him; but this right of supervision does not, under our Code, nor did it at the common law, carry the power to interfere in any such manner with the custody and general management of the property of the ward, except, of course, for conduct authorizing suspension or removal.

In *Lord v. Hough*, 37 Cal. 657, 664, it is said, in discussing this power of the court, that: "While the court of chancery has the control and superintendence of all guardians, however appointed, yet it can no more interpose in matters of guardianship without cause than it can interpose without cause in other matters which are within its jurisdiction. Chancery will not interfere and remove a guardian who has been legally appointed, unless for misbehavior. The guardian appointed by either the common law or statute has a legal right to the trust, of which he cannot be deprived except for reasons in equity. The discretion of the chancellor, of which mention is frequently made in connection with his power of supervision and removal of guard-

ians, is not an arbitrary or capricious, but a judicial, discretion, to be exercised not in total disregard, but with due regard, to all the legal rights of all concerned." See, also, *Lincoln v. Alexander*, 52 Cal. 482. Indeed, the right of custody and control of the property is even more essential to the full and proper discharge of a guardian's trust than to that of an administrator or executor, since the former is charged not alone with the safe-keeping of the property of his ward, but with its judicious and proper investment. And it is primarily to his discretion, rather than that of the court, that this most important duty is committed,—a duty to be performed under the direction and control of the court, but, after all, a duty confided by the law to the guardian, who is made responsible for its faithful performance. *Cardwell's Guardianship*, 55 Cal. 137, 141; *Woerner, Guardianship*, § 63.

It is quite apparent that, if the court can, by such an order, tie up the funds of an estate, and deprive the guardian of its control, the latter may be thereby prevented from fulfilling one of the primary purposes of his trust. And in such an instance the ward would be left without redress for any loss resulting, since obviously the guardian could not be held responsible for failing to perform a duty from which he was restrained by order of the court. In *re Welch's Estate*, supra. While respondent does not expressly claim that the order in question was made or intended as a direction for the "investment" of the fund, he cites in support of the order the provisions of the Code authorizing the court to direct and supervise the investment of the trust property, and particularly section 1792 of the Code of Civil Procedure, which provides: "The court, on the application of the guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require." In the first place, the recitals of the order negative the idea that it was intended as a direction for the investment of the money in pursuance of the authority given by the above section, since it states on its face that it is made in pursuance of a general rule theretofore adopted by the court providing for "the safe-keeping" of the moneys of estates generally, and makes no reference to the subject of investment on interest or otherwise. In the next place, if intended as a compliance with that section, it clearly transcends the power there given. Whether that provision contemplates an order for the investment of funds without notice to or application first made therefor by the guardian or other person interested in the estate, or whether, under any

circumstances, it would authorize a direction for the deposit or keeping of the funds in the hands of an institution or individual specially chosen and designated by the court without the consent of the guardian, are questions which need not be here decided; for certain it is that the court cannot, for the purpose of investment more than another, deprive the guardian of the custody and control of the fund, or the securities representing it. If money of the estate be invested, the guardian is still entitled to its general care and custody, and that of the notes, bonds, mortgages, bank books, or other security evidencing such investment, with the right and duty to preserve them, and to take such proper and necessary steps at any time to protect the interests of the ward therein as circumstances may demand. The order in question has the effect to deprive the guardian of this right, and to practically place the custody and control of the fund in the hands of the court exclusive of the guardian. Such an order is without doubt in excess of the power of the court, and void. The order is annulled.

We concur: BEATTY, C. J.; HARRISON, J.

(5 Idaho, 416)

COHN v. KINGSLEY.

(Supreme Court of Idaho. July 9, 1897.)

STATUTES—ENACTMENT—CONSTITUTIONAL REQUIREMENTS—ENROLLED BILL—LEGISLATIVE JOURNALS—CONCLUSIVENESS.

1. The provisions of the constitution requiring three several readings, the printing of bills, and an aye and nay vote on final passage of any bill, are mandatory.
2. To ascertain whether or not the legislature, in the passage of a bill, complied with the requirements of the constitution, the court may go back of the enrolled bill to see if the journals of both houses of the legislature show that the requirements of the constitution were obeyed in the passage of the act in question.
3. The journals of both houses of the legislature must affirmatively show that the provisions of the constitution in regard to the passage of any law were substantially followed by the legislature in the passage of an act the validity of which is questioned.
4. While the journals of both houses of the legislature are entitled to absolute verity, and cannot be contradicted, yet, if the journals fail to show that any step required by the constitution in the passage of a law was taken, such failure to show that such step was taken is conclusive evidence that it was not taken.
5. Neither house of the legislature can suspend the provision of the constitution which requires three readings on separate days in each house except in case of urgency, and then only on an aye and nay vote by two-thirds of the house, voting with reference to only one bill then before such house.

Sullivan, C. J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Ada county; George H. Stewart, Judge.

Agreed case between Fanny Cohn, as plaintiff, and Charles S. Kingsley, as defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff offered a deed to the defendant, who is county recorder in and for Ada county, for record, and tendered to defendant the fees for recording such deed as are provided therefor under the act of March 12, 1897 (Acts 1897, p. 62), which the defendant refused to accept. Defendant refused to record said deed unless the fees allowed by the act of March 13, 1891 (Acts 1891, p. 174), were paid to him. The parties then made an agreed case, by stipulation, under the statute, for the purpose of determining the validity of the act of March 12, 1897, appellant herein being the defendant in said agreed case. The district court held the act valid.

W. E. Borah, A. A. Fraser, and Hawley & Puckett, for appellant. Robert E. McFarland, Atty. Gen., for respondent.

QUARLES, J. The controlling question in this case is, is the act of March 12, 1897, regulating the fees and compensation of county and precinct officers, valid? Section 15, art. 3, of the constitution, is as follows: "No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed, for the use of the members: nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon: provided, in case of urgency, two-thirds of the house where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present." It is contended by the appellant that the provisions of said section of the constitution were not complied with by the legislature in the passage of said act. The respondent contends that the presumption is that the legislature complied with all of the provisions of the constitution, and that the court cannot go back of the enrolled bill for the purpose of ascertaining whether the provisions of the constitution were followed or not. Upon this question there is some conflict of authority, but the great weight of authority and the soundest reasoning support the rule that the court not only may, but it is the imperative duty of the court, when this issue is before it, to look to the journals of the legislature, and see if, in passing the statute in question, the legislature have proceeded in the manner provided by the constitution. By the terms of said section of the constitution, supra, six things must be done in the passage of a law, to wit: First, the introduction of the proposed law by bill, necessarily in writing; second, the printing of the bill, with the amendments thereto; third, the reading of the bill on three several days, in each house, previous to a final vote thereon; fourth, the reading of the bill on its final passage, section by section; fifth, a vote on the final passage, by yeas and

nays; sixth, the concurrence of a majority of the members present. These provisions are mandatory, and it is the imperative duty of the legislature to obey them. As we said in the case of Dunbar v. Board of Com'rs (decided at the present term) 49 Pac. 409, the duty of supporting the constitution of the state is imposed upon all public officers by the solemn obligations of the official oath, which obligations cannot be discharged by disobeying, ignoring, and setting at naught the plain provisions of the constitution, but only by obedience thereto. In construing said section of the constitution, it is necessary to inquire into the extent of the application of the proviso which we find therein, viz.: "In case of urgency, two-thirds of the house where such bill may be pending may upon a vote of the yeas and nays dispense with this provision." A careful reading of the section shows that that part of the section which precedes the proviso consists of three separate clauses disjunctively stated. The first clause relates to the introduction of the bill, the second to the printing of the bill, the third to the reading on three several days. We are of the opinion, from the context, from the conditions which the framers of the constitution thought might arise, and from the apparent object which they had in view, that said proviso applies, and was only intended to apply, to the last clause preceding the proviso. It was not intended to authorize the legislature to dispense with the introduction of the proposed law by bill, nor was it intended to authorize the legislature to dispense with printing the bill. The framers of the constitution evidently intended by said provision to put it in the hands of the legislature, in case of necessity to act promptly, to pass a bill in one, instead of not less than six, days, and we can imagine a case where such urgency would exist. For instance, an insurrection should take place, and in order to quell it an appropriation should be promptly made, or the executive should be given some power not then given by existing law, or it should be necessary to forthwith enlarge the militia. The object of requiring the printing and three several readings on separate days is a good one. It was to insure the rights and interests of the people against hasty and inconsiderate legislation. The people, in making and adopting the constitution, were not content with requiring the printing and reading one time only of bills, but have absolutely required that all bills shall be read on three several days in each house; and these several readings cannot be dispensed with, except "in case of urgency, two-thirds of the house where such bill may be pending may upon a vote of the yeas and nays dispense with this provision."

The history of the passage of the act in question, first known as "Senate Bill No. 2," afterwards as "Substitute Senate Bill No. 2," as shown by the journals of both houses, is briefly as follows:

In the senate: "January 7. Senate bill No. 2, introduced by Senator Thomas A. Davis, read for the first time, and referred to the

committee on judiciary. January 11. Judiciary reported, and recommended that the bill be printed. January 20. Bill reported printed. Same day, senate bill No. 2, by Davis, was read the second time by title and referred to committee on engrossment. January 22. Taken from committee on engrossment, and referred to general calendar for action of the committee of the whole. January 23. Senate bill No. 2 made a special order of business for Monday, January 27, at 2:35 o'clock p. m. January 26. Committee of the whole, having the bill under consideration, reported progress, and further consideration postponed for one week. February 2. The committee of the whole reported progress, and asked leave to sit again. February 8. Consideration by the committee of the whole. The committee reported progress, and recommends that the bill retain its place on the calendar, and asked and was granted leave to sit again. On motion of Senator Joseph C. Rich, Senators Ballentine (of Blaine), Keller, and Davis (of Oneida) were appointed a special conference committee on senate bill No. 2, and as such to report at two o'clock p. m. to-morrow, and the further consideration of the bill postponed until that hour. February 10. Thomas A. Davis, of the special conference committee on senate bill No. 2, informed the senate that the house had passed a resolution to confer with a like committee from the senate on said matter, and asked further time, which was granted. February 15. Committee reported, and submitted a substitute for senate bill No. 2, and recommended the passage of the same. Substitute for senate bill No. 2, introduced by conference committee: 'An act regulating the fees and compensation of the various county and precinct officers within the state of Idaho.' Read the first time by title, under suspension of section 15, art. 3, of the constitution, and senate rules, by unanimous consent, and referred to committee on public printing. February 17. Substitute for senate bill No. 2 reported back, printed, and placed on the calendar. February 24. The committee of the whole reported progress in consideration of substitute senate bill No. 2, and asked and was granted leave to sit again. On the same day the following report was adopted by an aye and nay vote of 12 to 7, viz: 'Mr. President: Your committee of the whole reports that it has had under consideration substitute for senate bill No. 2, and reports same back, with the recommendation that it do pass.' Substitute for senate bill No. 2 was filed for second reading, and considered engrossed. Motion made to reconsider the report of the committee of the whole was laid on the table by an aye and nay vote of 13 to 7. Substitute bill No. 2 was considered engrossed, and filed for third reading. February 16. Substitute to senate bill No. 2 read the third time, and passed by an aye and nay vote of 15 to 5. March 8. On motion the senate concurred in house amendments to substitute senate bill

No. 2, with the exception of the twenty-second amendment, and the house notified of such concurrence. On the same day the senate received a message from the house to the effect that the house of representatives had passed substitute to senate bill No. 2, by conference committee, as amended. On the same day the bill was reported correctly enrolled, and signed by the president of the senate and speaker of the house and transmitted to the governor."

In the house: "February 2. Message from the senate that the senate had passed substitute to senate bill No. 2, and that same was therewith transmitted. March 1. Mr. Keat moved that the rules of the house, and article 3, § 15, of the constitution, be suspended, and all senate and house bills, joint resolutions, and memorials on first and second reading be read first and second time by title, and referred to their appropriate committees, which motion was adopted by an aye and nay vote of 24 to 5; and under the said motion substitute for senate bill No. 2, by conference committee, 'An act regulating the fees and compensation of the various county and precinct officers within the state of Idaho,' was read the first and second time by title, and referred to committee on county officers. March 2. The committee on county officers reported the bill back, and recommended its passage. The bill was then read a third time, and referred to the judiciary committee. March 4. The committee on judiciary reported the bill back, with amendments, and recommended that said amendments be considered seriatim by the house, and recommended that the bill, with the amendments thereto, do pass. March 6. Mr. Keat offered two amendments which were adopted. Mr. Rogers offered an amendment which was rejected. Mr. Wright offered two amendments which were rejected. The committee of the whole recommended twenty amendments, numbered from one to twenty, respectively. The question was then put, 'Shall the bill as amended be passed to third reading?' and which question prevailed. Mr. Rice then offered an amendment which was adopted. Then, on an aye and nay vote, 21 to 18, the vote to pass the bill to third reading was reconsidered. Mr. Workman moved, as a substitute to amendment No. 13 by committee of the whole, the amendment herein referred to, as an amendment to the amendment by the committee of the whole, being amendment No. 13. The question was then put, 'Shall the substitute motion be adopted?' and carried by an aye and nay vote of 25 to 10, and so the substitute motion was adopted. It was then ordered that the bill be passed to third reading. Mr. Elder then moved that the rules of the house and section 15 of article 3 of the constitution be suspended, and senate bill No. 2 be considered engrossed, read a third time, and placed upon its final passage, which motion was, on an aye and nay vote of 23 to 3, declared carried. And so the rules and constitution were suspended,

and the house passed to the order of third reading of house bills. Senate bill No. 2 by conference committee, 'An act regulating the fees and compensation of the various county and precinct officers within the state of Idaho,' was read a third time. The bill was then put on its final passage, on an aye and nay vote, and carried, the vote being 32 to 3. March 8. Message received from the senate as follows: 'Mr. Speaker: I am instructed to inform your honorable body that the senate has had under consideration and concurred in house amendments to substitute to senate bill No. 2, with the exception as to the 22nd amendment, which has been amended as follows: In line 1, after the word "subdivision," strike out the figure "5" and insert the figure "3"; in line 2, strike out the figures "79" and insert the figures "78,"—which is herewith transmitted. Respectfully, Wm. V. Helfrich, Asst. Secretary.' On the same day the committee on printing reported that it had had printed amendments to substitute for senate bill No. 2, original amendments returned. Workman moved that the house concur in the amendment proposed by the senate as to senate bill No. 2, in 22nd amendment; subdivision 5 to be changed to 3, and to be line 78 instead of line 79, which motion prevailed."

And this is the record as it appears in the journals of the two houses. While many irregularities worthy of criticism appear in this record, we will only call attention to some of the more flagrant violations of the constitution. As shown by the senate journal, substitute to senate bill No. 2, offered by the conference committee, which was, in effect and in fact, a new bill, was read the first time by title; the senate assuming to suspend section 15 of article 3 of the constitution without an aye and nay vote, a thing which cannot be done under the provisions of the constitution. It does not appear from the journal of the senate that substitute to senate bill No. 2 was read the second time. The recital that it "was filed for a second reading" does not show that it was read a second time. Each house is required, by section 13, art. 3, of the constitution, to keep a journal of its proceedings. This means that the journal shall show all of the proceedings of the house, and all of the steps taken in the passage of every bill. By reason of this provision the journal becomes, not only the best evidence, but the exclusive evidence, of what was done by the house keeping such journal, and courts must impute to the record and statements in the journal absolute verity. The recitals in the journal are conclusive, and cannot be contradicted. *Burkhart v. Reed*, 2 Idaho, 470, 22 Pac. 1; *Clough v. Curtis*, 2 Idaho, 489, 22 Pac. 8; *Wright v. Kelly* (Idaho) 43 Pac. 565; *Water Co. v. Stockslager*, Id. 568; *Blaine Co. v. Heard* (Idaho) 45 Pac. 890. In the passage of a bill by either house, the journal of such house must show affirmatively that all of the requirements of the constitution were complied with by such house. To suspend the provision in regard to reading all bills on

three several days in each house, an urgency must exist; and the suspension must be by an aye and nay vote, and by two-thirds of the house. It is difficult to see that an urgency could possibly exist in the passage of ordinary measures like the act in question, but, waiving that question, it appears that the senate assumed to suspend the reading of the bill at length without an aye and nay vote thereon, in absolute violation of the constitution. If either house can disregard one plain provision of the constitution, then it may disregard all of its provisions, and the constitution, instead of being the fundamental law of the land, is a mere sham, an idle mockery, a nullity. In the house of representatives it does not appear from the journal that the bill was read a first and second time on several days, or that the provision in this regard was suspended. True it is that on the first day of March Mr. Keat introduced in the house an omnibus motion suspending section 15, art. 3, of the constitution, and dispensing with the reading in full the first and second times of "all senate and house bills, joint resolutions, and memorials," and permitting the same to be read the first and second time by title only. This provision of the constitution is to be suspended only in case of urgency, and only with reference to a bill which is then pending and before the house for consideration at the time of the suspension. It cannot be suspended generally. It cannot be suspended for one day. If the legislature, or either house thereof, can suspend it for one day, then such house could suspend it for the entire session, and as to all business, and the provision would be an idle toy to be played with and tossed aside at will. The house adopted 22 amendments, and it does not appear from the house journal that these amendments were read on three several days. This is required by the constitution. Nor does it appear that these amendments were printed prior to the final passage of the bill by the house, which the constitution absolutely requires. The journal of the senate fails to show that the bill was read on three separate days in the senate after it had been amended twenty-two times by the house, or that it was read in the senate at all after it was amended by the house, or that the bill with the house amendments thereto was ever finally voted on in the senate after it had passed the house. A bill may originate in and pass one house, and then be sent to the other house, and be amended in the latter house so as to change the entire purpose of the bill. In such event, if the amended bill is permitted to become a law without having been read or passed by the other house, it would be a violation of the constitution. It was the intention of the framers of the constitution to require amendments that might be adopted to a pending bill to be read three times on several days, the same as original bills, or sections of the pending bill which is amended. In the case at bar, speaking from the journal of the senate, the bill in question, which passed the house after being materially

changed, was never read in the senate or put to a vote on final passage in the senate. A bill which passes one house, and is materially changed by amendment by the other house, and then sent back to the house where it first originated, must go through the same procedure as to reading and final vote as if it was an original bill. The reason for this rule is obvious. In the case at bar, substitute to senate bill No. 2, after it was amended in 22 instances, was not the bill which the senate passed and sent to the house, and must, under the constitution, when returned to the senate, be treated (at least, so far as the amendments are concerned) by the senate as if it originated in the house. The mere declaration by the senate that "we concur in the house amendments" does not answer the requirements of the constitution.

The plaintiff, in preparing his case, procured a transcript of the journals of both houses, certified by the secretary of state to be full and correct. This is the correct practice, and we commend it.

The court should treat the enrolled bill (the fact that it is regularly enrolled) as presumptive evidence that the legislature, in passing it, performed all of its duties; but this presumption is subject to rebuttal. And when the validity of a statute is attacked the party attacking should show by the journals that at least one requirement of the constitution was disregarded, and the failure of the journals to show that any constitutional requirement was obeyed is conclusive evidence that such requirement was not obeyed. If all the requirements of the constitution had been complied with, as to reading, printing, and voting on final passage, in regard to the bill in question, by both houses, then those portions of the act in question which relate to state officials are void for the reason that such matter is not embraced in the title to said act, as required by section 16, art. 3, of the constitution. We only refer to this for the reason that it tends to show how lightly the legislature treated the provisions of the constitution in passing the act in question. The object of the act in question, which was to cut down the excessive cost of litigation, and correct abuses in the regulation of fees of county and precinct officers, is a good one, and one with which this court is in full sympathy. It is therefore with great reluctance that we hold the act in question to be void, but there is no other alternative.

The conclusions reached, after a careful and full consideration, are: First. To determine the validity of a statute, the court can and should, in the proper case, go back of the enrolled bill to the journals of both houses, to ascertain whether the requirements of the constitution were complied with by the legislature in enacting such statute. Second. The act in question is void in toto, by reason of the failure of the journals of the legislature to show a compliance with the requirements of the constitution in passing said act. The

judgment appealed from is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of the defendant. Costs of appeal awarded to the appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(Aug. 24, 1897.)

HUSTON, J. The learned attorney general, on behalf of the respondent, has filed a voluminous petition for rehearing, which we have carefully considered. A perusal of the same shows that the acquaintance of the attorney general with the arguments of appellant, printed and oral, is as limited as is his knowledge of the decision heretofore rendered in this case. In the petition he says: "No reference is made in the opinion of the court herein to said section 13 [article 3], and we are of the opinion that the court, in deciding said case, overlooked said section." An inspection of the opinion will show that we did refer to section 13, art. 3, of the constitution; and for the benefit of the learned attorney general, whose knowledge of the said opinion seems to have been derived from newspaper articles and street-corner talks, we will here repeat what we said in the original opinion in regard to said section, to wit: "Each house is required, by section 13, art. 3, of the constitution, to keep a journal of its proceedings. This means that the journal shall show all of the proceedings of the house, and all of the steps taken in the passage of every bill. By reason of this provision the journal becomes, not only the best evidence, but the exclusive evidence, of what was done by the house keeping such journal, and courts must impute to the record and statements in the journal absolute verity." We will add to what was said before that said section requires each house to keep a full, not a partial, record of its proceedings. If, in the face of this provision, the legislature can omit from its journals parts of its proceedings, it may omit other parts of its proceedings without limit, and the section would be almost, if not wholly, ineffectual. The authorities cited to establish the rule that mere silence of the journal to show that a certain thing was done does not prove that it was not done, we apprehend, arose under constitutions in many respects unlike ours. An examination of many of the authorities cited by the respondent to support this contention seems to limit the rule to those acts which the constitution does not require to appear in the journal. But our constitution clearly intends that all of the proceedings of each house shall appear in the journal. Hence we must presume that everything done by each house, all of its proceedings, and nothing else, appear in the journal. In fact, the legislature seems to have taken this view, and has caused the minute details of its proceedings to be recorded in its journals.

Again, the attorney general is in error when he says in the petition for rehearing, at page 5, that "appellant has never contended that the journals do not show that the ye and nay vote was taken upon the final passage of the bill." We respectfully refer the attorney general, and all other persons who entertain erroneous ideas of the court's rulings and what was argued before the court, to page 9 of appellant's brief, where the following language is found, to wit: "Calling the court's attention to the final passage of this act through the senate, we find the following journal entry in regard thereto (page 12, folio 35, of the transcript): 'Motion. Senator J. C. Rich moved to concur in the house amendment to substitute senate bill No. 2, with the exception of the 22d amendment. Carried, and the house was notified.' Appellant contends that, as this was the final passage of the act through the senate, it was a violation of, and did not comply with, the requirements of the constitution as to such final passage, as there was no vote taken by ayes and nays, which the constitution requires to be done." So the record does show that the appellant argued and contended that the senate never passed the act in question; this contention being necessarily based upon the idea that the bill which the senate first passed was materially changed by the house, and after being so changed was not read or passed on an aye and nay vote in the senate.

It is a matter of regret that the attorney general of the state should ridicule any of the provisions of the constitution, or speak of them as "insignificant," or use this language, which we find in the petition for rehearing: "We admit that the constitution of the state is surrounded with a halo of sanctity and solemnity, a great part of which is fictitious." The constitution requires certain things to be done in connection with the passage of any and all laws. It is true that the doing of these things is a matter of procedure. But by what right shall any one be permitted to say that any of the things required by the constitution to be done are "insignificant," and may therefore be omitted? Has any one more right to say that one of the things required by the constitution is insignificant and may be omitted than he has to say that any other thing required is insignificant and may therefore be omitted? If the right to ignore one provision exists, the right to ignore all exists. If the court must wink at one violation of the constitution, it must wink at other violations of it. If the court must approve one violation of the constitution, it must, to be consistent, approve other violations of it. We must be subject to the constitution, or else subject to the whims of those individuals who treat the sanctity of the constitution as fictitious and its provisions as insignificant. We cannot serve both God and Mammon. We must travel either the one road or the other. We think that safety and security demand that we stick to the letter and spirit of the

constitution, that we obey all of its mandates, until the people, the source of all power, who made it, change its provisions. Let us obey the constitution in all of its requirements, and treat all of its provisions as important.

Mr. Sutherland, in his work on Statutory Construction, speaking of another provision, at section 79, says: "The efficiency of this constitutional remedy to cure the evil and mischief which has been pointed out depends on judicial enforcement; on this constitutional injunction being regarded as mandatory, and compliance with it essential to the validity of legislation. The mischief existed notwithstanding the sworn obligation of legislators. It might be expected to continue notwithstanding that obligation is formulated and emphasized in this constitutional injunction, if it be construed as addressed exclusively to them, and only directory. It would, in a general sense, be a dangerous doctrine to announce that any of the provisions of the constitution may be obeyed or disregarded at the mere will or pleasure of the legislature, unless it is clear beyond all question that such was the intention of the framers of that instrument. It would seem to be a lowering of the proper dignity of the fundamental law to say that it descends to prescribing rules of order in unessential matters, which may be followed or disregarded at pleasure. The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it was devoid of moral obligation, and to be therefore habitually disregarded." Mr. Black, in his work on Interpretation of Laws, at section 13, quotes from the above section of Mr. Sutherland's work with approval, and adds: "As a rule, therefore, whenever the language used in a constitution is prohibitory it is to be understood as intended to be a positive and unequivocal negation." Judge Cooley, in his work on Constitutional Limitations (page 93, 5th Ed.), says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of the constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done, and they must be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced."

in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end, especially when, as has already been said, it is but fair to presume that the people, in their constitution, have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication." Continuing, Judge Cooley says (page 94): "There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application." And at page 156 he further says: "It is a necessary attribute of sovereignty that the expressed will of the sovereign is law; and while we may question and cross-question the words employed, to make certain of the real meaning, and may hesitate and doubt concerning it, yet when the intent is made out it must govern, and it is idle to talk of forms that should have surrounded the expression, but do not. But when the legislative power of a state is to be exercised by a department composed of two branches, or, as in most of the American states, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the lawmakers be clearly expressed, but it is also essential that it be expressed in due form of law, since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." Mr. Black, in his work on Constitutional Law, at page 336, says: "The constitutions of many of the states require that a bill, before it shall become law, shall be read a certain number of times (usually two or three) in each house. In respect to the manner of such reading the provision is considered merely di-

rectory, but not so with regard to the fact of its being read. If the constitution is not obeyed in this latter particular the statute is void." In harmony with the above views, with which we are in full accord, we are compelled to hold that the provisions of our constitution limit the power of the legislature in the enactment of laws to the mode therein prescribed.

The persistent contention of the respondent that the court should not go back of the enrolled bill to the legislative journals to see if the act in question was passed in the mode required by the constitution in face of the fact that this court has repeatedly held that it may do so, is ill advised and not worthy of consideration. To hold in accordance with this contention of respondent would make the provisions of the constitution merely directory and subject to the whims of either house of the legislature, contrary to the expressed will of the people. That the court may go to the journals of the legislature to see if the provisions of the constitution were obeyed by the legislature in the enactment of a law had become the established doctrine of this state before the convening of the last session of our legislature, and the legislature was fully aware of this settled rule when it attempted to pass the act in question. The rules of construction applicable to statutes and constitutional provisions should be permanent and unchangeable. On this point Judge Cooley, in his work cited supra, at page 67, says: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they establish were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying modes of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed, and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protection; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders would be justly

chargeable with reckless disregard of official oath and public duty, and, if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

There is no intention disclosed in the constitution to make the legislature the exclusive judges of the constitutionality of its acts. The legislature must, in the very nature of things, use its judgment, in the first instance, as to whether a proposed action by it is constitutional or not, or whether it is acting in the manner required by the constitution. But whether the legislature should make an honest mistake, or perversely violate the constitution, the remedy for such violation exists, nevertheless, and courts must refuse to aid and abet such violations of the constitution. The court does this by refusing to recognize the validity of any act passed in violation of the mandates of the constitution.

The learned counsel for respondent (the attorney general) cites the provisions of section 9, art. 3, of our constitution, to the effect that each house shall "determine its own rules and proceedings," etc. We are somewhat at a loss to understand the pertinency of this quotation in the consideration of the questions involved. Does the learned attorney general desire to be understood as claiming that this is a controlling provision of the constitution, and is to be taken literally, without regard to the provision of section 15, art. 3? This would be a strange and unheard-of rule of construction, but without it the quotation of counsel is idle.

In preparing his petition for rehearing the learned attorney general says: "Nor have they [counsel for appellant] ever claimed that the journals affirmatively show that the other requirements of the constitution relating to the passage of the bill were not complied with." This proposition is on a par with that other proposition so often reiterated, that this court, in its opinion in this case, assumed to be the judge as to whether an "urgency," as provided in section 15 of article 3, existed. Is it carelessness or fatuity which causes such an entire misstatement of fact as well as conclusion? What the court did say, in effect, was this: That as the constitution authorized the suspension by the legislature of the provisions of section 15, art. 3, of the constitution, with reference to the reading of bills on three several days, only when an urgency requiring such sus-

pension existed, the fact of such urgency must appear upon the record; otherwise the whole purpose and intention of the provision would be defeated. To sum up this whole matter in one sentence: What this court has held is this: Where the mandatory provisions of the constitution require certain things to be done by the legislature in the enactment of laws, the court will hold that where a law has been passed without a compliance with such mandatory constitutional provisions the same is unconstitutional. Against this conclusion, as a legal proposition, we have not, nor shall we ever be, cited to a single authority or principle predicated upon principles upon which our government is founded.

We cannot better answer the oft-reiterated claim, not argument, against the decision in this case, that it assumes that the amendments to a bill must be subjected to the same constitutional rules as the original bill, than by quoting from some of the very numerous authorities cited by the learned attorney general in his petition for a rehearing, as illustrative of the utter inutility of the rule contended for by him. We cite from Cooley on Constitutional Limitations (5th Ed.) p. 167, note 3: "A practice has sprung up of evading these constitutional provisions by introducing a new bill, after the time has expired when it may constitutionally be done, as an amendment to some pending bill, the whole of which, except the enacting clause, is struck out to make way for it. Thus, the member who thinks he may possibly have occasion for the introduction of a new bill after the constitutional period has expired takes care to introduce sham bills in due season, which he can use as stocks to graft upon, and which he uses irrespective of their character or contents. The sham bill is perhaps a bill to incorporate the city of Siam. One of the member's constituents applies to him for legislative permission to construct a dam across the Wild Cat river. Forthwith, by amendment, the bill entitled a bill to incorporate the city of Siam has all after the enacting clause stricken out, and it is made to provide, as its sole object, that John Doe may construct a dam across the Wild Cat. With this title and in this form it is passed, but the house then considerably amends the title to correspond with the purpose of the bill, and the law is passed, and the constitution at the same time saved. This trick is so transparent, and so clearly in violation of the constitution, and the evidence at the same time is so fully spread upon the record, that it is a matter of surprise to find it so often resorted to." In the case of *People v. Starne*, 35 Ill. 121, it is said the courts should not enforce a legislative act unless there is record evidence from the journals of the two houses that every material requirement of the constitution has been satisfied. In the case of *Miller v. State*, 3 Ohio St. 473, much relied upon by respondent, we find that the constitutional provision was as follows: "Every bill shall be fully and distinctly read on three different days, unless in case of

urgency, three-fourths of the house in which it shall be pending shall dispense with the rule." The court held that as the record did show that the bill had been read a third time, although omitting to show that it had been read "fully and distinctly," there was a sufficient compliance with the constitutional provision. In commenting upon this case, Judge Cooley says (Cooley, Const. Lim. [5th Ed.] p. 168, note 1): "The distinctness with which any bill must be read cannot possibly be defined by any law; and it must always, from the necessity of the case, rest with the house to determine finally whether in this particular the constitution has been complied with or not. But the rule respecting three several readings on different days is specific, and capable of being precisely complied with; and we do not see how, even under the rules applied to statutes, it can be regarded as directory merely, provided it has a purpose beyond the mere regular and orderly transaction of business. That it has such a purpose, that it is designed to prevent hasty and improvident legislation, and is therefore not a mere rule of order, but one of protection to the public interest and to the citizens at large, is very clear; and, independent of the question whether definite constitutional principles can be dispensed with in any case on the ground of their being merely directory, we cannot see how this can be treated as anything but mandatory."

The respondent seriously attacks that part of the decision in this case which holds that amendments to a pending bill must be read on three several days, in each house, unless in case of urgency the three readings on several days be dispensed with by two-thirds of the house on an aye and nay vote. That this rule is correct, and in harmony with the letter and spirit of our constitution, we are fully convinced. A "bill," within the contemplation of the constitution, means a draft of a proposed law, and nothing else. After a bill has been introduced in one house, and an amendment which changes one or more of its original features or adds new features is adopted by such house, the amendment then enters into and becomes a part of the bill or draft of the proposed law, and is as much a part of the bill as if it had been incorporated in the draft of the proposed law before it was introduced into such house. The constitution provides (article 3, § 15) that "no law shall be passed except by bill," and further says, "Nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon." *Id.* The term as here used is generic, and means not only the draft of the proposed law as originally introduced, but such draft with all of the graftings which may be made thereon. In other words, it means the full draft of the law which the legislature passes. It is argued that the procedure prescribed by the constitution is burdensome, and will seriously impede legislation. If we admit this to be true, the answer is that the remedy is in a change

of the constitution, not in violations of its mandates. The court did not make, nor can it change, the provisions of the constitution. We are asked to give our assent to the act in question, and pronounce it valid, when it was unquestionably passed, not in the manner required, but in a manner forbidden, by the constitution. We cannot do so, and, should we do so, it would be an attempt on the part of one branch of the government to modify the provisions of the constitution, and usurp a power which belongs to, and can only be exercised by, the people in their sovereign capacity. The object of these provisions are two-fold: First, to insure against hasty and inconsiderate legislation, by giving the opportunity to each member of the legislature to familiarize himself with all of the provisions of every proposed law, and afford sufficient time for reflection as to the effect and consequences of the enactment of any proposed law; second, to give the people the opportunity of learning what is being done or proposed to be done by their legislature, thus affording them opportunity to remonstrate against the passage of any proposed law which they might regard as detrimental or obnoxious. These objects are thwarted and wholly defeated if amendments are not treated as parts of the bill, and read three times on several days, and read section by section on final passage, and then passed by an aye and nay vote. If, under the guise of an amendment, a proposed law which has never been read in both houses is permitted to have the sanctity of law, the provisions of the constitution amount to nothing, and the will of the people may be ignored, and the object of the provisions entirely defeated. More than this, the floodgates of fraud would be thrown wide open, as to the enactment of laws, and the people be without remedy. To show how easily this could be done, just suppose that one senator and one representative desire to pass a certain measure which they know will be obnoxious to the people; that, by agreement, they should draft a bill which is entirely different in intent and effect from the one which they desire passed; that it is introduced into the senate, and perchance known as "Senate Bill No. 2," where it is read on three several days, and properly passed on an aye and nay vote; that it is then sent to the other house, where it is read on three several days, when the member who is in collusion with the senator who introduced it in the senate offers his amendment, which the house adopts, and which changes the entire object, scope, and effect of the proposed law, and which, although relating to the same subject and the same title, is in fact a new and different bill from the one introduced in the senate; that this new bill, called an "amendment," is then printed and passed by the house without being read but one time; that the house then sends a message to the senate, saying that "the house has passed senate bill No. 2 as amended"; and that thereupon a senator "moves that the senate concur in the house amendments to

senate bill No. 2," which motion should be declared passed without the amendment having been read or voted on by an aye and nay vote in the senate. Would not this be "whipping the devil around the stump," and doing indirectly what the constitution directly forbids? Yet this was done in the case at bar, in violation of all established law, and in contravention of the provisions of the constitution.

In this connection, and in approval of what is therein said, we will quote extensively from the decision of the Kentucky court of appeals in *Norman v. Board of Managers*, 93 Ky. 537, 20 S. W. 901, as follows: "Section 46 of our constitution provides: 'No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each house, and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal: provided, any act or resolution for the appropriation of money, or the creation of debt, shall, on its final passage, receive the votes of a majority of all the members elected to each house.' The act originated in the senate, and passed that body upon a yeas and nays vote, entered upon its journal, by the required majority. It then went to the other house, where, after being amended, it passed upon a like vote, entered upon its journal, by a like majority. It then came back to the senate, where the amendments were concurred in without a yeas and nays vote, and without the vote of a majority of the members elected. It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the constitution. It complied with it in neither letter nor spirit. The object of the section above cited was to have the assent of a majority of all of the members elected to each house to all the provisions of the act, and that this should appear by yeas and nays vote entered upon its journal. If a bill, after passing one house in the proper manner, and then, after amendment, passing the other house in like manner, could come back to the house in which it originated, and be adopted by a majority of those voting, or a quorum, it would defeat this object and render the section ineffectual. Let us look at it practically. An appropriation bill of one hundred dollars originates in the senate, and is properly passed. It goes to the house, where it is amended by making the sum ten thousand dollars, and is then properly passed by it. It returns to the senate for concurrence, and is adopted as amended, by a majority of those present, without a yeas and nays vote. Can it be well contended that this would be a compliance with the constitution? If so, then, there being thirty-eight senators, it would require twenty, or a majority of them, to pass a bill for a trifle, but after being amended in the house so as to, perhaps, bankrupt the treasury, it could be concurred in by the senate by the votes of eleven members, or a majority of a quorum; and in case of the house, with its one hun-

dred members, it would require fifty-one to pass the bill if it originated there, but only twenty-six, or a majority of a quorum, to concur in it after it had been changed in like manner by the senate. Further illustration seems needless. It is true it has been held that the final passage of a bill means when it first passes the body, and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yeas and nays vote on the journal, does not apply to amendments or the reports of conference committees. If so, then, no matter how material the change, a majority vote of a quorum may pass the bill. The words 'final passage,' as used in our constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may by reason of amendment become the least important. If so, then the body may pass what is practically a new bill in a manner counter to both the letter and spirit of the constitution. When the bill was voted on in the senate as amended, and after its return from the house, there never was any further action by the senate. It was the final vote, and therefore its final passage; and, being so, a majority vote of all the members elected, with an entry by a yeas and nays vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two houses and the governor, never was passed by the senate by a majority of all of its members, nor by a yeas and nays vote. It is said, however, upon the one side, that having been enrolled, signed by the presiding officer of each house, and approved by the governor, the act must be conclusively presumed to have been constitutionally enacted; that public policy requires this rule, else confusion will result, by our statute law being reduced from a state of certainty to one of doubt. Upon the other side it is urged, with equal ability, that a prima facie case only is thereby presented, and that resort may be had to the journals of the legislature, which are required by the constitution to be kept, and are kept, under the supervision of all the members, as to the truth of the matter. Each position is supported by numerous authorities, and, whether the one rule or the other obtains, more or less abuse and danger may result. There is some dynamite either way, but perhaps not as much in the latter as some apprehend, as the party questioning the enrolled and approved act must at the outset overcome a prima facie case. The first view is the English one, where there is no written constitution. It has been followed by our supreme court (U. S.), and by at least nine of the supreme courts of the states. The weight of authority in this country, as declared in perhaps as many as nineteen states, is, however, the other way."

Since the rendition of the opinion *supra* the court of appeals of Kentucky have held, in *Lafferty v. Huffman*, 35 S. W. 125, that a bill which has been properly enrolled, signed by the presiding officer of each house, and approved by the governor cannot be impeached by reference to the journals of either house to show the mode of its enactment. The latter decision was followed by the same court in two later cases, *Com. v. Shelton*, and *Com. v. Hardin Co. Court*, reported in 35 S. W., at pages 128 and 275. Whether this change in the opinion of that eminent court was caused through fear of appearing guilty of indelicacy and disrespect towards a co-ordinate branch of government, or through fear that the rules enunciated in *Norman v. Board of Managers* would entail upon the court considerable labor which otherwise would not devolve upon it, or other grave reason, we are at a loss to determine. But the doctrine announced in *Lafferty v. Huffman* simply places it in the power of the legislature to violate the provisions of the Kentucky constitution in regard to the passage of bills. Look at it practically, taking our illustration from the decision in *Norman v. Board of Managers*, *supra*. A bill originates in the senate, appropriating \$100, and properly passes the senate. It then goes to the house, where it is amended by making the sum \$10,000, and is then properly passed by the house. It then returns to the senate for concurrence, and is adopted by the senate without the yea and nay vote required by the constitution, and by a majority vote of those present, but less than a majority of all the members elected to the senate. By the Kentucky constitution this appropriation bill could not be law, for the reason that it did not receive a majority of the votes of all the members elected to the senate, voting by ayes and nays entered on the journal. The language of the Kentucky constitution is prohibitory,—"No bill shall become a law unless," etc., and, in the language of Mr. Black, "is to be understood as intended to be a positive and unequivocal negation." The bill is pronounced by the constitution to be "no law," yet the court, by adopting the convenient rule that it will not go back of the enrolled bill, but presume, from the fact that the bill was signed by the presiding officers of both houses and approved by the governor, that all of the requirements of the constitution relating to the passage of bills were complied with by the legislature, substituting fiction for fact, and recognizing said act as valid, simply nullifies the provisions of the constitution relating to the passage of bills. More than that; the court pronounces that to be law which the constitution says is not, and shall not be, law; thus making that which is void valid, and infusing life into that which never before had life. In such case it would be pertinent to inquire who made the act appropriating this ten thousand dollars. The legislature did not, because a majority of all the members elected

to the senate did not assent thereto on an aye and nay vote, for which reason the constitution declares it shall not be law. But the court, by recognizing it as law, gives it the effect and force of law. This, in our opinion, encroaches upon the constitutional rights which the people have reserved, and invades the realm of the lawmaking branch of the government. It is not the province of the court to make law. But when a court, in effect, nullifies provisions in a constitution, and recognizes statutes which are declared to be void by the constitution as valid, it is simply making law. That eminent patriot and statesman, Thomas Jefferson, entertained grave fears lest the republic should be undermined and destroyed by encroachments on the part of the courts upon the constitutional rights of the people. Neither branch of government must encroach upon the constitutional rights of the people. The people of this state have reserved to themselves the constitutional right to have all of their laws made in a certain mode, and have withheld from the legislature the power to make laws in any other mode. Shall the legislature and the judiciary connive together to overthrow this constitutional right? Do the obligations of the official oath rest so lightly upon judicial officers that they may obey those obligations or not, support the constitution or not, as they may deem expedient or inexpedient? May they enforce the fundamental law or refuse to do so at pleasure? If so, then constitutional government is in the last stages of dissolution, and the people have no constitutional rights which must necessarily be respected.

Respondent, in the petition for rehearing, says: "Can it be said that section 15 of article 3 of our constitution requires each amendment to a bill to be printed, or to be read on three several days? If such is the intent and purpose of the constitution, one member in either house can obstruct all legislation by simply offering amendments thereto. If all amendments, however numerous, are required to be printed, and read on three several days after printing, it would cause untold delay." To this we answer: The offering of an amendment or proposition to change a bill is not an amendment, and does not become such until the house in which it is offered accepts or adopts it. Then, under the express commands of the constitution, an amendment which has been offered and accepted, and thus enters into and becomes a part of the bill, must be printed, and the whole bill, not a part of it, must be read on three several days, unless, owing to the existence of an urgency, the three readings on several days be dispensed with by two-thirds of the house on an aye and nay vote entered in the journal. The presumption is that no member of either house will offer amendments merely for the purpose of delay. And if an amendment is offered to a meritorious bill which is pending in either house, merely for

delay, the house presumably will reject it, or should do so. But, if an amendment is offered which possesses merit, then the house in which it is offered should, in the interests of the people, and acting in the line of official duty, accept it, have it printed, and give it that mature and deliberate consideration which the constitution clearly intended should be given to all bills and to all parts of every bill. The position of respondent is absurd, and the argument advanced in this particular is without merit.

Respondent contends that it is not necessary for the journals to show anything except what the constitution expressly says must be entered upon the journals. This would dispense entirely with the office of the journal, and limit the entries therein to a record of the vote upon the expulsion of a member and on final passage of bills. The idea is not in accord with the spirit, and is opposed to the letter, of our constitution.

Respondent also contends that, except as to the entry of the vote on final passage and the vote on expulsion of a member, it is unnecessary to enter any vote in the journal unless demanded by three members under section 13, art. 3, of the constitution. It is the settled rule in nearly all of the courts that when an aye and nay vote is required by the constitution an entry of such vote must appear in the journal. Our constitution says that the reading on three several days cannot be dispensed with unless two-thirds of the house, "voting by yeas and nays," should, in case of urgency, dispense with this provision. This means that such vote shall be entered on the journal. Under section 13, three members, when they desire it, may have the vote on any motion, committee report, or any other question taken by yeas and nays, and entered in the journal. But the vote on final passage of any bill, or on a suspension of the provision which requires the reading of bills on three several days, or on the expulsion of a member, must, whether demanded by three members or not, be by yeas and nays, and entered in the journal.

Respondent contends that some reliance and confidence must be bestowed upon the proceedings of the legislature. This is true, and clearly intended by our constitution. The legislature is required to keep a record of its proceedings. Courts must rely upon that record, and presume it to be absolutely correct, and refuse to permit it to be contradicted. The constitution points out the mode in which all laws shall be passed, and requires the legislature to furnish through its journals the evidence showing the mode in which it passed every bill. By the evidence thus furnished by the legislature it must affirmatively appear that any act, when questioned, was passed by the legislature in that mode only authorized by the constitution. The object of the journals, principally, is to enable the people to ascertain that any and all laws were enacted in the manner required by the constitution, so as to determine whether such was constitu-

tionally passed, and therefore valid and binding. If we refuse to go back of the enrolled bill,—close our eyes and ears to the evidence which the legislature furnishes, and is required by the constitution to furnish,—the object of these constitutional provisions may be wholly defeated.

It has been said that the decision in this case abrogates the principle of majority rule. Does it? The people adopted the constitution, and have expressed in it the will of the majority as to the manner in which laws shall be enacted. Shall 49 members or any part thereof, in one house, or 21 members, or any portion thereof, in the other house, be permitted to enact a law in any other manner? If so, the will of the people is set at naught, and the will of a small number of individuals substituted for the will of the great majority. The creature must not be regarded as greater than the creator. Each of the three co-ordinate branches of our government is the creature of the constitution, subject and necessarily subordinate, thereto. In construing constitutional provisions, certain fixed and absolute rules, which the court cannot disregard, must be observed, viz.: The words of the instrument are to control. The intent of the people in adopting it is to govern. The intent of the people is to be found in the words used. The whole instrument must be examined. Words are not to be regarded as used without occasion. The words used are to be considered with reference to their usual signification. Effect must be given to the whole instrument, etc. It is needless to use further illustrations or cite additional authorities. After another full and careful consideration of this case in all its bearings, I see no reason for changing our views concerning the questions involved. A rehearing is denied.

SULLIVAN, C. J. (dissenting). I think the original opinion in this case should be modified upon two points, at least: First, wherein it holds that the journals must affirmatively show that each and every requirement of the constitution has been complied with in the passage of a bill; second, wherein it holds that the constitutional provisions require bills to be read on three several days in each house before the final vote thereon.

As to the first point: Section 13, art. 3, of the constitution of this state is as follows: "Each house shall keep a journal of its proceedings; and the yeas and nays of the members of either house on any question shall at the request of any three members present be entered on the journal." In the opinion it is held that the meaning of the first clause of said section is that the journal must show all of the proceedings of the house and all of the steps taken in the passage of a bill. While that may be true, I do not think the silence of the journal as to some of the proceedings required by the constitution to pass a bill should be held conclusive evidence, or any evidence, to show that such bill was not regularly passed. The

last clause of said section refers to and commands the entry on the journal of the yeas and nays on any question when requested by three members. Voting is a proceeding required in the passage of motions, resolutions, etc. And, if it was intended by the framers of the constitution that the first clause of said section was mandatory as to every act and proceeding of either house, what was the necessity for the last clause of said section? If the first clause absolutely required the entry on the journals of the yeas and nays whenever a vote was so taken, the last clause of said section adds nothing thereto, and was a work of supererogation. I am of the opinion that it was not intended by the first clause of said section to have all laws held invalid where the journals failed to show that each and every step required by the constitution in the passage of a bill had not been taken. Said section clearly intimates, to my mind, that in the passage of motions, resolutions, etc., when a ye and nay vote is taken, it need not be entered on the journal, unless requested by three members, although said section requires each house to keep a record of its proceedings. Section 15 of said article 3 provides, among other things, that on the final passage of a bill the vote shall be by yeas and nays, and entered upon the journal. Why provide in said section 15 that such ye and nay vote shall be entered on the journal, if such act was commanded by the first clause of section 13 of said article 3? Thus it is shown that the framers of the constitution, after directing each house to keep a journal of its proceedings, expressly and specifically commands that the ye and nay vote on any question must be entered on the journal on the request of three members, and also commands that on the final passage of any bill the vote must be by yeas and nays, and entered on the journal. I find no provision in the constitution that expressly requires either house to enter on its journal the fact that a bill was printed, or that it was read on three several days, before being placed on its final passage. The rule for which I contend has obtained in the state of Illinois, and many other states of this Union, for many years, and not a single instance has been called to my attention where a legislature has resorted to the means suggested by my associates in the enactment of laws in violation of said provisions of the constitution.

In *Miller v. State*, 3 Ohio St. 475, Chief Justice Thurman, speaking for the court, said: "Thus we have, *inter alia*, the provisions before quoted, 'that every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule.' This is an important provision, without doubt, but nevertheless there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by

any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences." It is said by Mr. Sutherland in his work on *Statutory Construction* (page 48): "Journals are records, and, in all respects touching proceedings under the mandatory provisions of the constitution, will be effectual to impeach and avoid the acts recorded as law and duly authenticated, if the journals affirmatively show that these provisions have been disregarded. In the absence of such an affirmative showing, and even in cases of doubt, it will be presumed that a quorum was present; that the necessary readings occurred; that amendments made by one branch, though extensive, were germane; that they were concurred in by the other branch,—though the journals may be silent." Touching the question under consideration, it is stated in *Black on Constitutional Law* (page 297) as follows: "But if the journal entries are ambiguous, or if they fail to show facts which the constitution does not expressly require them to show, this will not raise any presumption against the validity of the action of the legislature. On the contrary, the courts will presume that the legislature fully complied with the constitutional requirements, although the journals do not show the fact." In *State v. Illinois Cent. R. Co.*, 33 Fed. 730, under constitutional provisions like our own in regard to reading a bill upon three different days, it is held that the failure of the journal of the senate to show compliance therewith will not invalidate the bill or act. The case is from the United States circuit court in and for the Northern district of Illinois, and the opinion is by Mr. Justice Harlan, of the supreme court of the United States, who presides in the Seventh circuit. In that case it was contended that the general assembly, in passing the act under consideration in that case, did not meet the requirements of the constitution, in that the journals fail to show that the bill was read on three different days in each house. Nothing appeared in the senate journal to show that the bill had been read a second time in that body, and, after stating the facts, Mr. Justice Harlan states that the question for determination was, "Is it essential to its [the bill's] validity that it should appear in the journal that the bill was read on three different days in each house? Does the mere silence of the senate journal as to whether the bill was in fact read a second time in that body on some one of the three different days raise a conclusive presumption that it was not so read?" The learned justice then calls attention to the fact that counsel, to support the proposition that the mere silence of the journal as to whether a bill was read on three different days was fatal to the validity of the act, cites *Span- gler v. Jacoby*, 14 Ill. 207, in which that court said: "In our opinion, it is clearly competent to show from the journals of either branch of the legislature that a particular

act was not passed in the mode prescribed by the constitution, and thus defeat its operation. The constitution requires each house to keep a journal, and declares that certain facts made essential to the passage of a bill shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and presumed to contain a full and complete history of its proceedings. If a certain act receives the constitutional assent of the body, it will so appear on the face of the journal; and, when a contest arises as to whether an act was thus passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is that an act thus verified became a law pursuant to the requirements of the constitution, but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be contended that the proper entry was made in the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall." In commenting upon that quotation the learned justice said: "But we are not satisfied that the court intended to express an opinion upon that precise point [the point as to the silence of the journal as to the second reading of the bill]. Although it did not appear in that case that the bill was read the third time before it went to the senate, or that the yeas and nays were called, no special comment was made by the court upon the silence of the journal as to the bill not being read the third time. Plainly, its language had reference to the fact that the journal did not show the passage (final) of the bill by yeas and nays. It was with reference to that fact that the language above quoted was used." Justice Harlan in that case also comments upon the case of *Turley v. Logan Co.*, 17 Ill. 152. He quotes the following therefrom, to wit, "The journal should show the readings and the passage of the law by a constitutional vote," and says, "But nothing was said as to what would be the result when the journal did not show that each of the required readings was had." And further on he says: "That we do not misinterpret these decisions is shown in *Schuyler Co. Sup'rs v. People*, 25 Ill. 163, where one of the grounds of objection to an act was that the senate journal did not show that the bill was read three times before it was put upon its final passage. The court said: 'The constitution does not require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law, but the constitution does not say that three

several readings shall be entered on the journals. Some acts performed in the passage of laws are required by the constitution to be entered on the journals, in order to make them valid, and among these are the entries of the yeas and nays on the final passage of every bill; and we held in *Spangler v. Jacoby*, 14 Ill. 297, that where the journal did not show this the act never became a law. But, where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence of the journals on the subject ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done, unless the journals affirmatively show that it was not done.'" After using the language above quoted it is said: "This decision was expressly reaffirmed in *Railway Co. v. Hughes*, 38 Ill. 186. Nothing to the contrary was decided in *People v. Starne*, 35 Ill. 141, or in *Ryan v. Lynch*, 68 Ill. 161, which is relied upon as modifying or overruling *Schuyler Co. Sup'rs v. People*. The case in 35 Ill. recognizes the doctrine of the *Schuyler Co. Case*, and goes upon the ground that the yeas and nays were not called and spread upon the journals of the house on the passage of the bill. In *Ryan v. Lynch* it appeared from the journal that the bill was read twice in the senate, but the journal was silent as to the third reading, and it did not show any call of the yeas and nays on the passage of the bill. The decision was that as the proceedings in the senate, certified by the secretary of the state, were competent proof of the facts stated therein, the failure of the journal to show a call of the yeas and nays was fatal to the bill. Indeed, we do not find that any of the numerous decisions of the state court relating to the passage of bills by the legislature have modified or overruled the doctrine announced in *Schuyler Co. Sup'rs v. People*. With that doctrine we are entirely satisfied. It is in harmony with adjudications in many states whose constitutions have provisions similar to those in the constitution of Illinois which we have been considering. * * *

We therefore hold that the mere silence of the senate journal as to whether the act of 1869 was read the second time in that body does not justify us in holding it to be invalid." The constitutional provision of Illinois under which said decision was made is as follows: "Each house shall keep a journal of its proceedings. The yeas and nays of the members shall on any question, at the desire of any two of them, be entered on the journal." Const. 1848, art. 3, § 13. Section 13, art. 3, of our constitution is as follows: "Each house shall keep a journal of its proceedings; and the yeas and nays of the members of each house on any question shall at the request of any three members present, be entered on the journal." The purpose and intent of the said sections are substantially the

same. In Illinois the yeas and nays must be entered on the journal at the "desire" of any two members, and in Idaho at the request of any three members. And, so far as the question under consideration is concerned, sections 13 and 21 of article 3 of the constitution of Illinois are substantially the same as sections 14 and 15 of the constitution of Idaho. Said section 21 of the Illinois constitution provides that on the final passage of all bills the vote shall be by yeas and nays, and shall be entered on the journals, while section 15 of article 3 of the Idaho constitution provides substantially the same.

The weight of authority under constitutions similar to ours, so far as I have examined, is that, unless the journal affirmatively shows that some requirement of the constitution in the passage of a bill has been omitted, the presumption is that such requirement has been complied with, although the journal be silent in regard thereto, except when the constitution commands such act to be entered on the journal. For example, where the constitution declares that on the final passage of a bill the vote must be by yeas and nays, and entered on the journal, in such a case the act would be held invalid if the journal failed to affirmatively show that such vote was taken and entered as commanded by the constitution. In the case of *Schuyler Co. Sup'rs v. People*, supra, it is held, under that provision of the constitution requiring a bill to be read in either house on three different days, that, if the journal is silent as to the readings of the bill, it will be presumed that the bill was read. It is stated in *State v. Illinois Cent. R. Co.*, supra, that the decision in the *Schuyler Co. Case* is in harmony with the adjudications of many states, and the court cites *Miller v. State*, 3 Ohio St. 475; *McCulloch v. State*, 11 Ind. 424; *State v. City of Hastings*, 24 Minn. 78; *English v. Oliver*, 28 Ark. 317; *Chicot Co. v. Davies*, 40 Ark. 200; *State v. Francis*, 26 Kan. 724; *In re Vanderberg*, 28 Kan. 243; *State v. Mead*, 71 Mo. 268. See, also, to the same effect, *Pack v. Barton*, 47 Mich. 520, 11 N. W. 367; *Common Council of Detroit v. Board of Assessors*, 91 Mich. 78, 51 N. W. 787; *Walker v. Griffith*, 60 Ala. 367; *Blessing v. City of Galveston*, 42 Tex. 641; *Prescott v. Board of Trustees*, 19 Ill. 324. In *McCulloch v. State*, supra, it was held: "Where the legislative journals are silent touching a step in the proceedings which the constitution requires to be taken in the passage of a bill, it will be presumed by the courts that the constitutional requirements were complied with." It is stated by Judge Cooley, in *Constitutional Limitations*, at page 167 (6th Ed.), as follows: "The journals which each house keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not the passage in the manner provided by the constitution must be presumed, in accordance with the general rule, which presumes the proper discharge of official duty."

On the second point in the opinion in this

case we held that amendments to a bill must be read three times on three several days, the same as the original bill. In *People v. Wallace*, 70 Ill. 690, it is held that the constitutional provision requiring bills to be read on three several days before their passage does not apply to amendments to such bills. Mr. Sutherland, in his work on *Statutory Construction* (section 49) says: "The readings required on bills are intended to afford opportunities for deliberate consideration of them in detail, and for amendments. Hence amendments are admissible during the progress of a bill through the process enactment. They are not subject to the same rule as bills, in regard to the number of readings. They must be germane to the subject of the bill, and are not required to be read three times; nor does concurrence by one house in amendments made by the other require the yeas and nays, and their entry on the journal, under the provisions for those things, on the final passage of bills." See, also, *Miller v. State*, 3 Ohio St. 475. The rule for which I contend does not relieve the members of either house from keeping their oaths of office, and, if they conscientiously keep them inviolate, they will see to it that each and every constitutional requirement in the enactment of laws is fully and fairly met. The commands found in sections 13-15, art. 3, of the constitution of this state, are directed to the members of the legislature, and their oaths of office require them to see to it that the provisions of those sections are conscientiously complied with. The rule holding that, if the journal is silent upon matters which are not expressly required to be entered thereon in the passage of a bill, the presumption is that the legislature complied with the requirements of the constitution, does not relieve the legislature from keeping a full and complete journal of its proceedings; and under the first clause of section 13, art. 3, it is commanded to do so. My conclusion is that a law passed by the legislature should not be held invalid because of the fact that the journals fail to show that each and every act required by the constitution to be done in the passage of such law had been done, unless such act or proceeding is expressly commanded by the constitution to be entered on the journal. As, for instance, the vote on the final passage of a bill is commanded by the constitution to be taken by yeas and nays and entered on the journal. If the journal was silent as to the yeas and nays being taken, in such case the court would have jurisdiction to hold such bill invalid, and should do so; but if the journal was silent as to the printing of the bill, and the three several readings in each house, and of the adoption of an amendment by yeas and nays vote, as those acts are not expressly commanded to be entered in the journal, the presumption would be that those necessary acts were done, and such bill held valid. Otherwise if the journal fail to show the final passage of such bill by a yeas and nays vote, as the final passage of a bill is expressly commanded to be by yeas and nays, and entered on the

journal. And, further, that amendments to a bill are not subject to that provision of the constitution requiring bills to be read on three several days in each house. The original opinion should be modified as above indicated, or a rehearing granted.

QUARLES, J. (concurring). I concur with the views expressed in the opinion of Mr. Justice HUSTON in this case. His conclusions, and the reasons given therefor, I regard as being in perfect harmony with the letter and spirit of our constitution. Mr. Chief Justice SULLIVAN, while concurring with the conclusion reached in this case, does not agree with the majority opinion on two points which I will briefly discuss.

First, that the legislative journals must affirmatively show a compliance with the requirements of the constitution in the passage of a bill, the validity of which is questioned. Upon this point we are cited to a number of authorities, and furnished with a number of quotations. But a careful study of the authorities cited is all that is needed to show that the rule therein announced is based merely upon precedent,—because some court has so decided,—and not upon reason and common sense, the basis and foundation of all law. The careful and painstaking student finds many inconsistencies in the authorities touching constitutional questions. A careful study of the adjudicated cases leads to the conclusion that both the legislative and judicial departments of government of several of our states have chafed under the limitations and restrictions imposed by constitutions, and that they have at times done indirectly what the constitution directly forbids. In one case cited by Mr. Chief Justice SULLIVAN the constitution prohibited the introduction of any bill after the fiftieth day. A bill to incorporate a township had been introduced in due season, but after the fiftieth day a substitute for this bill, incorporating a city outside of the limits of the proposed township was introduced and adopted. The title and subject-matter of the original bill were entirely changed, and in lieu thereof a new title and a new proposition or subject-matter was substituted. The substitute bill passed, and was approved by the governor. The court held the act valid. In another case which he cites from the same court a bill to incorporate a township had been introduced before the fiftieth day, but after the fiftieth day a substitute for such bill, for the purpose of incorporating a county out of the same territory, was introduced, adopted, and passed. The court held this bill valid. It is apparent that the object of said provision was to prevent the introduction and "railroading" of bills through the legislature during the last days of its session, and that the legislature should have the last 10 days of its session to devote to those propositions which had been submitted to it prior to the fifty-first day of its session. But in both of these cases the object of the provision was wholly defeated,

and the legislature, under the guise of amendment or substitute, did indirectly what was expressly prohibited by the constitution. The object and purpose of creating a city, a township or precinct, and a county, as well as the powers exercised by each, are so entirely different that it is difficult to see how the court held the amendment or substitute in either of these cases germane to the original bill. In the first case it is easy to see that the entire population of the county might be heartily in favor of creating the proposed township. It is easily conceived that the people of the county might have been opposed to creating the new city, and perhaps a good majority of the residents of the new city were opposed to the incorporation of it; and it requires no great stretch of imagination to surmise that in the last case the great majority of the people of the old county were opposed to any division of such county, or the creation of a new county out of part of their territory. Perchance, in both cases, the people immediately interested, after carefully watching the proceedings of the legislature to see if any proposition affecting their local government and interests, to which they were opposed, should be introduced into their legislature, at the end of the fiftieth day saw that none had been introduced, and relying upon the aforesaid provision in their constitution, and believing that no such proposition could thereafter be proposed, ceased their vigilance, and quit watching the proceedings of their legislature. The existence of such conditions is suggested by the fact that the proposition to create the city in the one case, and the new county in the other, came in under mask, and not openly and in the usual way. It was doubtless through such apparent violations of plain constitutional provisions that Judge Cooley was induced to comment upon such frauds by giving the illustrations of substituting, by amendment, for the proposition to incorporate the city of Siam, the proposition to dam the Wild Cat river, so aptly quoted by Mr. Justice HUSTON. The lessons to be learned in these two cases show the wisdom of obeying the constitution in letter and spirit, the necessity of refusing to recognize as law any act which is expressly prohibited by the constitution, whether passed directly and above board, or passed indirectly, under cloak, or the habillment of fraud, and show the ease with which the plain provisions of the supreme law of the land can be evaded and effectually defeated by the joint action of the legislature and the courts. Now, courts do not make, but must obey and enforce, the law. In our constitution we find the supreme standard by which all statutory enactments are to be measured and judged. If, in a given case, the court must and does apply this standard, and finds that the statute falls short of the required measure, the court's duty is plain. In such case the court has no discretion, but must follow the constitution, or else, as was said by Judge Cooley, be guilty of "a violation of official oath and public duty." If courts,

through fear of appearing indelicate, recognize acts which are prohibited by the fundamental law, when such acts are indirectly committed, they are not discouraging, but encouraging, fraud, and are not closing the gates to fraud, but opening them and inviting entrance thereto.

As evidence of the inconsistencies of writers upon constitutional law, read the quotations from Mr. Sutherland, Judge Cooley, and Mr. Black given by my associates in this case. Then carefully study all of the authorities cited. How, then, are we to determine whether a bill becomes a law or not? In my opinion there is but one way to ascertain, and that is to look to the journals to see if the legislature has done those things commanded by the constitution. The object of requiring the legislature to keep a journal of its proceedings, in my opinion, is that the people, from whom all power comes, may have positive and permanent record evidence as to what has become law and what has not. Under this view it becomes absolutely necessary that the journals show that the steps expressly commanded by the constitution in the passage of a bill were taken. I confess that it is embarrassing for a court to take this position. To avoid such embarrassment, for reasons of expediency, and on account of a so-called public policy, some of the courts have adopted the view of Mr. Chief Justice SULLIVAN,—that, in order to hold a statute void for the reason that it was not passed in the mode required by the constitution, it must affirmatively appear by the journals that some constitutional requirement was not obeyed, and that the silence of the journal as to whether a requirement was obeyed or not is not sufficient to authorize the court to hold that such requirement was not obeyed. This proposition involves the absurd anomaly of requiring the plaintiff to prove a negative, and to prove it by a dumb witness,—one who does not speak, but is silent upon the question at issue. We will illustrate the absurdity of the proposition by supposing the following case, to wit: A bill is introduced into the senate, and read one time. When the second reading of bills is reached the next day, this bill, owing entirely to oversight, is overlooked, and not read the second time. Under these circumstances, the senate journal is silent as to the second reading, and does not say whether it was read the second time or not. Afterwards what should have been the third reading occurs, and the journal so shows. The bill passes both houses, and is signed and approved. Now, bear in mind that the bill was not read three times in the senate, but only twice. The journals show what was done, but do not show what was not done. By the express terms of the constitution, this bill is not law, because it was not read three times by each house of the legislature. Now, applying the doctrine of presumption contended for by Chief Justice SULLIVAN, that because the journal does not say in so many words "this bill was not

read three times," the court must, by presumption, supply the second reading, and thus make a law which the legislature did not, according to the constitution, make, and you effectually eliminate this provision from the constitution. If the court can read the bill for the legislature one time, it may do so two, or even three, times. If the journal need not necessarily show anything in regard to the passage of a bill except the final vote thereon, then the legislature may fail to read a bill at all, and by refusing to say anything about the reading of it the court must say that it was read three times, because the journal does not expressly say that "this bill was not read three times." The idea is monstrous, and the danger of such a rule is fully apparent, and its adoption would be tantamount to a refusal to obey and support the constitution.

The functions of the legislature consist exclusively in making laws, with but few exceptions. Then why command it, in the supreme law of the land, to "keep a journal of its proceedings," unless the journal is to show what bills have been enacted into law? Mr. Chief Justice SULLIVAN says in his opinion that the first clause of section 13, art. 3, of the constitution, "commands the legislature to keep a full and complete journal of its proceedings." This is undoubtedly true, and it is apparent that the object of this provision is to make the legislature show what it has done, leaving nothing whatever to implication. And, when the legislature says what it has done with regard to the passage of any bill, it negatives the idea that it has done anything else in regard thereto. Silence proves nothing where one is commanded to speak. But in such case the refusal of the witness to say that he did that which he should have done would justify the presumption that he did not do it. Our constitution commands certain things to be done in regard to the passage of a bill, and says that no bill shall become a law unless these things are done. It seems a travesty upon our supreme law to say that it guarantees to the people the right to have their laws made in this manner only, and that there is no way of enforcing this right, or for the court to say that this is law when the constitution says it is not law. There is one safe course which is in harmony with the constitution, and that is to adhere to the rule that the legislature must show, as commanded by the constitution, that it has done everything required by the constitution to be done in the serious and important matter of making laws. This is the rule of evidence provided by the constitution. It is not presumptuous in the courts, nor disrespectful to the legislature, to judge the acts of the legislature by its own evidence; and, as said by Mr. Chief Justice SULLIVAN in his opinion herein: "The commands found in sections 13, 14, and 15, art. 3, of the constitution of this state, are directed to the members of the legislature, and their oaths of office require them to see to it that the provisions of these sections are conscientiously complied

with." The only difference between us is that he thinks that, in courtesy to the legislative department, the judiciary should, by presumption, supply its omissions, while I cannot think so. To deal fairly with the legislature, and at the same time support the constitution in letter and intent, we should judge the acts of the legislature by its own evidence,—neither adding anything thereto nor taking anything therefrom. It is not presumptuous, indelicate, or disrespectful for the court to say: "We presume that the legislature obeyed the obligations of the official oath, and recorded in its journal every step taken by it in the passage of this bill. And because the journals do not show that this bill was read the second time in the senate, or that such reading was, on account of urgency, dispensed with by two-thirds of the senate on an aye and nay vote, we presume that the second reading was inadvertently overlooked in the senate, and did not occur. And, because this bill was not read three times in each house, the constitution says it is not law, and we cannot recognize it as law." This is, to my mind, the only safe and correct rule. It imposes no duty not enjoined by the constitution, and works no hardship. Its observance simply carries out the provisions of the constitution, in letter and spirit, preserves the constitutional right of the people to have their laws made in a careful and considerate manner, and properly respects the integrity of the legislative department. But violations of the express mandates of the constitution by the legislature, whether occurring through inadvertence or otherwise, cannot be tolerated. To prevent fraud, and to avoid the probable error of the court adjudging an act passed by the legislature to be law which by the constitution is not law, the court is compelled to adopt the rule that the journals of the legislature must affirmatively show that the express requirements of the constitution were complied with in the enactment of any law which is attacked on the ground that it was not passed in the manner required by the constitution. The journal is read in each house daily, and it is proper to conclude that the members and officers will see that it is correct. In fact, the journal is kept under the immediate supervision of each member. It is no great burden for the members to see that bills are reported, printed, read three times, and passed by an aye and nay vote, and that these steps are shown by the journals. The constitution requires it, and, being so required, courts should take the journals for what they say, and regard them as telling "the truth, the whole truth, and nothing but the truth." We do not impugn the integrity of the legislature. We think the fault lies principally in the fact that the legislature has followed the procedure of its territorial predecessors and that of our national congress, inadvertently overlooking the fact that our state constitution imposes limitations and restrictions upon the legislature which were not imposed upon the territorial legislature or upon congress; there

being no provision in the federal constitution requiring congress to read all bills three times, etc.

Our views of the good faith and integrity of the legislature can best be expressed by quoting the language of the supreme court of the state of California in the case of *Weill v. Kenfield*, 54 Cal. 111, as follows: "To our respect for a co-ordinate department of the state government is added our personal regard for the distinguished gentlemen who have so ably presented the view of this case from which we have felt constrained to dissent. We might freely admit that none of the restrictions of the constitution would be necessary to the proper discharge of their duties by the honorable gentlemen who compose the present assembly. But the people may not always be so happy in the choice of their representatives, and we deem it our duty to require a strict compliance with mandatory provisions intended to prevent evils in the past, and which may reappear in the future." The doctrine of presumption, as applied by Chief Justice SULLIVAN to the passage of bills, originated in England, where they have no written constitution. The English rule stops all inquiry at the enrolled bill, while the rule contended for by Mr. Chief Justice SULLIVAN permits the court to go back of the enrolled bill to the journal, to see if it passed by the required aye and nay vote, supplying everything else that the journal is silent about. The rule for which he contends is the English rule with a slight modification. If the court is to supply the principal part of the evidence by presumption, it would be more consistent to supply it all, and refuse to go back of the enrolled bill. In *Weill v. Kenfield*, supra, the supreme court of California, in discussing the question under consideration, say: "It was intended by and declared in the clause so often referred to that the reading of a bill shall no longer be implied from the mere silence of senators or assemblymen, but that the consent of the house in which the bill is pending to a waiver of the actual reading shall be indicated only by a formal vote of 'yeas and nays,' when two-thirds shall declare that an 'urgency' has arisen which renders it proper to dispense with the reading. The vote upon dispensing with the reading goes upon the record, so that each representative may be held responsible to his constituents for his conduct in respect to this, as well as other questions. The entry must now accord with the fact. It was not to be entered in the journal, as was often formerly the case, that a bill is read when it is not read. It must either be read, or the members called on to declare affirmatively that it shall not be read, because of pressing and urgent necessity. We do not dare to determine that any constitutional prerequisite to the validity of a law is of no practical service. It may be, as suggested, that the evil effects of the delays caused by the interpretation of the language of the constitution

we have adopted may more than counterbalance any benefits that may accrue to legislation by the additional opportunities afforded each lawmaker to become acquainted with the contents of all bills. But we are not permitted to consider the policy of a provision, where its language, as in the present instance, seems to us plain and positive. The whole of this line of argument is disposed of by the phrase, *'Ita lex scripta est.'*" In *People v. Starne*, 35 Ill. 121, the supreme court of Illinois use this language: "Were it not for the somewhat peculiar provision of our constitution, which requires that all bills, before they can become a law, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect, a bill thus signed and approved would be conclusive of its validity; and binding force as law. But this provision having been adopted to prevent improvident legislation, and to prevent the enforcement of bills that were never enacted into laws, the means of its enforcement are implied. It is true that these means are negative, and not positive, in their character. Whilst neither of the other co-ordinate branches of the government have authority to command its observance, the judicial and executive departments are not bound to enforce such bills as laws. Whilst they are *prima facie* binding, still when it appears from the journals that either of these constitutional requirements is wanting, the provisions of the bill will not be enforced. According to the theory of our legislation, when a bill has become a law there must be record evidence to every requirement from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses." In the last two sentences the learned Illinois court simply expresses in other words the rule announced in the original opinion in this case, viz. that the journals must affirmatively show that the requirements of the constitution were complied with by the legislature in the passage of a bill the validity of which is questioned. With all due deference to Judge Harlan, for whose learning and eminent ability I have the profoundest respect, I must say that his interpretation of the above language of the supreme court of Illinois seems strained and unauthorized. The same learned court, in *Ryan v. Lynch*, 68 Ill. 160, held that the certificate of the secretary of state, giving "full and true copies of the journals of the senate and house of representatives, so far as the same relate to the passage of the bill," was competent evidence to prove "the nonexistence of any particular fact." The nonexistence of the fact is shown by presenting the journal, or full copies thereof, from which it appears that certain steps were not shown. The journal showed what facts existed. It should have shown other facts. Its failure to do so proved their nonexistence.

Touching the second point discussed by Mr. Chief Justice SULLIVAN, I shall content

myself with saying that Mr. Sutherland cites as sustaining the rule that amendments need not be read three times only three cases, to wit: *Miller v. State*, 3 Ohio St. 475; *People v. Wallace*, 70 Ill. 680; *State v. Platt*, 2 S.C. 150. The two last-named cases merely mentioned the rule, and do not attempt to give any reason whatever in support of it. And in the Ohio case, after saying "It is not unusual, in parliamentary proceedings, to amend a bill by striking out all after the enacting clause and inserting a new bill," the court proceeds to say: "When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days, but when there is no such vital alteration three readings of the amendment are not required." Notice that the vital alteration consisted in wholly changing the subject or proposition of the bill. Did the learned court mean to convey the idea that, if some part of the subject or proposition remained,—a one-hundredth part, for instance,—it was not necessary to read the amendment, although it should wholly change ninety-nine hundredths of it? Such a rule is not based upon reason. The reasoning on this point in the opinion of Mr. Justice HUSTON herein is so clear and constant with common sense, and so apparently in harmony with the evident intent of our constitution, that I accept it fully, and refuse to blindly follow a small number of precedents that are not based upon reason and common sense, but opposed to the letter and intent of our constitution. For the reason that it is the unanimous opinion of the court that the act in question is void, a rehearing is properly denied.

CITY OF GUTHRIE v. THISTLE.

(Supreme Court of Oklahoma. July 30, 1897.)

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—NEGLIGENCE—PROVINCE OF JURY —INSTRUCTIONS—DAMAGES—SPECIAL VERDICT—WAIVER.

1. The plaintiff, while passing along on the passageway on the west side of First street, in the defendant city, at 8 o'clock at night, in January, when a part of the sidewalk was obstructed by stones on one side of the pavement, and by an excavation on the other, tripped in the darkness over a piece of baling wire, or something of that kind, stretched across the sidewalk, in connection with a building then in process of construction. She fell and was injured, and brought this suit for damages. The usual city electric light near that point was not burning. There was no danger signal at the point of danger. The plaintiff's testimony was that she was passing quietly and carefully along; that she had been in the habit of passing the point several times a day from her boarding house to her place of business, but had not seen the sidewalk in that condition before; did not know that the sidewalk had been taken up; and testified that she was walking very carefully, quietly, slowly, and steadily, and that, as well as she could see, there was plenty of room to walk, and she thought there was plenty of room to walk. Held, that the case presents one which should be referred to the jury to determine the plaintiff's right of recovery, under the proper instructions from the court. When such a state of facts is presented in evidence, it is the prov-

is the province of the jury to determine all questions of negligence and care.

2. An instruction was properly given by the court to the jury that it was incumbent upon the plaintiff to show, if she was injured, that it was caused by reason of the negligence of the defendant in not keeping its streets and sidewalks in repair, and that in passing upon the street she herself used reasonable and ordinary care, and that unless they so found they could not award the plaintiff damages; and, further, that, while the defendant was bound to use reasonable care and caution and supervision to keep its streets and sidewalks in a safe condition to travel, in the ordinary mode of traveling, by night as well as by day, and, if it fails to do so, it is liable for injury sustained in consequence of such failure, provided the party injured in exercising reasonable care and caution, but if by the exercise of reasonable care and caution the plaintiff could have avoided the consequences of the defendant's negligence she cannot recover.

3. A special finding of fact by the jury that the plaintiff was damaged "by reason of her incapacity to perform labor in the sum of three hundred dollars" is not inconsistent with the general verdict of \$500, inasmuch as the capacity to perform labor is but one of the elements which the jury was entitled to consider in assessing damages for the plaintiff.

4. A failure to object to the return of special findings of fact, and to permit the jury to be discharged without specifically answering the inquiries, which they had neglected or failed to answer, or had overlooked, is a waiver of the right to an answer, and it is too late to object to it after the jury is discharged.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by Pleasance L. Thistle against the city of Guthrie. From a judgment for plaintiff, defendant brings error. Affirmed.

The case was brought by the defendant in error in the district court of Logan county. Among the material averments of the petition were that on the — day of January, 1893, First street, a street in the defendant city, was much traveled and used by the citizens of that city and the public generally, and was negligently allowed to become out of repair at a point thereon between Harrison and Oklahoma avenues, on the west side of First street; that there was a dangerous hole or excavation at that point, and that a number of large stones extended from the west side of the street, at the point referred to, east for several feet into the street, almost entirely blocking the portion of the street on which the west sidewalk at that point was laid, and that there were small wires stretched across the portion occupied by the sidewalk, and at that point near to the ground, and of all of which excavation and obstructions the defendant had notice, but failed and neglected to improve the same for the space of 5 or 10 days; that the obstructions and excavation were made in the construction of the Victor building; that permission had been given by the defendant to erect that building, and to maintain the obstructions and excavation; that on the night following the 30th day of January, 1893, the excavation and obstructions were negligently allowed to remain without lights, open, and exposed, and that the usual electric light at the nearest street corner was not burning, and

that there was no guard stationed around or near them, to inform the public or the plaintiff of the dangerous condition of the west side of First street at that point. About 8 o'clock on that night, the plaintiff was lawfully traveling on the street at the point mentioned, and along the sidewalk on the west side of First street, and at the point mentioned, and by reason of the wire and large stones obstructing the sidewalk, which had been thus negligently left exposed and unguarded, she accidentally, and without fault on her part, struck one of her feet against one of the wires, or against one of the stones, and was violently thrown against another of the stones, and into the excavation, where she was greatly injured, and that she suffered personal injuries of a permanent character. She demanded damages in a large sum. A demurrer to the petition was overruled, and the defendant answered, denying generally, and alleging that the injury, if any was sustained, was due to her own fault and negligence, and was without fault or negligence on the part of the defendant. Upon the trial of the cause the jury was instructed by the court that "it was incumbent for the plaintiff to show, if she was injured, that it was caused by reason of the negligence of the defendant in not keeping its streets and sidewalks in repair, and that in traveling such streets she used reasonable and ordinary care, and that unless they so found they could not award the plaintiff damages." And that, "while the defendant was bound to use all reasonable care, caution, and supervision to keep its streets and sidewalks in a safe condition for travel, in the ordinary modes of traveling, by night, as well as by day, and, if it fails to do so, it is liable for injuries sustained in consequence of such failure, provided the party injured is exercising reasonable care and caution. But if, by ordinary care, the plaintiff could have avoided the consequences herself of the defendant's negligence, she cannot recover." And the court further instructed the jury that: "You are instructed that persons traveling upon the sidewalk of a city, which is in constant use by the public, have the right, when using the same with diligence and care, to presume, and act upon the presumption, that it is reasonably safe for ordinary travel. But if a person traveling upon a sidewalk comes to a place in the walk where there is an appearance of danger, or where they have been told that danger exists, then such person must not proceed further upon the presumption that the walk is in a safe condition, but the law requires a person, after they have notice of danger, to use care commensurate with the apparent danger, and if a person fails to so act, and receives an injury, such person cannot recover damages for the injury sustained. But if, after a person traveling along a street receives notice of danger, such person, in the exercise of due care, and under the belief that they have found a safe place, attempts to pass along the street, and in such attempt receives

an injury, which could not have been avoided by the use of a degree of care apparently sufficient to avoid the danger, then such person may recover for the injuries sustained, if caused by the negligence of the city."

The jury found for the plaintiff, assessing her damages at \$500, and also made the following findings to special interrogatories presented to the jury by the court at the request of the defendant: "Q. 23. If you find for the plaintiff, state what damages you allow for loss of time." (No answer.) "Q. 24. If you find for the plaintiff, state what amount you allow for incapacity to perform labor. A. Three hundred dollars. Q. 25. Was the wire wherein plaintiff's feet were caught or tripped the direct and immediate cause of plaintiff's fall, which resulted in her injury? A. Yes; the wire, or whatever it was, that tripped her." The counsel for the defendant filed a motion for judgment upon the special findings of fact, for the reason that they were inconsistent with the general verdict, which was overruled, as was also a motion for new trial.

Bayard T. Hainer, for plaintiff in error.
Cotteral & Hornor, for defendant in error.

McATTEE, J. (after stating the facts). It was assigned as error (1) that the petition failed to state facts sufficient to constitute a cause of action, and that the court erred in overruling the defendant's demurrer thereto; (2) that plaintiff's testimony showed that she was guilty of negligence directly contributing to the injuries sustained by her, and that the direct and proximate cause of her fall was due to the wire which caught or tripped her, without any fault or negligence on the part of the city, and hence the court erred in not sustaining the demurrer to the plaintiff's testimony; and (3) in not sustaining the motion for judgment upon the special findings of fact, for the reason that the general verdict was inconsistent with the special findings. The first assignment of error was abandoned in the brief of the plaintiff in error, and the cause was argued upon the propositions that the court erred in not sustaining the motion for judgment upon the special findings of fact, inasmuch as the general verdict assessed the plaintiff's recovery in the sum of \$500, while in the special findings of fact the jury assessed the amount of plaintiff's recovery in the sum of \$300; and that the special findings of fact were inconsistent with the general verdict of the jury, and should control it, and that judgment should have been rendered accordingly.

This proposition is not applicable here, for the reason that the finding of the jury that they allowed \$300 for incapacity to perform labor, and did not include all the elements of damage admissible, and which would be included in a general verdict for damages in a suit of this character (such additional elements of damage would include bodily injuries, pain, and suffering, as well as mental suffering, in

addition to that loss which they found that she had suffered by reason of her incapacity to perform labor), and the finding that a specified sum was found to be the equivalent for a particular element of loss, does not render a verdict invalid for a larger sum, which necessarily includes in its estimation other proper elements of damage. *Winstead v. Standeford*, 21 Kan. 270.

If the plaintiff in error proposed to avail itself of the failure of the jury to make a finding to the twenty-third interrogatory, it should have been done at the time that the special findings of fact were returned by the jury. A failure to object to the return of special findings of fact, and to permit the jury to be discharged without specifically answering the inquiries which they had neglected or failed to answer, or had overlooked, is a waiver of the right to an answer. The application should have been made to the court to require an answer, and an exception taken at the time, if the application had been overruled. *Long v. Duncan*, 10 Kan. 294; *Vater v. Lewis*, 36 Ind. 288; *Thomp. Trials*, § 2685; *Bradley v. Bradley*, 45 Ind. 67; *Barkow v. Sanger*, 47 Wis. 500, 3 N. W. 16.

Upon the second proposition of error, that the "testimony in this case conclusively shows that the plaintiff was guilty of negligence directly contributing to the injuries sustained by her, and that the direct and proximate cause of the plaintiff's falling was due to a small baling wire, which caught or tripped her as she was attempting to pass on the sidewalk, proceeding sideways," the proposition presented here is that, if the plaintiff observed or was made aware of some difficulties which existed at the point mentioned in the petition, and yet attempted to pass over the sidewalk at that point, and suffered injury thereby, that she was thus guilty of such contributory negligence as would preclude her recovery, and that, as a matter of law, the jury should have been thus instructed, or the demurrer to the plaintiff's evidence sustained, or judgment entered for the plaintiff in error here. This proposition, as thus stated and contended for by the plaintiff in error, has not been sustained by previous decisions of this court, nor do the facts in the case justify us in sustaining that view to be the law, upon the facts as they appeared in the evidence. While the testimony showed that the plaintiff saw that there was an obstruction, over which she stumbled, when she got up to it, and that she thought there was plenty of room for her to walk right along on the sidewalk, and that she caught her foot on a little piece of baling wire, and she thought that was the thing that made her fall, it yet also appeared that the event occurred at 8 o'clock at night in January, and that the electric light at the corner of the street near by was not burning, and that she was in the habit of coming along that street repeatedly to and from her boarding house to her place of business; that there was no warning or

danger signal near to the point where the obstructions were, and the territory where the injury occurred; that there was a path 18 inches wide, where she could have proceeded safely, but for the wire; that the wire was stretched from side to side of the sidewalk at different places at that point, and that she had never seen the sidewalk in that condition before; that she had never noticed that the sidewalk had been taken up, or anything done there, before she was hurt; that at the time the injury occurred she could not see that there was an obstruction there, and building going on, and digging done; that she could only see the width of the sidewalk in front of her, and distinguish it as different in color from the adjacent soil of the street; that she walked "very carefully, believing that she had about the width of eighteen inches to walk upon," and could walk safely over it by being careful; that she was walking "very quietly and slowly and steadily," and that, "as well as she could see, there was plenty of room to walk," and that she thought it was left there on purpose as a passageway, and could not see any walk around any other way; and that she was going along "very quietly," and something caught over one foot first, and then she went to put the other up, and it caught, and she fell, and it seemed to her at the time to be baling wire, and that when it came across her foot it seemed to be like something smooth. There was evidence here to show that the absence of the usual light at the corner of the street, and the absence of a danger signal, and existing dangerous conditions of the excavation by the sidewalk, and large stones unloaded there, occupying the sidewalk, and baling wire stretched across from side to side upon the sidewalk, in connection with the building which was in process of construction, or about to be erected, at a point where the public, including the plaintiff, had a right to pass, and had a right to presume that the passageway was in safe condition, were circumstances which should be left to the jury to determine the plaintiff's right to recover; and the defendant's rights were protected when the court instructed the jury that, notwithstanding the averments of her petition were proven, she could yet not recover if they found that she was in the attempt to pass the point of obstruction not in the exercise of due and reasonable care. Upon the state of facts adduced in evidence here, the court gave the proper instructions to the jury, and it is not reversible error, but is correct, for the court to have told the jury, as it did, that, under such circumstances, the question was one for the jury to determine whether the plaintiff was in such due and reasonable care at the time as to entitle her to recover, as against the defendant. It was incumbent upon the city to keep its streets and sidewalks reasonably safe for public travel, and it is not released from this liability by reason of the defective condition of the sidewalks by the mere

fact that the plaintiff could see that the street was not in its usual condition; and the mere fact that the plaintiff attempted to pass over the street, after having noticed that there was something wrong with it, does not, of itself, constitute negligence, and would not have justified the court in taking the case from the jury. *Maultby v. City of Leavenworth*, 28 Kan. 745; *City of Oklahoma City v. Welsh*, 3 Okl. 294, 41 Pac. 598. The judgment of the lower court is affirmed. All the justices concur, except DALE, C. J., who presided below, and KEATON, J., who was of counsel in the cause, and therefore take no part in the foregoing opinion.

BOARD OF COM'RS OF LOGAN COUNTY v. HARVEY et al.

(Supreme Court of Oklahoma. July 30, 1897.)

APPEAL—CASE MADE—TRANSCRIPT—PARTIES—DEMURRER.

1. The rule requiring that all parties who will be affected by a reversal of the judgment appealed from, or whose being made parties to the appellate proceeding is necessary to protect the rights of others, as has been enunciated by the supreme court of Kansas, is recognized as the rule in this territory; but this rule does not require that persons who were not made parties in the lower court should be served with case-made, or brought into this court.

2. Although a case-made may be void, as to a part of the defendants, on account of the insufficiency of the service on the attorney for the parties (which question as to the service we do not now decide, it being unnecessary in this case), yet if, attached to the case-made, there is a certificate of the clerk of the district court which is sufficient to present a transcript of the record of the case, all questions which are presented by the record, and where exceptions were saved, are properly presented for consideration by the supreme court.

3. A demurrer is one of the pleadings in a case, and is a part of the record of the trial court, and a ruling of the court upon a demurrer, where an exception has been saved, may be presented to this court for review upon a transcript of the record, without incorporating the demurrer and the exception into a case-made.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by the board of commissioners of Logan county against Cora V. Harvey and others. From a judgment for defendants, plaintiff brings error. On motions to dismiss. Denied.

J. C. Strang, Co. Atty., and Huston & Huston, for plaintiff in error. Asp, Shartel & Cottingham, for defendants in error.

BIERER, J. Plaintiff below, plaintiff in error here, filed its amended petition in the district court of Logan county on the 11th day of September, 1895. The parties named in this amended petition were "Board of County Commissioners of the County of Logan, Plaintiffs, v. Cora V. Harvey (née Dehl), H. C. Dehl, Isalah Smith, Danton Miky, C. A. Marshall, John Cammack, William Plagg, E.

W. Peterson, Peter O'Hare, E. R. Duvall, L. E. Pitts, M. Collar, and William Baxter, Defendants." By the amended petition plaintiff seeks to recover judgment against the defendant Cora V. Harvey (née Cora V. Deihl) as principal and the other persons named as sureties upon the official bond of the said Cora V. Deihl as register of deeds of Logan county. The record does not contain any original petition, and contains no summons, if one was ever issued. It appears that a demurrer to the amended petition was filed on behalf of M. Collar, by his attorney, S. D. Decker, and another demurrer filed by Louis E. Pitts, William Baxter, and Cora V. Harvey, by their attorney, George Gardner; that these demurrers were overruled, and an answer was then filed by the defendants Harvey, Pitts, Baxter, and Smith, by their attorney, George Gardner, and by Collar and Plagg, by their attorney, S. D. Decker. The record shows no appearance at any time by any of the other persons named as defendants, and, as before stated, no service of any process upon them. The amended answer contained three paragraphs, and was unverified; the first paragraph being a general denial, and the other two setting up special defenses. The plaintiff, by its attorney, A. H. Huston, filed a demurrer to the second and third paragraphs of the answer, which was overruled, and, plaintiff electing to stand upon the ruling on the demurrer, judgment was rendered, as the journal entry states, "against said plaintiff and in favor of said defendants, dismissing said action, and for costs of suit." Time was given the plaintiff to make and serve a case-made, and within the time allowed service of case-made was accepted by George Gardner, as attorney of record for the defendants Harvey, Pitts, Baxter, and Smith. The only proof of service of case-made upon the defendants Collar and Plagg is the following: "Territory of Oklahoma, County of Logan—ss.: A. H. Huston, being duly sworn, upon his oath deposes and says that he is the attorney for the plaintiff in the foregoing cause; that he served the above case-made on S. D. Decker, the attorney for some of said defendants, by placing said case-made upon the office desk of the said S. D. Decker, in his office in the city of Guthrie, on the 22d day of October, A. D. 1896, and leaving the same there for a period of five days thereafter. A. H. Huston." "Subscribed and sworn to before me this — day of —, 1896." There was no effort to serve the case on H. C. Deihl, Danton Miky, C. A. Marshall, John Cammack, E. W. Peterson, Peter O'Hare, and E. R. Duvall. On the 28th day of November, 1896, George Gardner, as attorney of record for the defendants Pitts, Cammack, Baxter, Harvey, and Smith, waived issuance and service of summons in the supreme court of Oklahoma territory, and entered appearance in said court for said defendants. Motions are made to dismiss this proceeding by L. E. Pitts, M. Collar, and John Cammack. All these mo-

tions are presented by counsel on two grounds: First, because the case-made was not served, or attempted to be served, upon the defendants H. C. Deihl, Danton Miky, C. A. Marshall, John Cammack, E. W. Peterson, Peter O'Hare, and E. R. Duvall; and, second, because it was not properly served, and there is no proof of even the kind of service claimed, on the defendants M. Collar and William Plagg. We will consider the motions on these grounds in their order.

This action was brought on a bond, and it was sought to hold all the defendants who were sued liable for the breach of the bond. As the action was dismissed at least as to all the defendants who filed their answer, the contention of counsel for defendants is that when one party to an action appeals from the judgment of the district court to this court he is required to make all parties adverse in interest to him parties to the proceeding in error, and must serve case-made upon all such parties in interest, and must, in some manner, procure service and have them before the supreme court; and he cites the following cases from the supreme court of Kansas, from which we have taken our Code of Civil Procedure, in support of this contention: *Ex parte Polster*, 10 Kan. 204; *Armstrong v. Durland*, 11 Kan. 15; *Hodgson v. Billson*, Id. 357; *Bassett v. Woodward*, 13 Kan. 341; *Richardson v. McKim*, 20 Kan. 346; *Thompson v. Manufacturing Co.*, 29 Kan. 476; *Paper Co. v. Hentig*, 1 Pac. 529; *In re Brown's Appeal*, Id. 78; *McPherson v. Storch*, 30 Pac. 480; *Paving Co. v. Botsford*, 31 Pac. 1106; *Steele v. Baum*, 32 Pac. 918; *Central K. L. & I. Co. v. Chicago L. Co.*, 37 Pac. 132; *Norton v. Wood*, 40 Pac. 911; *Hughes v. Miller*, 42 Pac. 696; *Eaton v. Mendenhall*, 44 Pac. 683. We have examined carefully all these cases, and they all bear upon the question here presented, excepting the case of *Thompson v. Manufacturing Co.*, 29 Kan. 476, which was upon the question as to how and in what manner a party must be served in order to be brought into the supreme court, instead of what parties must be brought before the court. From these numerous authorities it would appear that the proposition as to what parties must be brought before the supreme court in order to warrant a review of the questions sought to be presented on appeal has been fully adjudicated, and the rule clearly fixed. And the rule appears to be that all persons who were parties to the proceeding in the trial court, and whose interests will be affected by a reversal of the judgment, must be brought into the appellate proceeding. And also, where the interests of those who are brought as parties into the appellate proceeding will be injuriously affected by a reversal or modification of the judgment complained of as to such parties, without a reopening of the case as to other parties as to whose interests the judgment has become final by failure to appeal, so likewise the proceeding will be dismissed. It is claimed by counsel for defendants in error that this rule should

be applied to this case, and this proceeding dismissed, because certain of the defendants, excepting Collar and Plagg, were not served with case-made. Counsel do not argue the phase of the case presented by the fact that these persons, while they are named in the petition as defendants, do not appear from the record to have been parties to the proceedings, and herein, we think, is where their contention must fail. A careful examination of all the Kansas cases shows that wherever a proceeding has been dismissed in the supreme court because of failure to bring into that court some person whose interests would be affected by a reversal of the judgment below, or failure to reverse the judgment below as to whom would affect some defendant in error who is brought to the supreme court, the person who is not brought into the supreme court was a party to the judgment appealed from. This appears in each and every case, and we have been unable to find in any of the Kansas cases a case where the phase of the matter now presented was decided. While these persons, excepting Collar and Plagg, whom it is insisted should be served with case-made, were named as defendants in the amended petition, they were never, so far as appears from the record, made parties to the case; and, there being nothing in the record to show that they were parties, we must presume that they were not. The naming of a person in a pleading, where the person appears to have had nothing to do with the suit, does not make him a party to the action. If he is a defendant, he must be served with process, or he must enter his appearance to the action, before he can be made a party thereto. If he is not made a party to the action, his interests can neither be favorably nor unfavorably affected by it, and the proceeding cannot be a bar to another proceeding to enforce his right, or fix his liability, in an action by or against him. While those who were defendants were, by the face of the bond, co-sureties, and liable to the same extent as the other parties except Cora V. Harvey (née Deihl) on the bond, yet their liability either to the county or for contribution to the other co-sureties, if that becomes appropriate, could in no way be determined until they were made parties to the action by bringing them into court; and naming them as defendants in the petition would not do this. We think the requirement to bring parties into the supreme court whose interests will be affected by a reversal of the judgment, or who should be brought in because the interests of other defendants to the proceeding may be injuriously affected if they are not brought in, extends only to persons who were parties to the judgment appealed from. The language used by the supreme court of Kansas in two of the cases above cited seems to us clearly to indicate that the principle established by the decisions of that court was intended not to be carried beyond the scope we give it here. In the case of *In re Browne's Appeal* (Kan. Sup.) 1 Pac. 78, it appears that Walter Hale was

the county surveyor of the county; that one Annie Mason had brought a proceeding to have the lines of a tract of land established. The county surveyor had given notice to Browne, Mason, and the other parties interested of the time when he would survey and establish the lines. The lines were established, and Browne, feeling aggrieved, appealed to the district court, and, upon being defeated there, appealed to the supreme court, and brought into that proceeding only Walter Hale, the county surveyor, who was held to have no interest in the matter. The following language of this opinion indicates what the supreme court of that state mean by their decisions requiring parties in interest to be brought into that court: "For the purpose of this case we shall assume that the appeal taken by E. D. Browne from the survey of Walter Hale, county surveyor, to the district court, was regular and valid. For the purposes of the case we shall also assume that Annie Mason was the party who instituted the proceedings, and was, therefore, substantially the plaintiff in the case. And as the record shows that '— Klemm, Mrs. Sarah Morasch, and E. D. Browne' were notified with respect to the survey, we shall consider them as parties to the proceeding, and as substantially the defendants. We shall not only consider all these persons as parties to the survey, but we shall also consider them as parties to the action in the district court; and, if the statutes are valid, and the appeal of E. D. Browne valid, we would think that this would be the case." And the court concluded: "We think E. D. Browne, when he brought the case to this court, should have made all persons parties who were parties to the original survey, or who were parties in the district court; but he has not done so, but has simply made the county surveyor the only party besides himself." On the proposition before us, that court, in the case of *Paper Co. v. Hentig* (Kan. Sup.) 1 Pac. 529, also said: "And in no case should a judgment be interfered with by the supreme court, where one of the parties to the judgment is not a party in the supreme court." Our conclusion therefore is that the first ground is untenable.

The second ground of the motion is easily disposed of. The case is sought to be brought here upon a case-made, and the question that is presented by counsel, as to whether or not a case-made can be served by leaving it upon the desk of the attorney for a party, would, indeed, be a serious one, but it is not necessary to decide that question here. Upon an examination of the record we have discovered a matter not called to our attention by counsel for either party in their briefs, and that is that, while plaintiff in error presents the record as if brought here by case-made, there is also a certificate of Louis E. Pitts, as clerk of the district court of Logan county, attached to this record, and which certifies that the case-made "contains a true and correct statement of all the pleadings, motions, findings,

and rulings of the court, exceptions saved, and proceedings had in said cause." That certificate is sufficient to present all the papers to which it has reference, as a transcript of the record, and the question sought to be presented is one which appears upon the record, without being brought into it by case-made. The error assigned in this case is to the action of the court in overruling plaintiff's demurrer to two paragraphs of the answer, and the record contains the amended petition, the answer, the demurrer, the ruling of the court, and the exceptions saved and the judgment rendered. These matters are all part of the record without a case-made. Sections 3964, 4308, St. 1893; *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382. And although as a case-made it would be held void as to parties not served, if we should hold the service in the manner in which it was made insufficient, as it does contain a transcript of the record it is sufficient to present all questions which may be presented upon a transcript. *Lauer v. Livings*, 24 Kan. 273; *Abel v. Blair*, 3 Okl. 399, 41 Pac. 342. Our conclusion is that this record is sufficient to present the error assigned as to all the parties who were parties in the court below, and, as we have held those were all the parties necessary, and as they are all now here by the action of their attorney, George Gardner, excepting the defendants Collar and Plagg, and as the year has not yet expired within which they may be served with summons in error, the case will be continued for service upon them. The motions to dismiss will be overruled, and the case continued for service upon the two defendants not now in court. All the justices concurring.

SLOVER v. TERRITORY.

(Supreme Court of Oklahoma. July 30, 1897.)
CONSTITUTIONAL LAW—INDICTMENT—SUFFICIENCY
—DISJUNCTIVE ALLEGATIONS—ROBBERY—
SENTENCE.

1. In criminal cases the accused has the constitutional right to "be informed of the nature and cause of the accusation" against him. The indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime of which he stands charged, and every ingredient of which the offense is composed must be accurately and clearly alleged. The indictment must furnish the accused with such a description of the charge as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and also to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to sustain a conviction should one be had.

2. This constitutional provision does not necessarily preclude the legislature from altering in some respects and simplifying the common-law form of charging an offense, provided the form they authorize is such as to inform the accused substantially of the nature and character of the particular offense sought to be proved against him, and not to deprive him in this respect of any real or practically substantial benefit which would have been secured by the common-law mode of charging the same offense.

3. When the statute enumerates several acts

disjunctively, or several methods which, separately or together, shall constitute the offense, the indictment, if it charges more than one of them, should do so in the conjunctive; and the indictment will be held bad on demurrer when such acts or methods are stated in the disjunctive. A disjunctive allegation does not inform the accused of "the nature and cause of the accusation."

4. Where, to constitute the crime of robbery in the first degree, the larceny must be committed by force, or by putting the party robbed in fear of immediate personal injury, an indictment is bad, for uncertainty, that does not charge that the party robbed was in fear of immediate personal injury, and set forth the facts in such manner as to show what the injury feared was, and showing the danger of the injury feared to have been immediate.

5. Under the statute of this territory, robbery, when committed by two or more persons conjointly, is punishable only by imprisonment for life. It is the conjoint commission of the offense, and not a conjoint conviction or sentence, that attaches this penalty, and it is error for the court, upon the conviction of one defendant of a conjoint robbery, to impose a sentence of punishment by imprisonment for a less period than life.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John H. Burford.

Jesse Slover was convicted of robbery in the first degree, and sentenced to 10 years' imprisonment in the penitentiary, and he brings error. Reversed.

E. T. Marsh and W. H. Criley, for plaintiff in error. C. A. Galbraith, Atty. Gen., for the Territory.

TARSNEY, J. The defendant, with one Amos Clayton, was jointly indicted for robbery. The indictment avers that the defendants "did then and there unlawfully and wrongfully, willfully and feloniously, by means of force and fear, take from the person or immediate presence of Mrs. Nettie Newport, against her will, certain personal property, to wit, eleven dollars in money, and some chewing and smoking tobacco, all of the value of \$12 in money, and then and there the personal property, goods, and chattels of Albert Newport, and then there in the lawful and peaceful possession of the said Nettie Newport, contrary to the statute," etc. Defendants demurred to the indictment on the ground that it "did not state facts sufficient to constitute a public offense." Demurrer was overruled, and exception saved. Defendants were jointly tried and convicted. Clayton was granted a new trial, and plaintiff in error was sentenced to a term of 10 years in the penitentiary. Having moved unsuccessfully for a new trial and in arrest of judgment, he brings the case here, and assigns error in the overruling of the demurrer to the indictment, and in the overruling of the motion for a new trial and in arrest of judgment. It is objected that this indictment, stating in the disjunctive that the property was taken from the person or immediate presence of Mrs. Nettie Newport, does not state that it was taken from either her person or from her immediate presence, and therefore does not state facts com-

stituting the crime of robbery. In criminal cases the accused has the constitutional right "to be informed of the nature and cause of the accusation." Const. U. S. Amend. art. 6. The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the crime is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that the indictment must furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and also to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be had; for these facts are to be stated and set forth in the indictment with reasonable particularity of time, place, and circumstance. *U. S. v. Cruikshank*, 92 U. S. 542; *Cooley*, Const. Lim. 374; *Whart. Cr. Pl. & Prac.* 153. The constitutional provision requiring the accused in every criminal prosecution "to be informed of the nature of the accusation" is based upon a presumption of innocence, and upon the theory that an innocent man may be indicted as well as a guilty one, and that he will not be able to prepare for trial without knowing what he is to meet. The indictment in this case does not apprise the defendant against what he is to defend himself. It does not charge that the defendants took from the person of Mrs. Newport the property specified, nor does it charge that they took the property from her immediate presence, but charges that they did one thing or another, which can mean nothing. The inference from the language, as used, is not that the property was taken both from her person and from her immediate presence, but that it was taken either from her person or from her immediate presence, but which the grand jury did not know and did not say. Consequently, they have left the defendants in as much doubt as they were themselves. An indictment, the averments of which are stated in the disjunctive, as a general rule, is fatally defective. Disjunctive allegations are those which charge that the defendant did one thing or another. The rule is that, whenever the word "or" would leave the averment uncertain as to which of two or more things is meant, it is inadmissible. *Blish*, New Cr. Proc. 585. The certainty required in an indictment precludes the adoption of an alternative statement. If an indictment charges the defendant with one or the other of two offenses in the disjunctive, as that he murdered or caused to be murdered, forged or caused to be forged, or that he broke into a barn or stable, or set fire to a house or shop, such indictment would be fatally defective for uncertainty. *Whart. Cr. Pl. & Prac.* 161; *State v. Drake*, 30 N. J. Law, 425; *State v. Fairgrieve*, 29 Mo. App. 643; *Thomp-*

son v. State, 37 Ark. 408; *People v. Tomlinson*, 35 Cal. 503. Matters that are essential to give information of the nature of the accusation and essential to a description of the offense cannot be omitted. *People v. Olmstead*, 30 Mich. 431. Nor can such essential matters be stated in the disjunctive.

Counsel for defendant in error calls our attention to section 18, p. 196, of the Laws of 1895, which reads, "And where the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count," and contends that this provision authorizes a disjunctive form of allegation in the indictment. The objection to this indictment is not to the means by which the offense is alleged to have been committed, but to the manner in which it is alleged to have been committed. If the statute was intended to mean what counsel contends for it, we would not be willing to concede its validity in view of the above constitutional requirement as to indictments. We may concede that this constitutional provision was not intended to prevent the legislature from dispensing with matters of form only in the description of an offense, nor with any degree of particularity of specification in the description which did not give the defendant any substantial and reliable information of the particular offense intended to be proved; nor do we hold that it would not be competent for the legislature to alter in any respect the common-law form of charging an offense, but statutes simplifying the forms of indictments must be confined to the omission only of such matters as are not essential to give information of the nature of the accusation, and will not warrant the omission of averments essential to the description of the offense. *People v. Olmstead*, 30 Mich. 431; *Brown v. People*, 29 Mich. 232; *McLaughlin v. State*, 45 Ind. 338. We think that this indictment was bad for uncertainty, the allegations of the essentials of the offense being in the disjunctive.

2. This indictment was equally defective in another particular. The defendant is convicted of robbery in the first degree. The indictment charges the robbery to have been committed by "means of force and fear," but the fear that is essential to constitute robbery in the first degree, as defined by the statute, is "fear of some immediate injury to the person" of the party robbed, and the indictment must set forth the injury that was feared, as it is a part of the definition of the offense, and aver that such fear was that the injury would be immediate.

3. The defendant was convicted of having conjointly with one Amos Clayton committed the robbery. Section 2126 of the Statutes of 1893 provides: "Whenever two or more persons conjointly commit a robbery, or where the whole number of persons conjointly committing a robbery, and persons present and aiding such robbery, amount to two or more, each and either of such persons is punishable by imprisonment for life." It is not a con-

joint conviction or conjoint sentence that attaches the punishment of life imprisonment, it is the cor-joint commission of the offense. The granting of a new trial to Clayton did not authorize the court to impose upon plaintiff in error a less punishment than the statute provides. For the reasons stated herein, the judgment of the court below is reversed, and the cause remanded, with instructions to sustain the demurrer to the indictment. All the justices concurring.

HAGAN et al. v. BIGLER.

(Supreme Court of Oklahoma. July 30, 1897.)

PROMISSORY NOTES—DEFENSES AGAINST PAYEE.

In an action upon a promissory note by the payee against the maker, equitable defenses, such as want of consideration, partial failure of consideration, or want of delivery of the note, may be interposed. The payee of a promissory note is not a bona fide holder, in the sense of the law relating to bona fide holders of negotiable paper, and the law relating to bona fide holders has no application in an action between the original parties to the note.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice J. R. Keaton.

Action by Ella Bigler against Joseph Hagan and Martha Hagan. From a judgment for plaintiff, defendants bring error. Reversed.

R. G. Hays and J. A. Wilson, for plaintiffs in error. R. H. Winn and R. Wooldridge, for defendant in error.

TARSNEY, J. This suit was commenced to recover upon a promissory note for \$500, dated March 15, 1894, payable on or before one year after date, executed by Joseph Hagan and Martha Hagan, plaintiffs in error, to the order of Ella Bigler, defendant in error. The answer was a failure of consideration, and also that the note had never been delivered. On the trial of the cause, the plaintiff offered in evidence the note sued upon, and rested; whereupon the defendant, to show the consideration for the making of said note, introduced in evidence an agreement and journal entry in the case of Frank Bigler against Joseph Hagan, theretofore pending in said court. Hagan and Bigler had been partners in business, and the action was brought to dissolve the partnership, and settle the partnership affairs. The agreement was that Bigler, who brought the suit, should dismiss the same; that plaintiff should pay all the costs of either party in said action, except the defendant's attorney's fees; that the court should make an order upon the receiver to pay over all moneys which he had received from the sale of the partnership property, and turn over all unsold property to Hagan. Hagan and wife were to dismiss, and did dismiss, another action then pending, wherein Martha Hagan was plaintiff, and H. B. Mitchell, receiver of the firm of Hagan & Bigler, was defendant, at the cost of the plaintiff. Said agreement

recites: "In consideration of the turning over of said moneys and delivery of said unsold property to Joseph Hagan, the said Joseph Hagan has this day executed and delivered to Frank Bigler his certain promissory note for \$500." The defendant, for the purpose of showing that, subsequent to the making of said agreement, a parol agreement was entered into between the parties, whereby the \$500 note mentioned should be made payable to Ella Bigler, should be placed in the hands of one C. R. Jones, to be delivered to Ella Bigler, when, and not until, the moneys and property in the hands of the receiver should be turned over to Hagan, and the costs in the action paid by Bigler, offered evidence that the note in this action was the only one executed; that it was placed in the hands of said C. R. Jones; that the moneys and property in the hands of the receiver were not turned over to Hagan; that the costs of said action had not been paid by Bigler; and that, without the knowledge of Hagan, the note was delivered by Jones to Mrs. Bigler. The court refused to permit evidence of such subsequent parol agreement, or that the terms of the original agreement had not been complied with, by the turning over of the moneys and property in the hands of the receiver, or the payment of the costs. To the exclusion of this evidence the defendant excepted, whereupon the court instructed the jury to return a verdict for the plaintiff in the sum of \$724.16.

These were manifest errors. The cause seems to have been tried upon the theory that the plaintiff was an innocent holder of said note, free from any equitable defenses. It may be stated, generally, that the bona fide holder takes negotiable paper free from all equitable defenses,—that is, those defenses which do not appear on the face of the paper, and which do not absolutely destroy the existence of the paper as a monetary obligation. But who are bona fide holders? The payee of a note is not a bona fide holder. A bona fide holder of a negotiable instrument is one to whom the instrument has been transferred by the payee, or by some subsequent indorsee, for value and before due, and without notice of any defect in the instrument. The law relating to bona fide or innocent holders of negotiable paper does not apply in actions between the maker and the payee. Between the original parties, any equitable defense may be interposed by the maker. He may show that the note never was delivered. He may show an entire or a partial failure of consideration. He may show that an agreement or contract upon the part of the payee, which was of the consideration for the note, has never been kept. Mrs. Bigler was the payee in this note, and every agreement made by her husband, which was a part of the consideration of the note, she was bound by; and, if such agreements have not been kept and performed, the defendant might show a total failure to keep such agreements in defense of an action on this note, or a partial failure in

recoupment of damages. For the reasons stated, the judgment of the court below is reversed, and the cause remanded for a new trial.

KEATON, J., having presided in the court below, not sitting; all the other justices concurring.

SPENCER v. TURNEY et al.
(Supreme Court of Oklahoma. July 30, 1897.)

BILLS AND NOTES—PLEADING—DENIALS.

1. In a suit on a promissory note, wherein the plaintiffs alleged the execution and delivery of the note at Fairfield, Iowa, a paragraph of the defendant's answer, which alleged: "That said defendant did not execute and deliver at Fairfield, Iowa, to the plaintiffs, or either of them, the note on which action has been brought, and which is set up and described in plaintiffs' petition,"—is a negative pregnant, which admits the execution of the note, and, the place of execution being immaterial, this paragraph of the answer presented no defense.

2. And also, in such an action, a paragraph of the answer stating that "the defendant denies that he is indebted to plaintiffs in any sum whatever" states no defense, as the plaintiffs did not sue upon an indebtedness, but sued upon a promissory note.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John H. Burford.

Action by J. Turney & Co. against L. M. Spencer. Plaintiffs were granted judgment on the pleadings, and defendant brings error. Affirmed.

E. J. Simpson, for plaintiff in error. J. C. Robberts & Son and John I. Dille, for defendants in error.

BIERER, J. J. Turney & Co. brought this action in the court below to recover judgment for the principal and interest upon a note which they allege in their petition was made by defendant to plaintiffs at Fairfield, Iowa, on the 7th day of March, 1889, for the sum of \$1,363.50, with interest at the rate of 10 per cent. per annum, said note being due six months after its date. The defendant filed a demurrer to the petition, which was overruled, and he then answered in three paragraphs, the first being that the note was barred by limitation, and the second and third being as follows: "Second. That said defendant did not execute and deliver at Fairfield, Iowa, to the plaintiffs, or either of them, the note on which action has been brought, and which is set up and described in plaintiffs' petition. Third. The defendant denies that he is indebted to plaintiffs in any sum whatever." This answer was verified by the defendant. Plaintiffs moved for judgment on the pleadings, which was granted, and exceptions saved, and defendant contends that this action of the court was erroneous. It is claimed that the second paragraph of defendant's answer was sufficient to put in issue the execution of the note, and the cases of *Brenner v. Bigelow*, 8 Kan. 496, and *Moore v. Emmert*, 21 Kan. 1,

are cited as authority in support of this position. The cases referred to in no way support this claim. The answer is a negative pregnant, which, in effect, admitted that the note was executed as alleged in the petition, but denied its execution and delivery at Fairfield, Iowa. To deny that the note was made at Fairfield, Iowa, implies that it was made at some other place. All that this paragraph of the answer denied was the place of the execution of the note, and as the place where the note was made is, in this case, entirely immaterial, nothing that the plaintiffs alleged was denied, and the pleading tendered no issue. *Bliss*, Code Pl. § 332. In *Tate v. People* (Colo. App.) 40 Pac. 471, it was held: "A denial in an answer that a judgment was assigned for a valuable consideration is a negative pregnant, which admits the assignment, but denies the sufficiency of the consideration." And in *Edgerton v. Power* (Mont.) 45 Pac. 204, it was stated that: "An answer which denies that 'the amount of stock' sold by plaintiff to defendant was ever delivered is defective, because a negative pregnant." The third paragraph of the answer, which denied that the defendant was indebted to the plaintiffs in any sum whatever, also presented no issue. Plaintiffs did not allege an indebtedness, which would have been a conclusion, but they did allege the execution and delivery of a promissory note, which was an allegation of fact, and the defendant failed to deny this fact by attempting to deny a conclusion which plaintiffs had not alleged. No other question is presented by brief of counsel. The trial court ruled correctly in sustaining the motion for judgment on the pleadings, and the judgment is accordingly affirmed. All the justices concurring.

HADLOCK v. BOARD OF COM'RS OF G COUNTY.

(Supreme Court of Oklahoma. July 30, 1897.)

COUNTY COMMISSIONERS—APPEALABLE ORDERS.

An appeal will lie from the board of county commissioners to the district court from all decisions of such board by any person aggrieved by their decision; and when the board of county commissioners make an order fixing the salary of the county treasurer, basing such salary upon the population of the county, *held*, that an appeal will lie to vacate or correct such order.

(Syllabus by the Court.)

Error from district court, Custer county; before Justice John C. Tarsney.

Appeal by D. M. Hadlock from a decision of the board of county commissioners of G county. The district court dismissed the appeal, and appellant brings error. Reversed.

Dille & Burford, for plaintiff in error. T. F. Shive, Co. Atty., and John F. Stone, for defendant in error.

DALE, C. J. This is an action which is brought here from the district court of Custer county to reverse the judgment of that court in

a cause therein pending, wherein the judge of said court dismissed an appeal taken by the plaintiff in error from a decision of the board of county commissioners of G (now Custer) county. It appears from the record in this case that on the 3d day of July, 1895, the board of county commissioners of G county, in regular session, determined the number of inhabitants in said county, and fixed the annual salary of the county treasurer at \$1,200; that said order remained of record and unrepealed from then until July 7, 1896, when the board of county commissioners, in regular session, proceeded to vacate the former order, fixing the annual salary of the county treasurer, and made a new order, reducing such salary to \$600. From this second order of the commissioners, so made, Hadlock appealed to the district court of G county, and, at the regular October term following such appeal, Hadlock filed a motion to dismiss the entire proceedings, and to vacate the order of the county commissioners made on July 7, 1896, for the alleged reason that the board was without jurisdiction to make the second order at the time it was made, and supported his motion by a certified transcript of the order of 1895. This motion the court overruled, to which plaintiff in error excepted. Plaintiff in error then demanded a trial de novo, and offered to submit testimony upon the questions presented by said appeal. This demand was denied by the court, and the offer to submit testimony was overruled, to all of which plaintiff excepted. The court then, on its own motion, ordered the appeal dismissed, and refused to further consider the case, and rendered judgment against the plaintiff in error for costs, to which last ruling plaintiff in error also excepted, and brings the case here upon the record thus presented, and assigns as error the refusal of the court below to sustain his motion to vacate the order of the board of county commissioners, made on July 7, 1896, and also alleges error upon the part of the court in refusing to give him a trial de novo upon the subject-matter of the population of Custer county.

Counsel for defendant in error insist in their brief that no appeal lies from the decision of the board of county commissioners, made on July 7, 1896, to the district court of the county; and the first matter to be disposed of arises upon this question. It is earnestly contended by counsel for appellee that Hadlock had no such an interest in the order made reducing the salary of the county treasurer as to give him a standing in the district court; that he should have waited until the 1st of October following the order, presented his claim for \$300, quarterly salary, and, upon the disallowance of one-half of such sum, brought suit to recover the amount claimed. Our statute, we think, is conclusive upon this question. Section 1803, St. 1893, provides that, "from all decisions of the board of commissioners upon matters properly before them, there shall be allowed an appeal to the district court by any persons aggrieved." Language could not be broader or more certain in its meaning, and, if Hadlock was aggrieved

by the order reducing his salary, he had, under this statute, a right of appeal. Under the law, it is made the duty of the board of commissioners to fix the amount of the salary to be paid as compensation to the county treasurer. If the board takes action, and no objection is made to the order fixing the compensation, the parties affected by such order are bound by it, unless the effect of the order might be avoided by reason of the board not having jurisdiction to make it. The statute giving the right of appeal from all decisions of the board of commissioners does not contemplate that a person aggrieved shall only have the right of appeal in those matters of which the board has jurisdiction, but, whenever the board does act upon any matter which is before it for action, appeal lies, and it is for the purpose of determining whether or not the board properly acted upon the matter before it that the appeal is taken. In this case the decision of the board sought to reduce a salary. It is true only a portion of the salary thus affected had been earned, but, inasmuch as, under the law, the decision would affect Hadlock during the unexpired portion of his term of office, he was to that extent aggrieved. Where a statute allows an appeal from all decisions of a tribunal, it is not limited to final decisions (2 Enc. Pl. & Prac. 60; *Houk v. Barthold*, 73 Ind. 21); and a judgment on a collateral matter, distinct from the general subject of litigation, affecting only the parties to that particular controversy, is appealable (2 Enc. Pl. & Prac. 70, and cases therein cited). If an order makes a final disposition of any portion of the subject-matter by imposing a liability, or depriving the party of a right, an appeal therefrom will lie (*Taylor v. Sweet*, 40 Mich. 739); and it does not matter at what stage of the proceedings the order is made, its effect upon the rights of the parties determines its appealability (Id.); and, even if it be held that the judgment of the board of commissioners is a void judgment, still appeal will lie (*Shoemaker v. Grant Co.*, 36 Ind. 165; *Borough of Stonington v. States*, 31 Conn. 213; *Petty v. Durall*, 2 G. Greene, 120).

These decisions are based upon statutes analogous to ours. Certainly it was the intention of the statute to grant an appeal, as stated, upon all matters properly before the board of commissioners. Suppose, for instance, that Hadlock had taken no appeal from the board of commissioners reducing his salary from \$1,200, to \$600 per year; that, as suggested by counsel for appellee, he had, on the 1st day of October, made out his bill for his quarterly salary of \$300, presented the same for allowance, and had the same been disallowed in part, such disallowance being based upon the order of the board of commissioners of July 7, 1896, it is very doubtful whether or not he could have recovered, because, under the law providing that the board of county commissioners shall fix the salary, based upon the population of the county, one of the facts to be determined—to wit, the number of inhabitants of the county—could not have been determined, in an action

for that portion of his salary which the board of county commissioners had disallowed. It occurs to us that a court would at once say that, until that order was set aside or vacated, the county, as well as its officers, would be bound by it; and it further appears to us that, in a collateral proceeding of the character suggested by counsel for appellee, the county treasurer could not be heard to dispute the validity of, or the findings of, the commissioners, made in their order of July 7, 1896. We conclude, therefore, that the appeal was properly before the trial court for consideration, and that the trial court erred in dismissing the same. The cause is therefore remanded, with directions to reinstate the appeal and hear the cause.

YOUST et al. v. WILLIS et al.

(Supreme Court of Oklahoma. July 30, 1897.)

RETROSPECTIVE STATUTES—APPEAL BONDS.

The act of the legislature approved February 26, 1895, to regulate the appeals from the justice of the peace and probate courts, and providing that when final judgment shall be rendered against the appellant in the district court, that on motion of the appellee, or any other person having an interest in such judgment, and after 10 days' notice of such motion to be served upon the appellant, the court may enter up judgment against the surety or sureties on the appeal bond for the amount of such judgment rendered against the appellant, is not invalid, because retrospective, when applied in cases where the appeal bond was executed before the act took effect. The legislature may provide for changes in the procedure of courts, which affect only the remedy, and do not affect the obligation of any contract, or the substantial rights of the parties.

Keaton, J., dissenting.

(Syllabus by the Court.)

Error from district court, Payne county.

Action by Willis and Bradford against John Youst in the probate court, in which there was a judgment for plaintiffs. Defendant appealed to the district court, giving a bond on which F. M. Stallard and George Stees were sureties. From a judgment entered against them on the bond, the sureties bring error. Affirmed.

Neill & Clark and George P. Uhl, for plaintiffs in error. King & Hutto, for defendants in error.

TARSNEY, J. On January 14, 1895, defendants in error, Willis and Bradford, obtained a judgment against the plaintiff in error John Youst in the probate court of Payne county, for the sum of \$100 and costs of suit taxed at \$100. From this judgment Youst appealed to the district court of said county, and for the purpose and in the perfection of said appeal said Youst, on January 28, 1895, made and entered into an undertaking or bond for an appeal, as required by law, and containing the conditions, stipulations, and undertakings provided by the statute therefor, and F. M. Stallard and George Stees, plaintiffs in error herein, signed and executed said undertaking or appeal bond as sureties thereon. On May

24, 1895, said cause being heard in the district court, judgment was rendered therein against the said Youst for the sum of \$221.27 and costs, amounting in the aggregate to \$390. Execution was issued on said judgment, and said execution was returned nulla bona. Thereafter, on the 4th day of February, 1896, defendants in error gave notice to said Youst, Stallard, and Stees that they had filed in said district court a motion to take judgment against said Youst as principal and against said Stallard and Stees as sureties upon said appeal bond, and that said motion would be presented to said district court on the first day of the ensuing April term thereof, or as soon thereafter as the same could be heard. This notice was served upon all the plaintiffs in error. Said motion was filed in said district court, and on April 21, 1896, said motion was considered by the court. Upon the hearing of said motion said Youst appeared, and requested the court to allow and set a time for pleading to and resisting the said motion, which request was denied by the court. Stallard and Stees did not appear to said motion. The court entered a default against said Stallard and Stees, and, after hearing said motion, and the evidence offered in support thereof, and of the service of notice thereof, rendered judgment upon said appeal bond in favor of said Willis and Bradford and against said Youst, Stallard, and Stees for the sum of \$235.40, and costs taxed at \$169.10. Exceptions were properly saved, and the cause duly brought to this court for review.

The only assignment of error, which it is necessary for us to consider, is as follows: "That the entire proceedings of the court below in this matter were without any warrant or authority of law, and without jurisdiction over Stallard and Stees, and therefore void." The proposition contended for by plaintiff in error is that the court below had no jurisdiction of the persons of the plaintiffs in error, which would warrant the rendition of the judgment. It is an ancient principle, embodied in all our constitutions, that no person can be deprived of life, liberty, or property except by due process of law, and "due process of law" means in the due course of legal proceedings according to those general rules and forms which have been established for the protection of private rights. *Pennoyer v. Neff*, 95 U. S. 714; *Pearson v. Yewdall*, Id. 294; *McMillen v. Anderson*, Id. 37; *Davidson v. New Orleans*, 96 U. S. 97. In order that a judgment may be valid as being according to the due course of judicial proceedings and by due process of law, it is essential, where the judgment is a personal judgment, that the court should have had jurisdiction, both of the subject-matter and of the parties to the cause; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear. *McVeigh v. U. S.*, 11 Wall. 239; *Jack v. Thompson*, 41 Miss. 49; *Littleton v. Richardson*, 34 N. H. 179; *Mead v. Larkin*, 66 Ala. 87; *Coo-*

ley, Const. Lim. 496. Process or notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicial power. It is the essence of a cause. Without it, there cannot be parties, and without parties there may be the forms of a sentence, but no judgment obligating the person. Cases cited supra. Mr. Freeman, in his work on Judgments (section 118), says: "The power to hear and determine a cause is jurisdiction. Before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has been preferred, and that such person or thing has been properly brought before the tribunal to answer the charge therein contained." And in section 130 of said work the author further adds: "The defendant may also give the court jurisdiction by his voluntary action, as where he appears by his answer, or in some other mode recognized by law. If he does not do so voluntarily, before the court can rightfully exercise jurisdiction over him it must be authorized to require him to appear before it, and submit to its judgment in the action or proceeding; and its process requiring such appearance must be issued and served upon him in substantial compliance with the law." We have, then, to inquire, does the record in this cause bring the proceedings therein within the rules and principles above stated, so as to show a want of jurisdiction in the court below to render the judgment complained of? Ordinarily, the proceedings to recover upon a cause of action like the one at bar would require that the defendants in error should have filed their petition in a court of competent jurisdiction, and have caused the process of the court (the summons) to have issued and been served upon the plaintiffs in error, notifying them of the commencement of an action upon their obligation, and requiring them to answer thereto. That such was the state of the law in this territory at the time said appeal bond was executed, there is no question. But it is contended by defendants in error that the proceedings in the district court were valid, because predicated upon and in conformity with the statute in force at the time such proceedings were had. By an act approved February 26, 1895, it was provided:

"Section 1. That when final judgment shall be rendered against the appellant, in the district court in any action appealed from the probate courts or justice's courts, under the provisions for appeals from said courts, the court, on motion of the appellee, or any other person having an interest in such judgment, or a right to any part of the costs in such actions, after ten days' notice of such motion, to be served upon the appellant by copy delivered to him, may enter up judgment in the name of the appellee or his legal representatives, against the surety or sureties on the ap-

peal bond of the appellant for the amount of such judgment and the costs, which, by the terms thereof, the appellant may be required to pay. Execution may issue on such judgment, as in other cases, for the use and benefit of the successful party or any person interested in such judgment or in the cost of such actions. In case the bondsmen appeal from the judgment entered upon such motion, execution therein shall be stayed sixty days.

"Sec. 2. This act shall be in force and effect from and after its passage and approval."

Was this act authorized under the constitutional principles we have stated, and was it valid to confer jurisdiction upon the district court over the persons of the sureties on said appeal bond? Mr. Cooley says: "The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed, from time to time, but only with due regard to the landmarks established for the protection of the citizen. When the government, through its established agencies, interferes in the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley, Const. Lim. 434. While, as we have said, no person can be deprived of liberty or property except by "due process of law," which means by due course of legal proceedings in accordance with established principles and settled maxims, yet what constitutes due process of law may differ with different classes of cases. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the necessity for general rules is not such as to preclude the legislature from establishing special rules for particular classes of cases, provided the particular cases range themselves under some general rule of legislative power; and hence there are a number of classes of cases where the property of the citizen may be taken without the actual service of ordinary process upon him, or without his ever actually having his day in court; and legislative enactments providing for such procedure have been sustained as not in violation of any constitutional right of inhibition. Proceedings in admiralty and in attachments against the property of nonresident debtors are illustrations.

The right of the legislature to provide a sub-

stitute service for that of ordinary process as a notice by one party in controversy to another in certain classes of cases has been upheld, and the jurisdiction founded thereon maintained. In *Re Empire City Bank*, 18 N. Y. 199, it was said: "It may be admitted that a statute which could authorize any debt or damages to be adjudged against a person upon purely *ex parte* proceedings without a pretense of notice, or any provision for defending, would be a violation of the constitution, and be void; but where the legislature has presented a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the court has not the power to pronounce the proceedings illegal." *Jones v. Driskill*, 94 Mo. 190, 7 S. W. 111; *Campbell v. Evans*, 45 N. Y. 356. Where a statute provides for the taking of certain security, and authorizes a judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the conditions, and to waive process, and consent to judgment. *Chappee v. Thomas*, 5 Mich. 53; *Pratt v. Donovan*, 10 Wis. 378; *Whitehurst v. Coleen*, 53 Ill. 247. On the principle of these cases many statutes which provide for summary proceedings by motion, and with and without notice, for judgment upon appeal bonds and securities, have been held valid; and we have no doubt of the constitutionality of the act of the legislature of this territory above quoted as to appeal bonds entered into and executed since the enactment of the law. But is it valid to sustain a judgment upon such bond executed before it went into effect? As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. The right to a particular remedy is not a vested right. The exceptions to this rule are those peculiar cases in which the remedy is a part of the right itself. The state may change or abolish old remedies and substitute new, or even without substituting any, if a reasonable remedy still remains. Nor has a party a vested right in the procedure for his defense which will prevent changes in such procedure which do not affect his substantial rights. There is no doubt of the right of the legislature to pass statutes which may reach back to and affect prior transactions, provided that no other objection exists to them than their retrospective character. There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void; the distinction in the several cases being based upon the question whether they did or did not impair the obligations of the contracts of the parties, or change their substantial rights, and the rule is well established, in relation to changes of judicial remedies and procedure, that whatever the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to

dispense with it by a subsequent statute; and, if the change consists in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. It follows that if the legislature might, by a prior law, have provided for dispensing with the ordinary process of the court, in order to give jurisdiction to the court over the persons of sureties upon appeal bonds, and substituted therefor such notice as is provided in the act of 1895, or to dispense with such process and notice, and make the execution of the bond to give jurisdiction to the court over their persons in the cause wherein it was made, then we cannot see why it was not competent for the legislature to provide the procedure which they have provided, and why it is not operative and valid to authorize the proceedings had in this case. Individuals entering into contracts cannot bind the hands of the state as to the organization of its courts or their procedure so long as such organization or procedure does not interfere with their contractual obligations, or deprive them of an effective remedy thereon. It is true that this statute does not provide for giving any notice to the sureties on such bonds, but only provides for a notification to the appellant that a judgment on the bond will be moved for; but the legislature might have provided for dispensing with notice to any or all the parties to the bond, and have provided that the making and filing of the bond in the cause would be sufficient to give jurisdiction to the court; and as to the sureties that is, in effect, what this statute does. The statute had been in force for months after they gave their bond, and before judgment was taken thereon. They had been actually notified of the pendency of the motion, and as to the time when it would be considered. By making the bond, and by operation of this law, they were in court, and the court might lawfully render judgment against them. This being our conclusion, and there being no other error assigned, it follows that the judgment of the court below must be affirmed. It is so ordered.

DALE, C. J., having presided in the court below, not sitting. BIERER and McATEE, JJ., concur.

KEATON, J. (dissenting). As I do not agree with my associates in the conclusions reached upon the questions decided in this case, and as they are of more than ordinary importance, I feel it my duty to state the reasons for my nonconcurrence, although limited of time requires that I do so very briefly. The principles enunciated by the supreme court of the United States, Freeman on Judgments, and Judge Cooley in his incomparable work on Constitutional Limitations, contained in the first part of the foregoing opinion, meet with my unqualified approval, but I believe them utterly repugnant to the hold-

ing that chapter 31, Sess. Laws Okl. 1895, is constitutional and valid. It will be observed that no notice whatever upon the sureties who are to be bound by the judgment entered is provided for in said chapter. The provision that notice shall be served upon the appellant is ridiculous, as he is already bound by the original judgment. To uphold this law will be to encourage other legislation of this character, and it will require but one step further by the legislature in this direction to enact that the supreme court of this territory, upon affirming a judgment against an appellant or plaintiff in error, shall also enter up judgment against his bondsmen, and that the probate courts shall, upon the breach of their duties, enter up judgment against the bondsmen of executors and administrators, as the sureties on both these classes of bonds bind themselves that their principal will perform the orders and judgments of the respective courts. I think such legislation fundamentally wrong, and in violation of our constitutional provision guarantying that the property of no individual shall be taken without due process of law. Suppose, for instance, that the alleged surety on the bond in an appeal from a justice to the district court never, in fact, executed said bond. Is it due process of law to enter judgment against him, and issue an execution thereon, and require him to resort to the extraordinary remedy of injunction, and assume the burdens of advancing costs and giving indemnifying bonds, in order to protect his property from sale under said execution? Suppose, again, that such an alleged surety should, by accident or otherwise, learn of the intended proceeding upon the motion of the appellee to enter judgment against him, and should appear in the court, and set up the fact that he never executed the bond, or that same was executed by fraud or mistake, or allege any other competent defense to such proceeding, and demand a trial by jury, could the court grant same on the summary proceeding provided for in said chapter? If not, then how can the provisions thereof be declared valid under said constitutional guaranty? The same difficulties will arise where the conditions of said bonds are illegal, or for any other cause not binding upon those who executed them as sureties. Suppose, further, that a surety upon such bond should die after the execution thereof, and before the date of final judgment in the district court against the appellant, would it be due process of law for the district court to proceed to enter up judgment against the deceased? Under the provisions of said chapter there is no possible way for the court to know whether the surety is living or dead, as no notice of any kind is required to be served upon such surety to bring him into court. But suppose the court should, in some way, ascertain the fact of the surety's death, would it be the court's duty, under said chapter, to enter up judgment against the heirs of the deceased,

or his administrator or executor? I think the provisions of this chapter wholly repugnant to reason and common sense, as well as violative of our organic law, and can, therefore, never give my assent to upholding same. It is clear to my mind that a surety upon an appeal bond is as much entitled to have his day in court as a surety on any other class of legal obligations. In fact, some of the most important litigation of the day grows out of the interpretation to be given to just such bonds, and the question of the liability of the sureties thereon. In entering my dissent in this case I freely admit that there is considerable respectable authority (perhaps the majority of the decided cases) sustaining the position taken by the majority of this court; but I cannot give my assent to the reasons given or the conclusions reached therein. In *Chappee v. Thomas*, 5 Mich. 53, cited in the opinion of the majority of this court, the reasoning upon which a similar statute was sustained is as follows: "The bond is, we think, to be read in all respects as if the whole of the statute in reference to the appeal, the bond, and mode of entering up judgment upon it were recited at large in the bond. And in this view it becomes a direct and binding assent to and authority for the entry of the judgment in this manner, and stands upon a principle analogous to that of a warrant of attorney. It is true the authority is here given to the court, instead of one of its officers, as the attorney of the party, but this is a difference of form, rather than of substance." It may be said in this connection, however, that Chief Justice Martin took no part in said decision. From an examination of the opinion in *Chappee v. Thomas*, *supra*, it will be readily observed that the reasoning therein does not answer any of the objections above suggested to such a law as the one sustained by that and a majority of this court. In the case of *Pratt v. Donovan*, 10 Wis. 378, the supreme court of that state, after assigning practically the same reasons for sustaining a similar law as those assigned in the opinion of the supreme court of Michigan in *Chappee v. Thomas*, *supra*, attempts to answer some of the writer's objections thereto in the following language: "And I think it is no objection to this view to say that the undertaking might be forged. The decision is placed upon the fact that the undertaking, assuming it genuine, fairly amounts to a consent to the entry of judgment. And we think the validity of the law is to be tested on this assumption. And, if correct in the position that the undertaking is a consent, the fact that it might be forged does not invalidate the law. A cognovit might be forged; an attorney might, without authority, consent to a judgment, or one person might, by collusion, be sued for another, and consent to judgment. In all such cases the party wronged would undoubtedly be entitled to his remedy on a proper application to the court. But we think the possibility of

such a forgery or false personation does not invalidate the law authorizing judgments by consent. The law proceeds on the assumption that the consent is genuine, and on that assumption its validity is to be determined." The above is not a satisfactory answer to said objections. If courts could assume all written instruments to be genuine and subsisting, then they could uphold a law providing for the entry of judgment against parties executing promissory notes by simply bringing the notes into court, and exhibiting them, without requiring any notice whatever to be served upon the parties proceeded against. It is true that the signatures to the note may be forged, or the note may have been paid, or the makers, or some of them, released, or some other valid defense to said note may exist; but the same may be true as to the liability of sureties on an appeal bond. Such sureties may have paid the judgment against their principal. They may have been released by the appellee, or the conditions of the bond may be wholly insufficient to bind them, or their signatures thereto may have been forged, yet judgment is to be entered against them upon the mere motion of the appellee, and without any notice whatever to them. The decision in *Pratt v. Donovan* was by a divided court, Paine, J., writing the opinion, which was concurred in by Dixon, C. J., with Justice Cole dissenting. I think the doctrine announced and adhered to by the supreme court of Kentucky, which is practically opposite to that contained in the majority opinion herein, the correct one. See *Hughes v. Hughes*, 4 T. B. Mon. 43. And *Smith v. Smith*, 1 How. (Miss.) 102, is also directly in point as supporting the same doctrine. In all of the cases cited in the opinion concurred in by the majority of the court the liability of the sureties is based upon the proposition that such sureties must have known the law when they signed the obligation, and that the law therefore became as much a part of their obligation as if written into the bond. In fact, this is the only theory upon which such a statute can possibly be upheld, and in the case at bar no such law existed when the sureties incurred the liability on the bond. It cannot, then, be said that at the time of the execution of the undertaking such law became a part thereof, but the majority of the court hold that whatever the legislature could have legally enacted prior to the execution of the bond as to the procedure which should be employed in procuring judgment against the sureties thereon could be enacted subsequently thereto, and made binding upon such sureties. This, in my opinion, cannot be sustained in reason or authority, even if it should be conceded that the act in question is valid as to bonds executed subsequent to its enactment. I agree that the procedure as to the manner of bringing said sureties into court could be changed by the legislature subsequently to the inception of their liability on said undertaking, provided the

mode of procedure subsequently enacted required that they be given actual notice of the proceedings against them by which the judgment against the principal in the undertaking should also become a judgment against them; but I can go no further, and feel that I am supported by sound principles of law. Entertaining these views, I hold that the statute in question should be declared unconstitutional and void, and especially so regarding the liability of the sureties on the appeal bond in question.

McCOLGAN et al. v. TERRITORY et al.
(Supreme Court of Oklahoma. July 30, 1897.)

RECOGNIZANCES—PARTIES—DEMURRER.

1. The territory of Oklahoma is a proper party plaintiff to bring an action on a forfeited recognizance.

2. Demurrer is not the proper method by which to object to a suit against a defendant by initials instead of by his Christian name.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

Action by the territory and Oklahoma county against Thomas McColgan and others on a forfeited recognizance. From a judgment for plaintiffs, defendants appeal. Affirmed.

Amos Green & Son, for appellants. J. L. Brown, Co. Atty., for appellees.

BIERER, J. This action was brought in the name of the territory and Oklahoma county, as plaintiffs, against W. H. Carr, George Smith, Thomas McColgan, and William T. James, upon a forfeited recognizance given by Carr as principal and the other defendants as sureties for the appearance of Carr before the district court of Oklahoma county on a charge of aiding and abetting prisoners to escape from jail. The errors assigned are to the decisions of the court in overruling the demurrers of the defendants. It is claimed that there was a misjoinder of the territory of Oklahoma as a party plaintiff, and that the territory was not a proper party plaintiff, and had no capacity to sue in this cause; and that no judgment could be rendered for the territory, because the money to be recovered on this judgment does not go to the territory, but to the county, for the benefit of the school fund; and that, therefore, the county is the only proper party plaintiff. The judgment was rendered in favor of the territory of Oklahoma, the case being dropped as to Oklahoma county.

There was no error in overruling the demurrers. The Code does not require that in all cases suits shall be brought in the name of the real party in interest. General section 3898, St. 1893 (section 26 of the chapter on Civil Procedure), provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-eight; but this section shall not be deemed to authorize the assign-

ment of a thing in action, not arising out of contract." General section 3900 (section 28 of the Code of Civil Procedure) provides that: "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted." Section 5503, under which the recognizance sued on was given, provides for such undertakings being made in the name of the territory; and the territory, we think, should be held to be a person, and therefore authorized to sue as one in whose name a contract is made for the benefit of another, within the meaning of this section 28.

The only other complaint is that the defendant James was sued by his initials, "Wm. T. James." This suit was brought against the defendant in the same name in which he signed the bond sued on, and in which he also filed his demurrer when he appeared in the action in the district court, and made complaint because he was so sued. If the name is sufficient for him to do business in and to appear to an action in, it would seem that it ought to be a sufficient name also by which he might be sued. As a matter of law, however, it is a good practice to always sue parties in their Christian names, and parties ought ordinarily to be so sued where their Christian names are known. The presentation of a demurrer, however, is not the proper way to present the objection of a defendant to his being sued by his initials. *Slocum v. McBride*, 17 Ohio, 607. Finding no error in the record, the judgment of the court is affirmed, with costs. All the justices concurring.

ATCHISON, T. & S. F. RY. CO. v. WIGGINS,
County Treasurer, et al.

(Supreme Court of Oklahoma. July 30, 1897.)

ILLEGAL TAX—INJUNCTION—SUFFICIENCY OF PETITION.

1. A petition which alleges facts to show that a tax levy of 14 mills for the purpose of paying the salaries of county officers for the ensuing year was made by the board of county commissioners, when 8 mills would be more than sufficient for such purpose, and that plaintiff has paid 8 mills of the tax, and that the county treasurer is threatening to collect and will issue his warrant for the collection of the balance of the tax so levied unless enjoined from so doing, states a good cause of action, and it is error to sustain a demurrer to such a petition.

2. A tax levy which is clearly in excess of the amount which the board of county commissioners are authorized to levy for a particular purpose, is illegal.

3. The remedy by injunction is one provided by law to restrain the threatened enforcement of an illegal tax.

(Syllabus by the Court.)

Error from district court, Woodward county; before Justice Frank Dale.

Action by the Atchison, Topeka & Santa Fé Railway Company against E. S. Wiggins,

county treasurer of Woodward county, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Henry E. Asp, J. W. Shartel, and J. R. Cottingham, for plaintiff in error. B. B. Smith, Co. Atty., and R. J. Ray, for defendants in error.

BIERER, J. The plaintiff brought its action in the district court of Woodward county on the 4th day of May, 1897, its petition being as follows:

"In This District Court of Woodward County, Oklahoma Territory. The Atchison, Topeka & Santa Fé Railway Company, Plaintiff, against E. S. Wiggins, as County Treasurer of the County of Woodward and Territory of Oklahoma, and A. Ingalls, W. W. Carter, and Edward Claunch, the Board of County Commissioners of the County of Woodward and Territory of Oklahoma, Defendants. Petition. Comes now the plaintiff, and for its cause of action against the said defendants alleges and avers: That heretofore, and in, to wit, the year 1896, it was, and is now, a corporation duly organized and existing under the laws of the state of Kansas, and owned, possessed controlled, and operated a certain line of railway into and through the county of Woodward and territory of Oklahoma, and that the board of railway assessors of said territory for the year 1896 assessed all the railroad property of the said plaintiff in said Woodward county at and for the sum of three hundred five thousand five hundred thirty-two and $\frac{12}{100}$ dollars (\$305,532.12), and that thereafter levies of various taxes for various territorial, county, and municipal purposes were levied for the same year, and that the said board of county commissioners for said county attempted to levy for said county for the purpose of paying county salaries a levy of fourteen mills on the dollar valuation of the said county, and that the total assessed valuation of the said county is the sum and amount of seven hundred one thousand dollars (\$701,000), including the property of this plaintiff so assessed for taxation in said county, and that the total salaries to be paid out of the salary fund of said county, as fixed and established by law for the year 1896, was only the sum of four thousand two hundred dollars (\$4,200), and that as against said sum there was the sum of at least one thousand four hundred dollars (\$1,400) arising from saloon licenses and other sources than the ordinary taxation to be applied thereto and credited thereon. That the tax levy so made for the purpose of paying county salaries by the said board of county commissioners on the property of this plaintiff alone amounted to the sum of four thousand two hundred seventy-seven and $\frac{44}{100}$ dollars (\$4,277.44), and being more than sufficient to pay and discharge all of the county salaries properly chargeable to said fund, and that the said levy of taxes on the taxable property of said county for county salaries was more than

double the amount necessary to pay each and all of said salaries, and that a levy of nine mills is more than sufficient to raise all sufficient and necessary revenue to pay all of the charges properly chargeable to the said county salary fund, including twenty-five per cent. for contemplated delinquent taxes. That the said plaintiff has paid of its said taxes eight mills, levied for such purpose, and all of its other taxes except six mills of the said levy so levied for the purpose of paying said county salaries, which said sum is excessive, illegal, and unjust, and which said sum the said county treasurer of said county is now threatening to collect, and will issue his warrant for the collection thereof, and cause the same to be levied on the property of this plaintiff, unless restrained from so doing. That plaintiff has no other adequate relief at law, and therefore prays that the said defendants, and each of them, be perpetually enjoined from collecting or attempting to collect, or issuing any warrant for the collection of, the sum of one thousand eight hundred and thirty-one dollars (\$1,831) of the said unlawful levy so as aforesaid made for the purpose of paying county salaries, and that the plaintiff in the meantime be granted a temporary injunction against the collection of said sum, and on the final hearing thereof that the said injunction may be made perpetual. Henry E. Asp, John W. Shartel, J. R. Cottingham, Houston & Marum, Attorneys for Plaintiff.

"Territory of Oklahoma, Logan County—ss.: J. R. Cottingham, of lawful age, being first duly sworn, upon his oath deposes and says he is one of the attorneys for the plaintiff in the above action; that he has read the above petition, and knows the contents thereof, and each, all, and every of the allegations therein contained are true. J. R. Cottingham.

"Subscribed in my presence, and sworn to before me, this 3d day of May, 1897. [Seal.] Elizabeth Parsons, Notary Public.

"My commission expires Jan'y 20, 1901."

And upon this petition a temporary order of injunction was granted. The defendants demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and judgment rendered for the defendants dissolving the temporary order, and denying the injunction, and for costs; and the sole question is, does this petition state a cause of action? A part of section 3, art. 2, c. 43, of the Session Laws of the territory of 1895, provides: "At the regular meeting in July of each year the board of county commissioners shall prepare an itemized estimate of the necessary expenses of the county during the ensuing year, including the amount necessary to meet outstanding indebtedness, as evidenced by bonds legally issued and the interest thereon, and such estimate shall state the amount of revenue necessary to be raised for each fund, and the rate of levy necessary to raise such estimated revenue, with twenty-five per cent. added thereto as allowance for delinquent

taxes. The levies for county purposes shall be a separate, specific and sufficient levy for the payment of salaries; a levy for court expenses not exceeding three mills; for support of the poor, including insane, not exceeding two mills; for roads and bridges, not exceeding two mills; for county supplies, not exceeding three mills; for contingent fund, not exceeding three mills; which last item shall include all county expenses not properly chargeable against any of the other funds hereinbefore provided for; and for a sinking fund, to be paid in money, such rate as in the estimation of the board of county commissioners will pay one year's interest on all outstanding bonded debt of the county, together with such part of the principal as shall be by law required, such fund to be applied, first, to the payment of the interest, and second, to the payment of the principal." This is the statute under which this levy was made, and it is claimed by plaintiff in error that, while this statute makes an express limitation upon the amount of the levies which the board of county commissioners can make for certain of the funds provided by this law, and makes no such express limitation upon the amount of the levy for the salaries of county officers, yet, as the county commissioners are given authority only to make "a separate, specific, and sufficient levy for the payment of salaries," they have no authority to levy an amount which is clearly in excess of the amount required to pay the salaries of the county officers for the ensuing year. In our judgment, this is the law. The power to levy taxes is a sovereign power, reposed in the legislature, and delegated by it to municipal boards or officers, to be exercised for an express purpose, or as a necessary incident to the exercise of some power clearly granted. In the case before us it was delegated to the board of county commissioners to make "a separate, specific, and sufficient levy for the payment of salaries" of the officers of the county "during the ensuing year." This is an authority to levy annually all the tax that will be necessary to pay one year's salary of such officers, but not to levy in one year sufficient for two or ten years. Upon existing and appropriate conditions the commissioners may make an estimate of the amount necessary to meet the payment of the salaries for one year, and to this they may add 25 per cent. for delinquent taxes; but they may not add more than 200 per cent., as has been done in this case. If the allegations of the petition, admitted by the demurrer, are true, or 1,000 per cent., as may be done in the next case. With reference to several other levies provided for in this section of the revenue law, there is an express limitation upon the amount that can be levied for these particular purposes, a point beyond which the commissioners cannot go, no matter what the urgency of the demands of the instance may be; but that cannot be construed to make the wish of the commissioners the limit of their levy for salaries. The limit of the levy for the payment of salaries may

be much more difficult of ascertainment than for these funds which have prescribed boundaries; but it as surely exists, and that may be said to be where the necessity ceases, when enough has been levied to meet the demand on the fund for the year. It is for that purpose that this public exaction is permitted, and when that has been satisfied the exercise of the authority is complete. The complete exercise of power furnishes its own limitation upon the authority. When what has been done is all that there has been given authority to do, a limitation is as surely presented as though stated in express language. A clear absence of authority to do an official act has always been held to render the act void. This petition alleges that the assessed valuation of the property of Woodward county for the year 1896 is \$701,000, and that the total salaries to be paid out of the salary fund for that county amount to \$1,200, and that as against this there was a sum of at least \$1,400, arising from saloon licenses and other sources of revenue than the ordinary taxation, and which is to be applied to and credited on this salary fund. This would leave a balance of \$2,800 to be raised for the salary fund for that year by the levy of a tax by the board of county commissioners. Add the 25 per cent. allowed by law for delinquent taxes, and the total amount to be levied would be \$3,500. A 14-mills levy, however, would amount to the sum of \$9,814, which would make an excess of \$6,314,—almost twice the amount of the levy which the commissioners were authorized to make. Such an excess as this certainly cannot be supported by any grant of authority to the board of county commissioners by the statute before us, and the enforcement of such a tax would be a ruinous exaction upon the property of the county, not levied for the purpose of meeting a necessary public expense, the principle upon which tax burdens are allowed to be laid. A levy of eight mills, which is the amount the plaintiff alleges it has paid of this tax levy, would amount to \$5,608, which would be \$2,108 more than the amount which is alleged to be sufficient to meet the entire salaries to be paid out of the salary fund, after deducting the \$1,400 raised from saloon licenses and other sources, and adding 25 per cent. thereto for delinquent taxes. This, it seems, ought to be sufficiently liberal.

The determination of the amount of the levy for the salary fund undoubtedly required computations to be made, based upon the amount of taxable property of the county, and the amount of the salaries, which are graduated according to the population of the county; and the exercise of such powers in the levy of a tax does not make the act of the county commissioners such that it is beyond the power of the court to correct mistakes made in the determination of the amount of tax necessary to meet the demands of the fund for which the levy is made; and, if the levy is shown to be clearly excessive, we can see no reason why a party cannot complain

to the court, and have the unnecessary exaction upon his property enjoined. Upon principle we would conclude that the tax which is clearly excessive is, as to the excess, illegal, and this conclusion is as strongly supported by authority as it is sound in principle. In the case of *Hurt v. Hamilton*, 25 Kan. 76, a levy of 12½ mills was made for the purpose of paying certain bridge bonds which had been issued to the amount of \$23,000. It was determined that \$13,000 of these bonds were legal, and that a levy of 7 mills was sufficient to pay the due proportion of principal and interest for the year in question, and the balance of the bonds and 5½ mills of the levy were enjoined. In the case of *Commissioners v. Blake*, Id. 356, a levy of taxes which was made to pay judgments which had been rendered upon unpaid demands of the county on account of the annual expenses of the county which could not be paid out of the fund provided by law, and which had been levied to its limit for the years in question, was held to be in excess of the power of the county commissioners, and the levy was enjoined as illegal. In the case of *Burlington & M. R. R. Co. v. Saunders Co.* (Neb.) 19 N. W. 698, it appears that there was due from the county the sum of \$1,765.22 on account of the insane fund, and this was, under the law, certified by the superintendent of the insane hospital to the auditor of state, and the auditor notified the county clerk of the county that this amount was due from the county, and the board of county commissioners then proceeded to levy a tax to pay this amount into the state treasury. An excessive levy was made by the commissioners to meet this charge, and the tax, as to the excess, was enjoined. It is stated in the opinion: "The testimony shows that a tax of one mill on the dollar for the year named will produce considerably more than \$1,765.22. As the tax is levied in pursuance of an express provision of the statute, no greater sum can be levied than is expressly authorized. Therefore, to the extent of \$1,765.22, the tax is sustained, and all in excess of that sum, being levied without authority of law, is void, and is perpetually enjoined." The statute under which that case was determined provided that: "The board of county commissioners shall add such amount to the next state tax to be levied in said county, and pay the amount so levied into the state treasury." Comp. St. 1881, p. 307, § 47. In this case it provides that the levy "for county purposes shall be a separate, specific, and sufficient levy for the payment of salaries." Sess. Laws Okl. 1895, c. 43, art. 2, § 3. In that case, as in this, there was no express limitation upon the amount which the board of county commissioners should levy. In both cases the board is authorized to make a sufficient levy to meet the charge on the particular fund; but in that case, as we hold in this, it was held that "no greater sum can be levied than is expressly authorized," and, if it is done, the col-

lection of the excess may be enjoined. In the case of *Libby v. Burnham*, 15 Mass. 144, the assessor was authorized to assess for one year the sum of \$1,817.22, when he assessed the sum of \$1,966.16, and for another year he was authorized to collect the sum of \$2,488.47, when he assessed the sum of \$2,701.15. The law appears to have authorized the assessor to add 5 per cent. to the sums required for fees or commissions, and upon that case Parker, C. J., said: "We are of opinion that assessing more than five per cent. above the sums voted by the town to be raised makes the assessment illegal and void." The same court stated, in the case of *Joyner v. Inhabitants of School Dist. No. 3*, 3 Cush. 567, that: "Assuming all the other proceedings to have been regular, the excess in the amount of the tax assessed beyond the sum voted to be raised by the district would alone vitiate the assessment, and render the tax illegal. Under a vote of the district to raise \$250, the assessors assessed the sum of \$285.01; an amount far exceeding the excess which is allowed by the statute. This is a fatal objection to the validity of the tax." We will admit that these cases appear to have drawn the point pretty fine, but they serve to show how strictly the doctrine which controls our opinion in this case is adhered to by the supreme courts whose decisions hold a leading position among the authorities. Our decision is in harmony with the conclusion of the supreme court of Pennsylvania in the case of *Appeal of Conners*, 103 Pa. St. 356, the syllabus of which case states: "Although legislative authority be given to impose a tax for a certain purpose, yet, if the tax levied be clearly in excess of the sum required for the purpose, a court of equity will enjoin its collection to the extent of the excess." In answer to the argument that injunction is not the proper remedy for such a case as this, it is sufficient to observe that it has not only been held to be the proper remedy in other states, as will be seen from the above decisions from the supreme courts of Nebraska and Pennsylvania, but it has so many times been held to be the proper remedy under the Kansas Code, which we have adopted, that it is unnecessary to cite further authorities on this point than the two Kansas cases above cited. The judgment of the court below is reversed and remanded, with directions to overrule the demurrer to plaintiff's petition.

DALE, C. J., having presided in the court below, not sitting; all the other justices concurring.

WALTON et al. v. WILLIAMS et al.

(Supreme Court of Oklahoma. July 30, 1897.)

SUMMONS IN ERROR—PROBATE CLERK—SURETIES—RIGHTS AND REMEDIES—RECEIVERS—COSTS.

1. A summons in error is not required to be issued and served within 60 days after the petition in error is filed in this court. It is required

that the appeal shall be taken and perfected (which includes the issue of summons in error) within one year from the rendition of the judgment appealed from.

2. The transcript from a probate court must be certified to by the probate judge, and not by the clerk. There is no clerk of a probate court in the sense that there is a clerk of the district court. The act authorizing the probate judge to appoint a clerk is permissive merely, and there may or there may not be a clerk of a probate court, at the option of the judge of said court; and when one is appointed the judge is not disqualified or excused from performing any act or duty which by law he might perform if no clerk had been appointed.

3. In an action by sureties against their principal it is not necessary that the petition should allege that the sureties had settled or paid the debt for which they were bound by their obligation as sureties. Under section 546 of our Code of Civil Procedure, a surety may maintain an action against his principal to obtain indemnity against a debt or obligation for which he is bound before it is due, and without having first paid or satisfied the same, whenever any of the grounds exist upon which an order of attachment may issue.

4. A court has no authority, upon dismissing an action wherein a receiver has been appointed, to tax, as costs in the action, against the plaintiffs, the costs and expenses of running the business placed in the receiver's hands, or for clerk hire, rent, or for any unpaid allowance to the receiver. These are not items for taxation as costs, but must be recovered, if at all, in an action for that purpose, and where an issue may be framed and tried as to the amount and justice of such items; and such items only as the law fixes and designates as costs can be taxed as costs.

(Syllabus by the Court.)

Error from probate court, Grant county.

Action by P. T. Walton and others against M. R. Williams and another. From a judgment for defendants, plaintiffs bring error. Reversed.

A. M. Mackay, for plaintiffs in error. Samuel Weston, for defendants in error.

TARSNEY, J. This case comes to this court upon petition in error upon a transcript of the record of the probate court of Grant county. There is pending a motion by defendants in error to dismiss the appeal. There is no merit in either cause assigned therefor. Whether plaintiffs in error caused to be issued from this court within 60 days, or any other time, from the filing of their petition in error, a summons in error, is immaterial, provided the summons in error was issued, and the appeal perfected, within one year from the rendition of the judgment appealed from. The transcript need not be certified by the clerk of the probate court. There is no clerk of the probate court in the sense that there is a clerk of a district court. The law does not require that there shall be a clerk of a probate court. The provision in the Session Laws of 1895 (Laws 1895, 102) that "the probate judge may be permitted to appoint a clerk, who may issue process and perform such other acts ministerial in character as are performed by the clerk of the district court," does not take away the authority of the probate judge to certify to transcripts, or do any other act which he might lawfully do,

or that was his duty to do if such act had not been passed. It was a mere permissive act authorizing the probate judge to have the assistance of a clerk where the business of the court required it, and judges of probate may or may not appoint such clerks, at their option. The motion to dismiss is not sustained.

2. It appears from this record that M. R. Williams and George Blake were the agents at Pond Creek for the Pabst Brewing Company, of Milwaukee, Wis.; that they gave a bond to the brewing company for the faithful performance of their duties; that plaintiffs in error and various other parties became sureties upon said bond for Williams and Blake. Plaintiffs in error, without joining the other sureties on said bond as plaintiffs, commenced this action in the probate court of Grant county against the defendants in error, Williams and Blake, alleging the making of said bond; that they became sureties thereon; that defendants had defaulted in the conditions of said bond; that they had become indebted to the obligee in the sum of \$325; that plaintiffs had become liable as sureties on said bond for said sum of \$325, and asked judgment for that amount. The bond and contract of surety was not set out in the petition. To this petition a demurrer was filed and sustained. The plaintiffs asked leave to file an amended petition, and leave was granted to plaintiffs to move to file an amended petition. Plaintiffs moved to file an amended petition, which was attached to said motion, and the motion was argued, submitted, and by the court denied. The amended petition, in addition to the matters stated in the original petition, set forth a copy of the bond to the brewing company, and the contract of surety indorsed thereon; alleged that the contract was terminated between the brewing company and Williams and Blake; that Williams and Blake were indebted to the brewing company in the sum of \$322.42; that they had failed and neglected to pay the same; that the brewing company had notified the plaintiffs of said default, and made demand upon Williams and Blake for the payment of the same, and notified the plaintiffs that it would hold them liable therefor upon their contract of surety; that defendants, Williams and Blake, had attempted to dispose of their property within the jurisdiction of the court, with the intent to hinder, delay, and defraud their creditors, and without indemnifying the plaintiffs against their liability as surety upon said bond. The other makers of the surety were made parties defendant. The court refused to permit this amended petition to be filed, and afterwards dismissed the cause. Before the demurrer was sustained, or the motion to file an amended petition was denied, an attachment had been issued, and, in addition to other property, a one-half interest of defendant Blake in a drug store was levied upon, and a receiver was appointed, first to take charge of Blake's one-half interest in the drug store, and afterwards to take charge of and

conduct the entire drug business; the other partner in the drug business being made a party to the action. The record in this case might well be called a comedy of errors. If it were not for the brief of defendants in error, we would be at a loss to understand upon what theory the court below proceeded in sustaining the demurrer to the petition, and in refusing to permit an amended petition to be filed, and we are yet at a loss to understand the theory of the other proceedings in the case. From the brief of counsel we take it that the court, in sustaining the demurrer and refusing to permit the amended petition to be filed, proceeded upon the theory that sureties, before they can sue their principal and maintain an action against him, must pay or settle the debt for which they are bound by the terms of the obligation which they signed as sureties for their principal, and that the fact of payment must be pleaded. This may be a correct interpretation of the law in the absence of a statute regulating the matter, but section 546 of our Code of Civil Procedure provides: "A surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which, by the provisions of this Code, an order may be made for arrest and bail or for an attachment." In this case the plaintiffs in both petitions prayed that the defendants be ordered and adjudged to indemnify them, and that, failing so to do, plaintiffs have judgment for the amount of their liability as sureties; and the petitions set forth the grounds which would authorize an order of attachment. This statute was meant to change the common-law rule, so that a surety should not be compelled to stand by and see the principal, for whose obligations he was bound, fraudulently dispose of his property, and leave his just debts to be paid by those whom he had deluded into becoming his sureties. The court erred in sustaining the demurrer to the petition and in refusing to permit plaintiffs to file an amended petition.

3. When the court dismissed the cause (if the same had been properly dismissed) it had no right to render judgment against the plaintiffs for the expenses of running the drug store, for clerk hire, for rent, or for any unpaid allowance to a receiver. These are not items for taxation as costs in an action when it is dismissed, but must be recovered, if at all, in an action for that purpose; and where an issue may be framed and tried as to the amount and justness of such items only such items as the law fixes as costs can be taxed as costs. We have here the anomaly of a party who was not a party to the action below made a party defendant here because a judgment was rendered in his favor for rents under the theory of taxing costs. For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with instructions to permit the plaintiffs in error to file

therein their amended petition, and to vacate all orders made in said cause subsequent to the refusal by the court to permit such amended petition to be filed. All the justices concurring.

YOUNG v. SEVERY.

(Supreme Court of Oklahoma. July 30, 1897.)

OBJECTION TO PLEADING—LANDLORD AND TENANT—FAILURE OF TITLE—ESTOPPEL.

1. An allegation, though indefinite and uncertain and otherwise defective, of a material and necessary matter, is sufficient when first questioned by an objection to the introduction of any testimony thereunder.

2. A tenant is estopped from denying his landlord's title, in so far as the right to the use and possession of the premises is concerned, although the title under which the latter first acquired possession and control thereof has reverted to the United States, and both the landlord and tenant are claimants for said property, and applicants and contestants for title thereto under and by virtue of the laws regulating the disposal thereof.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice Frank Dale.

Action by C. L. Severy, as assignee of S. W. Sawyer, against E. C. Young. Judgment for plaintiff. Defendant brings error. Affirmed.

This action was commenced by C. L. Severy, as assignee of S. W. Sawyer, in the district court of Canadian county, on the 16th day of October, 1894, by filing therein his petition, which, omitting the prayer, is as follows: "Territory of Oklahoma, County of Canadian—ss.: In the District Court in and for Said County and Territory. C. L. Severy, as Assignee of S. W. Sawyer, Plaintiff, v. W. P. Seawell, I. E. Wagoner, O. H. Benton, W. L. Choate, E. C. Young, partners under the firm name of E. C. Young Lumber Co., Defendants. Petition. The plaintiff above named complains of the said defendants, and alleges: (1) That the said C. L. Severy is the duly and legally appointed, qualified, and acting assignee of the said S. W. Sawyer. (2) That the said defendants are co-partners, and doing business as lumbermen in the city of El Reno, under the firm name of E. C. Young Lumber Co. (3) That on or about the 1st day of October, 1891, the said S. W. Sawyer rented to the defendants, and the defendants hired of the said S. W. Sawyer, certain real estate situated in the county of Canadian, in the territory of Oklahoma, described as follows, to wit: 'Lots 14, 15, 16, 17, and 18, in block 83, in the city of El Reno,' as shown by the recorded plat thereof, at the monthly rental of \$30 per month, payable monthly in advance; that the said defendants occupied said lots under and by virtue of said contract and agreement from the 1st day of October, 1891, up to the present time; that the said defendants have paid on account of said rent the sum of \$377.60, or for the period of time from October 1, 1891, to October 1, 1892, and

the period of time in the month of October covered by \$17.00; that the sum of \$750, less the said sum of \$17.60, or the sum of \$732.40, being the part of the rent for the period of time from October 1, 1892, to November 1, 1894, has not been paid, and is now due this plaintiff, with interest as by law allowed." To this petition the defendant E. C. Young answered, first by way of a general denial, and then alleged the following as his second and third defenses, to wit: "Second defense: That the title of the said Samuel W. Sawyer to the premises described in plaintiff's petition failed long prior to the 1st day of October, 1892. The said lots became at the time of said failure a part of the public domain of the United States, and the said Sawyer was at said time disqualified to acquire title thereto by reason of the fact that he had entered upon the lands open to settlement on the 22d day of April, 1890, after the issuance of the proclamation of the president opening the same to settlement, and prior to the time fixed in the said proclamation for the opening of the same; and the defendant is now, and during all of the time since the 6th day of February, 1892, has been, occupying the said lots for business purposes, and seeking to acquire title thereto by occupancy, and his application for a deed to the said lots was, at the time of the commencement of this action, and now is, pending before the commissioner of the general land office of the United States, and the application of the plaintiff for the said lots is also pending before the said commissioner, and undisposed of. Third defense: The plaintiff for his third defense to the plaintiff's petition, says that the purposes of the assignment from S. W. Sawyer to the plaintiff have been fulfilled, and the rights of the said plaintiff thereunder have expired." When the case was called for trial, and both parties had announced "Ready," and the plaintiff had called the said E. C. Young as a witness, and before the introduction of any testimony on behalf of plaintiff, defendant's counsel objected to the introduction of any testimony under the petition for the reason that it did not state facts sufficient to constitute a cause of action, which objection was by the court overruled, to which ruling defendant's counsel at the time duly excepted. The testimony produced on behalf of plaintiff at the trial of the cause shows that on or about the 5th day of August, 1892, the said S. W. Sawyer made a general assignment for the benefit of all his creditors to the said C. L. Severy, plaintiff below, and that the deed of assignment was properly and legally executed, acknowledged, and filed for record as required by chapter 6, St. Okl. 1890; that the firm of Seawell, Wagoner & Benton, engaged in the lumber business in said city of El Reno, leased the lots described in plaintiff's petition of the said S. W. Sawyer on or about October 1, 1891, agreeing to pay therefor, as rent, the sum of \$30 per month in advance; and on or about January 1, 1892, the said E. C.

Young, defendant below, became a partner of said above-named firm, and the business thereof was subsequently conducted in the name of E. C. Young Lumber Company; that said new firm continued in the possession of said real estate under the original contract of lease, and continued to pay as rent therefor the sum of \$30 per month until the month of October, 1892, on which said month the sum of \$17.60 only was paid, after which time no further rent was paid, the defendant, E. C. Young, who had paid the rent thereon after becoming a member of said firm, declining and refusing to pay any further rent. At the conclusion of plaintiff's testimony, the defendant, E. C. Young, interposed a demurrer to the evidence, which was overruled by the trial court, to which ruling said defendant excepted. Thereupon the following agreement was entered into by and between the plaintiff and defendant in open court, to wit: "It is now agreed by counsel for plaintiff and defendant in open court that the lots described in plaintiff's petition are a portion of the original homestead entry of John A. Foreman; that at the time of the leasing of the lots to Seawell, Wagoner & Benton, Foreman had entered the said real estate at the proper land office under the provisions of section 22 of the organic act, and had made a deed to the lots described in the petition to S. W. Sawyer; that afterwards, and on the 6th day of February, 1891, in a proper proceeding, the secretary of the interior canceled the entry of John A. Foreman on the said land, and the same was afterwards, and in the month of May, 1892, entered by board No. 4 of town-site trustees as a portion of the town site of El Reno, in trust for the benefit of the occupants of said town site; that after the said entry the defendant, E. C. Young, and the plaintiff, C. L. Severy, applied to the said board of trustees in compliance with the rules providing for the regulation of proceedings of the said board for a title to the said lots, and complied with the regulations and rules of said board of trustees with reference to deposits, and a hearing of the said cause between plaintiff and defendant with reference to said lots was had before the said board, and decided in the year 1892; that thereafter the defendant in this action duly appealed from the decision of the said board to the commissioner of the general land office, and the said appeal is still pending and undisposed of before the said commissioner; that no deed has as yet passed to any claimant under the town-site laws, and no decision has ever been made on the said appeal by the said commissioner." The defendant then introduced testimony showing that the said S. W. Sawyer had been in Oklahoma territory between March 23 and April 22, 1889, for a period of two days; that during said time the said Sawyer remained at an hotel near the depot of what is now Oklahoma City; that the said Sawyer then went outside of Oklahoma territory, and did not return until after said April 22, 1889, and did not reach the town of

El Reno until about June 3, 1889; also, that the said Sawyer purchased the lots, described in plaintiff's petition hereinbefore set out, of the Rock Island Railroad Company, and placed thereon certain improvements in the way of sheds, etc. And he says in his testimony, as a witness for defendant, "For the farther [lot], where the shed is, I paid \$210.50 cash, the other four lots I exchanged for lots that were over on Choctaw street." At the conclusion of the evidence, the defendant, by leave and order of court, filed an amended petition to conform to the facts proven on the trial, which said petition, omitting the formal parts, is as follows: "The plaintiff above named complains of the defendants, and alleges: (1) That the said C. L. Severy is the duly and legally appointed, qualified, and acting assignee of the said S. W. Sawyer. (2) That the said defendants are co-partners, and doing business as lumbermen in the city of El Reno, in said county and territory, under the firm name of E. C. Young Lumber Co. (3) That on or about the 1st day of October, 1891, the defendants Seawell, Wagoner, Benton, and Choate, as partners in the lumber business, leased from S. W. Sawyer lots 14, 15, 16, 17, and 18, in block 83, in the city of El Reno, as shown by the recorded plat thereof, and entered into the occupancy thereof, and thereafter continued in the occupancy of said property until January 1, 1892, when such partnership was changed by the addition of E. C. Young, as a partner, and the said business was thereafter conducted, using said real estate therefor, under the firm or co-partnership name of E. C. Young Lumber Company. That said firm E. C. Young Lumber Company, from and after the 1st day of January, 1892, continued in the possession of said real estate under the original contract of lease hereinbefore mentioned, and paid the agreed rental therefor, the same being \$30 per month, until October, 1892, the sum of \$17.60 having been paid on that month's rent; that no further rent has been paid by the defendants; that there has been paid for the use as rental for the use of said property from the 1st day of October, 1891, the sum of \$377.67, for the period of time from October 1, 1891, to October 1, 1892, which sum includes \$17.60 paid on the rent for the month of October, 1892; that there is due plaintiff and unpaid for the use of said property by defendants the sum of \$717.40, being part of the rent for the use of said property for the period of time from October 1, 1892, to October 16, 1894, which sum, together with interest as allowed by law, is due to plaintiff as assignee of S. W. Sawyer." The court thereupon found the issues in favor of the plaintiff, and entered judgment for him in the sum of \$717.40, after which a motion for a new trial on behalf of defendant was duly filed, overruled, and the ruling duly excepted to.

Blake & Blake, for plaintiff in error. Gillett & Libby, for defendant in error.

KEATON, J. (after stating the facts). The first contention of plaintiff in error is that the petition of plaintiff below fails to state facts sufficient to constitute a cause of action, for the reasons that—First, it does not show such an assignment from Sawyer to Severy as entitled the latter to maintain his action; and, second, it fails to show any leave of court for the bringing of same. We do not think this position tenable. Besides the caption, where it is stated that plaintiff sues as the assignee of Sawyer, it is further alleged in said petition "that the said C. L. Severy is the duly and legally appointed, qualified, and acting assignee of the said S. W. Sawyer." While this allegation is certainly somewhat uncertain and indefinite in many particulars, and would doubtless have been held insufficient had it been challenged by a motion to make more definite and certain, yet we are not prepared to say that it is bad as against a general demurrer, and, when its sufficiency is questioned by neither motion nor demurrer, and defendant's answer shows that he thoroughly understood what was meant by said allegation, we are clearly of the opinion that the trial court committed no error in overruling the objection of defendant's counsel to the introduction of any evidence under said petition. The cases cited by counsel for plaintiff in error do not support their contention. The one most nearly in point is *City of Atchison v. Twine*, 9 Kan. 350, wherein it is held that "in such action, whether plaintiff is administrator or not is an issuable fact, and that he was such administrator should in some way appear in the petition." In that case, there was no averment in the petition whatever concerning the fact that plaintiff was the administrator of George Johnson, deceased, on account of whose death the action was brought. Suppose the petition therein had contained an allegation to the effect that plaintiff "is the duly and legally appointed and acting" administrator of the estate of the said George Johnson, deceased, without stating when, by whom, or where said appointment was made, can it be contended that the supreme court which decided the case would have held this averment fatally defective when objected to for the first time upon the introduction of testimony? We think no such inference can possibly be drawn from the language used in that decision. There is a wide difference between an entire failure to plead a material and necessary matter and defectively alleging same. "A petition which states facts sufficient to constitute a cause of action must be held sufficient on the introduction of any evidence under it, however informal, indefinite, and uncertain it may be in some of its statements of fact." *Fitzpatrick v. Gebhart*, 7 Kan. 35. "The questions whether the petition states facts sufficient to constitute a cause of action, and whether the petition and the findings, taken together, sustain the judgment of the court below, may generally be considered by the supreme court, whether any exception has been taken to the ruling

of the court below or not. But the subsequent proceedings often cure a defective petition; and when the objection to the petition is made in any way except by demurrer, or by a motion to require the plaintiff to make his petition or certain allegations thereof more formal, or more definite and certain, the objection should generally be overruled unless there is a total failure to allege some matter essential to the relief sought, and should seldom, if ever, be sustained when the allegations are simply incomplete, indefinite, or conclusions of law." *Mitchell v. Milhoan*, 11 Kan. 617. "Where the question of the sufficiency of a petition is raised for the first time by an objection to the introduction of any evidence under it, and not raised otherwise, courts will always construe the allegations of the petition very liberally, so as to sustain the petition if it can be sustained; and if anything should intervene between the filing of the petition and the final rendering of the judgment which could, by a fair and reasonable intendment, be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured." *Barkley v. State*, 15 Kan. 99. "Where some of the facts necessary to constitute a cause of action are stated in the petition only inferentially, such petition may, nevertheless, be held good, where no objection is made to it except by objecting to the introduction of any evidence under it on the ground that it does not state facts sufficient to constitute a cause of action." *Bailey v. Dodge*, 28 Kan. 72. See, also, upon this question, *Insurance Co. v. Duffy*, 2 Kan. 347; *Polster v. Rucker*, 16 Kan. 115; *Moody v. Arthur*, Id. 419; *Reeve v. Downs*, 22 Kan. 330; *Grandstaff v. Brown*, 23 Kan. 176; *Clay v. Hildebrand*, 34 Kan. 694, 9 Pac. 406; *Schenk v. Insurance Co. (Cal.)* 11 Pac. 807; *Ladd v. Piggot (Ill. Sup.)* 2 N. E. 503; *Railway Co. v. O'Connor (Ill. Sup.)* 3 N. E. 501; *Hedderly v. Downs (Minn.)* 17 N. W. 274. We are aware of no law requiring an assignee for the benefit of creditors, chosen under said chapter 6, St. Okl. 1890, to obtain leave of the district court of the county where appointed before he can bring suit on a claim due the estate.

Counsel for plaintiff in error next contend that he had a right to dispute the title of his landlord to the lots in question, and set up claim thereto as an occupant under the tow-site laws upon the failure of Sawyer's title, as claimed through Foreman, the original grantor, and that by reason of such failure of title and the interest acquired by virtue of his said claim as an occupant, he was no longer liable to his said landlord for rent for the use and occupancy of said lots and the improvements thereon. This position, we think, is equally untenable for the reasons: First, because the facts in this case do not show such a failure of title in his landlord as to authorize plaintiff in error to dispute it in so far as possession and payment of rent are concerned; second, because plaintiff in error recognized the right

of his landlord to the possession of said premises by the payment of rent for several months after the alleged failure of title. According to the evidence and agreed facts in this case, the said S. W. Sawyer was the only occupant of the lots in question during the month of May, 1892, when the tract including same was entered as a town site for the use and benefit of the occupants thereof; the occupancy of plaintiff in error as Sawyer's tenant being, in legal effect, the occupancy of Sawyer in person. But for this tenancy, plaintiff in error, so far as shown by the record, would never have been an occupant of these premises, and every principle of law and justice requires that such occupancy shall not be used to defeat the right of his landlord to the use and possession of said property. The cases cited by counsel for plaintiff in error are in entire harmony with this rule. In *McKie v. Anderson* (Tex. Sup.) 14 S. W. 576, it is held that: "One in possession of land as owner of an individual share, having accepted a lease of the other interest, may, without first giving up possession, assert an adverse title against the lessor in an action by the latter of trespass to try title and for partition. * * *

The rule that a tenant cannot deny his landlord's title is limited to suits for possession only, and does not apply in an action of trespass to try title and for partition, in which the title itself is put in issue." And in *Smith v. Smith* (Tex. Sup.) 16 S. W. 637, the holding is that: "In an action for rent the tenant counterclaimed that prior to the execution of the contract for rent he held the fee to the land in controversy, and, in order to secure the landlord as surety upon a note given by him [tenant] to a third party, he had conveyed the land to the landlord by absolute deed, with the understanding that it was to be a mortgage, or that the land was to be held in trust until a sale could be effected. It was further averred that a sale had been made by the landlord, and that a balance was due the tenant after paying the note and the rent. Held, that the exclusion of evidence tending to show the real relation of the parties was error, since the rule which prevents a tenant from disputing his landlord's title cannot be applied so as to preclude a grantor of land from showing that the deed was intended only as a mortgage or to place land in trust." We can find nothing at page 733, 6 South. (cited by said counsel), nor anywhere in the decision of the supreme court of Louisiana in *Cochrane v. Gilbert*, occupying pages 731 to 734 of said report, which is at all applicable to the proposition under consideration. We desire, in this connection, to express our disapproval of the practice of counsel merely citing in their briefs the volumes and pages of reports, without giving the title of the cases to which reference is made. After a careful examination of Judge Hawley's opinion in *Lakin v. Dolly*, 53 Fed. 333, we find nothing therein which is in conflict with the position taken by us upon this question, but think said position is fully

sustained by the decision of this court in *Hamill v. Jalonick*, 3 Okl. 223, 41 Pac. 139, wherein it is held that: "The suit was not for the purpose of trying the question of title, nor, as between the parties, was such question involved. Under section 1, art. 12, c. 70, Laws 1890, two kinds of actions are contemplated. One may be brought to determine the title, and the other the right of possession. This action was for the possession of the property. Jalonick claimed as a landlord against Hamill, his tenant. We think counsel for appellant fails to properly distinguish between the two actions. Jalonick could not maintain the action against Hamill for the title, because the question of title is one yet to be determined in another tribunal. But, if the contract of lease was valid in the first instance, as between Jalonick and Hamill, it always retained its validity until Hamill had, by a surrender of possession under the lease, put an end to the contract between them." The question of whether or not the said S. W. Sawyer is qualified, under the law, to acquire title to lands in that portion of Oklahoma opened to settlement on April 22, 1889, is one exclusively for the land department, and the trial court should have sustained plaintiff's objection to the introduction of any evidence concerning same. Finding no error in the record, the judgment of the district court is affirmed, at the cost of plaintiff in error.

DALE, C. J., having presided in the court below, not sitting; all the other justices concurring.

(15 Utah 245)

BLYTH & FARGO CO. v. SWENSON et al.

(Supreme Court of Utah. Sept. 9, 1897.)

SERVICE OF PROCESS—JUDGMENTS—VACATION—APPEAL—TIME FOR TAKING—FINAL ORDERS—PARTIES—ATTORNEYS AT LAW—AUTHORITY.

1. When an appeal is not taken within one year after the judgment becomes final, it will be dismissed.

2. A final order overruling a motion to set a judgment aside, entered without service of process or appearance, may be appealed from, under section 3635, Comp. Laws Utah 1888.

3. When judgment is rendered against a defendant without service of summons or appearance, he may within one year, under section 3256, Comp. Laws Utah 1888, enter a motion to set it aside, and ask leave to answer, and the court should, on sufficient proof, grant such leave and set the judgment aside, or, if deemed more just, allow the judgment to stand, and, upon issue found for such defendant, to then set it aside. And, if the motion is served and entered within the year, the court may hear it after the year expires, and set it aside.

4. When the record shows that a defendant appeared by his attorney, such record is conclusive of the appearance, but only prima facie evidence of the authority of the attorney to act. Such authority may be denied and rebutted by proof. And if without authority the judgment will not be allowed to stand, and the defendant will not be left to his remedy against the attorney.

5. On appeal by one of three defendants from an order overruling a motion to set a judgment aside as to himself, it is not necessary to serve

notice on those not appealing, when they concede it correct as to themselves, but not as to him. In that case they cannot be regarded as adverse parties, under section 3636, Comp. Laws Utah 1888.

6. When the suit is against two or more defendants by their individual names, not against them by a common name in which they are transacting business, the service of summons on one or more will not give jurisdiction to enter judgment against those not served, under section 3191, Comp. Laws Utah 1888.

Miner, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; before Justice Ogden Hiles.

Action by the Blyth & Fargo Company against Edward A. Swenson and others. From a judgment for plaintiff, and an order refusing to set aside the same, defendant S. J. Stookey appeals. Reversed.

Moyle, Zane & Costigan and Stewart & Stewart, for appellant. Dey & Street, for respondent.

ZANE, C. J. It appears from this record that the plaintiff brought suit against the defendants, by their individual names, on two promissory notes, and alleged in the complaint that they were executed by the defendants as partners; that personal service was made on the Swensons, and that there was no service on defendant Stookey; that Cherrington & Harkness, attorneys at law, were employed by the Swensons to appear for them in the case; that they filed a demurrer, in which they did not give the individual names of the defendants for whom they appeared; that they signed the demurrer as follows: "Cherrington & Harkness, Attorneys for Defendants;" and that they were not authorized to appear for appellant, Stookey. It further appears that the demurrer was overruled, and that judgment nihil dicit was entered against all the defendants on February 21, 1896; that an execution was issued thereon on the 9th day of December, 1896, next following, and levied on Stookey's property; that on the 3d day of February, 1897, Stookey gave notice to the plaintiff that he would on the 13th day of the same month, at 9 o'clock and 30 minutes a. m., or as soon thereafter as counsel could be heard, move the court to set aside the judgment as to himself, and filed the notice and motion in the clerk's office on the day the notice was given; that he asked leave to file an answer, duly verified, which he attached to the notice, and presented with it, denying the execution of the notes by Stookey or by his authority, and denying other material allegations of plaintiff's complaint; that on the 13th day of February, named, the court postponed the hearing of the motion, and on March 8, 1897, heard the motion on the affidavits establishing the above facts, and denied it. From the judgment and the order overruling the motion to set it aside the defendant Stookey has appealed.

The respondent moves the court to dismiss the appeal from the judgment on the ground

that it was not taken within one year from the date of its rendition. The statute required the appeal to be taken within that time, and for that reason the motion as to the appeal from the judgment is allowed, and it is dismissed.

The respondent also moves the court to dismiss the appeal from the order overruling the motion to set the judgment aside, because no appeal lies, as alleged, from such an order. A judgment against a party not served with process, who did not appear in person or by his attorney, is without any binding effect; and though the process against him may have been returned as served, or the record may show his appearance, if in fact he was not served, and did not enter his appearance or authorize it to be done, he may, upon learning of the judgment, move the court to set it aside, and upon sufficient proof the court should grant the motion. A judgment in such a case, without the service of process or appearance, would not be due process of law, under the constitution of this state or the constitution of the United States. And the sale of the defendant's property by virtue of an execution issued upon such a judgment, if sustained, would deprive him of his property without due process of law. A judgment appearing from the record to have been entered against a defendant without service of process or appearance is void on its face, and may be set aside at any time by the court. It is absolutely void. And if from the record it appears to have been rendered upon process duly served, or upon appearance, when it was not so rendered, the court should set it aside, as void, upon proof that the process was not served and that there was no appearance. A motion to set a judgment aside, fair on its face, for want of service of process or appearance, is, in effect, the same as a bill to set a judgment aside for the same reason. In the latter case there can be no doubt as to the right of appeal from an order refusing to set the judgment aside, and such a decree must be regarded as a final judgment, and appealable. We think an order denying a motion to set aside a judgment, for the same reason, must be regarded as a final judgment, and appealable. It would be very unreasonable to hold that errors by the trial court in overruling motions to set aside judgments entered against a defendant without notice or appearance should be reviewed on appeal from the judgment sought to be set aside, or not reviewed at all. Stookey was ignorant of the judgment until about eight months after it was rendered, and it appeared regular on its face. The evidence to prove that the attorneys who professed to appear for him on the case were not authorized to do so was offered on the hearing of the motion to set aside. An appeal from the judgment sought to be set aside would not in all cases enable the court to review errors in overruling the motion. Want of jurisdiction was shown by evi-

dence. But the statute declares that exceptions to the decision on the ground that it is not supported by evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within 60 days from its rendition. In this case the judgment had stood eight months before the appellant knew of it. It might have stood more than a year without such knowledge. The right of appeal from judgments cannot be extended for such long and indefinite periods, or depend upon such uncertainties. Hayne, in his work on New Trial and Appeal (section 199), says: "It is believed the rule does not apply to orders made ex parte. For the aggrieved party may not have any knowledge of such order until after the expiration of the time for appeal. And, even if he had such knowledge, an appeal would in most cases be of no avail. For it must be heard upon the case which was before the court below, and the aggrieved party, not having had any opportunity to present his facts in support of his side of the question, would, if compelled to appeal from the ex parte order, for all practicable purposes, be deprived of his day in court." The same rule should be applied when a judgment is entered against a defendant without notice or appearance. Laws authorizing appeals relate to the remedy, and should be construed liberally in furtherance of the remedy. Appeals from judgments upon verdicts or upon findings cannot await such motions to set them aside. If the appeal is taken and decided before the order denying the motion to set aside is determined, and the order cannot be regarded as a final judgment, and appealable, then there is no mode by which the ruling of the court in making such orders can be reviewed. The rule is that, when the ruling of the trial court in making such an order cannot be reviewed upon appeal from the judgment sought to be set aside, the order is regarded as a final judgment, and appealable within the time allowed for appeals from other final judgments, unless the statute fixes a different time. Section 3256, Comp. Laws Utah 1888, provides that: "The court may * * * upon such terms as may be just relieve a party * * * from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when for any reason satisfactory to the court, or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or judge thereof, in vacation, may grant the relief upon the application made within a reasonable time, not exceeding six months after the adjournment of the term." Such provisions authorize relief from judgments or orders taken against a party through his mistake, inadvertence, surprise, or excusable neglect. The mistake, inadvertence, or excusable neg-

lect may have been of a party served with process, or who has appeared before judgment or the order made. The provision of the section immediately following the one quoted relates to judgments or orders made against a defendant without personal service, and is as follows: "When from any cause, the summons in an action has not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." When judgment has been rendered against a defendant without the service of a summons upon him, this provision authorizes the court, within one year after its rendition, to permit him to answer the complaint, on such terms as may be just. When the defendant knows of the pendency of a suit in time to appear before judgment, and fails to do so, the court will not grant leave to answer afterwards, though no summons was served upon him, unless justice demands it. The court is not required to grant leave to answer in all cases where judgments may be rendered against a defendant without the service of summons upon him. The court has a reasonable discretion,—a legal discretion. But when the defendant was not served with summons before judgment, and there was no appearance in fact, the statute quoted gives him a year after its entry, in all such cases, to ask leave to answer.

It appears that the defendant Stookey was not served with process, and did not appear in person, or authorize any one to appear for him, before judgment. The weight of the evidence establishes the fact that the appellant did not know of the judgment against him until about eight months after it was rendered, and that there was some effort by him to adjust the matter without further litigation, upon the expectation that the Swensons, the other defendants, would arrange to pay or satisfy it, as they admitted they were bound to; and, such efforts having failed, he served a notice of his motion to set it aside, to which an answer showing a defense to the suit was attached, and filed the same in the clerk's office, and moved the court to set the judgment aside, and asked leave to file his answer 15 days before the year given by the statute above quoted expired; that the time to hear the motion was fixed for the 13th day of the same month, but was postponed by the court until the 8th day of the next month. To hold that leave should not be given because the court postponed the hearing of appellant's application beyond the year would be a very illiberal and narrow construction of the statute. The statute relates to the remedy, and should, as before stated, receive a liberal construction in furtherance of the remedy. But we are of the opinion that the defendant against whom a judgment may have been rendered without

service of process or appearance may, upon learning of it after the expiration of the year, make his motion to set it aside, and that the court should grant him leave to answer. And if the motion in such case is made before the expiration of the year, and the hearing is deferred until afterwards, the court should hear and decide the motion. Though a defendant should be first informed of a judgment so obtained years after its rendition, by the levy of an execution on his property, he would have the right to move the court to set it aside, and to ask for leave to plead or answer, and upon sufficient proof it would be the duty of the court to grant such a motion and leave. A party must be given an opportunity to be heard before judgment in a case to which he is a party, if he so desires. He is entitled to his day in court. *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842; 1 *Freem. Judgm.* (4th Ed.) § 105; *People v. Greene*, 74 Cal. 400, 16 Pac. 197; *Mason v. Eldred*, 6 Wall. 231; *Great West Min. Co. v. Woodmas of Alston Min. Co.* (Colo. Sup.) 20 Pac. 771; *Winters v. Means*, 25 Neb. 241, 41 N. W. 157. In *Great West Min. Co. v. Woodmas of Alston Min. Co.*, supra, the summons had been served on the foreman of the mine, instead of the general agent of the mining company, who was away at the time. The court said: "The service of process in this case was not made upon a general agent of the defendant company, and such service could not bind the company. * * * The record shows that the defendant company appeared by its attorney, and this is conclusive proof that the attorney so appeared, but only prima facie evidence of the authority of the attorney so to act. It would not only be harsh, but absurd, to hold that a person could be deprived of his property without notice, and upon the mere entrance of an appearance by an attorney acting wholly without authority delegated for this purpose. Attorneys are officers of the court, and their authority to appear will not be questioned by the court. Their appearance is prima facie evidence of authority to act, but when such authority is denied, or properly put in issue, it is competent to rebut by proofs any presumptions which may arise from such acts. If the attorney was without authority, then his acts could bind no one. * * * The proceedings in this case are a direct attack upon the judgment, and it is useless to discuss the question so ably presented by counsel, whether a judgment can be attacked collaterally for want of due service. It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant, and that the entry of an appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows, as a logical result of the propositions before discussed, that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for

this purpose) void, and that all sales or other proceedings had thereunder are, as to all persons, irrespective of notice or bona fides, absolute nullities. A different rule might prevail if a judgment is only attacked on the ground of fraud, and rights have been acquired on execution sales without notice of such fraud. But absence of legal service or authorized appearance is jurisdictional. Without jurisdiction, no judgment whatever will be entered, nor rights acquired thereunder." In *Ladd v. Stevenson*, supra, the court used the following language: "The whole power of the court to relieve from judgments taken through 'mistake, inadvertence, surprise, or excusable neglect' is not limited by section 724; but, in the exercise of its control over its judgments, it may open them, upon the application of any one for sufficient reason, in the furtherance of justice. Its power to do so does not depend upon any statute, but is inherent, and it would be quite unfortunate if it did not possess it to the fullest extent." *Freeman*, in his work on Judgments (section 105), says: "But if they were not at the trial, or were not represented there, on account of some mistake or excusable neglect, then their remedy is not by application for a new trial, but by an application addressed to the discretion of the court, and made under the statute authorizing relief to be granted from judgments rendered against a party through 'his mistake, inadvertence, or excusable neglect.' These statutes must be regarded as limiting the cases in which relief can be granted to applications made within the time, and for some of the causes specified in the statute, provided the relief is sought upon some of the grounds mentioned in such statutes. If, however, the motion is to vacate a judgment because irregularly entered, it may be granted, although not made within the time named in these statutes." In *Mason v. Eldred*, cited above, Mr. Justice Field, delivering the opinion of the court, said: "Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded." *Jones v. Insurance Co.*, 47 Pac. 74, and *Watson v. Mayberry*, 49 Pac. 479 (decisions of this court, not yet officially reported), are cited by respondent. The moving party in the first case had appeared at the hearing at which the order was made which he asked the court to set aside. In the latter case the party moving for a new trial had appeared upon the trial, and the court held that no appeal lies from an order overruling such a motion, but that the action of the court in making it can be reviewed on appeal from the judgment rendered; that, if such motion is made within the 10 days given by the statute, the judgment does not become final, for the purposes of an appeal, until the motion is denied; and if granted, no appeal lies. These

cases are not analogous to the case in hand, and are irrelevant and inapplicable in considering it.

The plaintiff also insists that Stookey's co-defendants are adverse parties to him on this appeal, and that notice of the appeal should have been served on them. The motion was to set aside the judgment as to the appellant, not as to his co-defendants. Edward A. Swenson and J. B. Swenson, co-defendants of Stookey, gave their affidavits upon the hearing of the motion from the decision from which this appeal is taken, and they did not object to the judgment against them, but stated that the attorneys were employed to appear for them, and that they were not employed to appear for Stookey; that they made no adverse claim against Stookey, and conceded all he claimed. No issue was made upon his claims. In fact, they corroborated his statements, and expressly concede his claims by voluntary statements in their affidavits. Section 3636, Comp. Laws Utah 1888, requires notice of the appeal to be "served on the adverse party." The co-defendants concede that the judgment was just as to them, and agree with Stookey in his contention with the plaintiff. If, as the appellant's co-defendants concede, the judgment was properly rendered against them, and it was wrongfully rendered as against him,—if the debt was theirs, and not his,—if they should be compelled to pay the judgment they could not compel contribution from him; they could have no adverse claim or right against him with respect to it in any event. If one defendant to a joint judgment pays it, he cannot compel his co-defendant to contribute, unless the debt, as between themselves, was his co-defendant's debt, in whole or in part, or they were both sureties to a principal. If it was alone his debt, he cannot compel his co-defendant, who jointly or severally bound himself to pay it, to contribute. We cannot regard the appellant's co-defendants as adverse parties to him upon this appeal. *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130; *Hinkel v. Donohue*, 88 Cal. 597, 26 Pac. 374. We do not regard the case of *Commercial Nat. Bank v. United States S. L. & B. Co.*, 44 Pac. 1043, 13 Utah, 189 (a Utah case, to which we have been referred), as analogous, so far as it relates to the appeal, to this one.

It is also claimed that the service of the summons on appellant's co-defendants was sufficient to give the court jurisdiction to enter the judgment against the appellant. Reliance is placed on section 3191, Comp. Laws Utah 1888: "When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been defendants, and had been sued upon their joint liability." The suit in which the judgment complained of was entered was not against parties associated

under a common name. The suit was against the defendants individually. Nor was the judgment against such association under such common name. And the individual property of the appellant was seized. Therefore the statute relied upon can have no application to this appeal. 2 Bates, Partn. § 1085.

It is further urged that, attorneys of this court having professed to appear for the appellant in filing a demurrer to the complaint, he should be left to his remedy against the attorneys who without authority appeared for him. This rule, in effect, regards a judgment as valid against a defendant though he had no opportunity to appear in the case and contest it. The rule insisted upon would require a defendant to pay a judgment against him because an attorney, without his authority or knowledge, appeared for him in the case. In that case, without his fault, he would be compelled to pay the judgment, and rely upon his recourse by suit against the attorneys who appeared for him without his consent or knowledge. If leave is granted to appellant to file his answer, the case can be tried upon the issues made, and, if found for the defendant, the judgment can be set aside. If not, it will remain. And, if it shall be ascertained that the respondent was damaged by the wrongful appearance of the attorneys, it may collect from them. In the case of *Marvel v. Manouvrier*, 74 Am. Dec. 425, the court said: "At common law, it seems, the unauthorized entry of appearance by an attorney will bind the party, provided the attorney is able to respond in damages to the extent of the injury suffered by the defendant. Under our law the plaintiff is left to his remedy against the attorney who without authority undertakes to appear for and represent another in a court of justice. The party is not bound to show that he had a defense to the action. He may do that when he is cited." *Winters v. Means* (Neb.) 41 N. W. 157; *Critchfield v. Porter*, 3 Ohio St. 519; *Jones v. McKelway*, 17 N. J. Law, 345.

In view of the facts appearing upon the hearing of the motion, the order of the court appealed from, denying appellant's motion, is reversed, and the cause is remanded, with directions to the court below to stay any further proceedings to collect the judgment until the case is tried, to grant appellant leave to file his answer, and to try the case upon the issues made, and, if found for the appellant, to set the judgment aside; otherwise to permit it to remain in force.

BARTCH, J. I concur in the result

MINER, J. (dissenting). From the facts as disclosed in this record, I have come to a different conclusion from that of the majority of the court. It appears that the plaintiff brought this action against the defendants to recover judgment upon two promissory notes set out in the complaint, and alleged that the defendants were co-partners at the time the notes sued upon were made and were doing business under the firm

name and style of Swenson Bros. & Stookey, and as such firm made and delivered the notes upon which this action was brought. Summons was duly issued and served on defendants Swenson in January, 1896, but was not served on defendant Stookey. Within the time required to plead, all the defendants, through Messrs. Cherrington & Harkness, their attorneys, filed a demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the same was served on the attorneys for the plaintiff. This demurrer was heard and overruled February 8, 1896, and 10 days granted to defendants in which to answer. Notice of the overruling of the demurrer, etc., was duly served on defendants' attorneys, and service was admitted by Cherrington & Harkness. No answer being filed, the default of all the defendants was duly made, and judgment by default entered against them February 21, 1896. Execution was issued upon the judgment December 9, 1896, and levied in part upon property of defendant Stookey. On February 3, 1897, defendant Stookey entered, and gave notice of a motion to set aside the judgment against him, and all subsequent proceedings, for reasons set forth in affidavits filed, basing the application upon the statute. Stookey's answer was attached to the notice of motion, but was not sworn to until February 25, 1897, after the expiration of a year from the entry of the judgment. Mr. Stookey, in his affidavit sworn to February 2, 1897, denied any knowledge of the judgment until after the adjournment of the term at which it was rendered, and that he had no knowledge of it until a short time before he made the affidavit; that he never employed any attorneys to appear for him in the action; that the co-partnership was dissolved October 2, 1895; and that plaintiff had notice of such dissolution. In his affidavit made February 19, 1896, he stated that Mr. Dey informed him of the judgment about October 1, 1895. It appears from the affidavit of J. B. Swenson that the demurrer was filed by Cherrington & Harkness, at his request, on behalf of himself and E. A. Swenson only, and that Stookey never authorized him to employ counsel, and he did not know that Stookey had any information as to the filing of the demurrer; that the partnership of Swenson Bros. & Stookey was dissolved October 2, 1895. In opposition to the motion, Thomas Blyth, one of the plaintiffs, testified to the amount of the indebtedness evidenced by the notes given by defendants; that the notes were given for goods sold defendants, as co-partners under the firm name of Swenson Bros. & Stookey, prior to July 2, 1895; that plaintiff had no notice or knowledge of the dissolution of the firm when the notes were given, nor until June, 1896; that in June, 1896, he notified Stookey that plaintiff had recovered judgment against him and his co-defendants; that thereupon

Stookey notified him of the dissolution of the firm, and that he (Stookey) had an indemnity bond from the other defendants to protect him against the indebtedness of the firm to the plaintiff; and that Stookey never denied such indebtedness, but claimed that Swenson Bros. should pay it. C. C. Dey, a member of the bar of this court, testified that in September, 1896, he demanded payment of the judgment from Stookey; that Stookey promised to have the judgment paid, and claimed to have indemnity from Swenson Bros. to secure him against paying the claim. Cherrington & Harkness were not called as witnesses upon the motion, and no excuse is given for not calling them. The motion was heard on March 6, 1897, and denied March 8, 1897. On April 10, 1897, defendant Stookey served on plaintiff's attorney, and filed with the clerk, a notice of appeal from the order and judgment rendered in favor of the plaintiff on February 21, 1896, and from the order made March 8, 1897, overruling defendant's motion to set aside and vacate the judgment. But no notice of such appeal was ever served on the co-defendants, Swenson Bros.

The respondent moves to dismiss the appeal on the ground that this court has no jurisdiction to hear said appeal, for the reasons—First, that the appeal from the judgment cannot be entertained because said appeal was not taken within one year from the entry of said judgment; second, the appeal from the order denying the motion to vacate the judgment cannot be entertained because said order is not a final judgment, and is not appealable; third, that neither of said appeals can be entertained because Stookey, the only defendant appealing, did not serve notice of appeal on either of his co-defendants, and claim that the judgment was regular and valid on its face, that the appellant was guilty of gross negligence and want of diligence in presenting his motion after notice of the judgment, and that the proof shows no merit in his case, or good faith in his application. Under section 3679, Comp. Laws Utah 1888, a defendant appears in an action when he answers or demurs. The defendants all appeared in the action when the demurrer was filed, and the court had jurisdiction of the parties and the subject-matter of the suit. The judgment was valid on its face, and remained valid until set aside in accordance with the rules of law. *Suydam v. Pitcher*, 4 Cal. 280; *Rowland v. Coyne*, 55 Cal. 1; *Willman v. Friedman* (Idaho) 38 Pac. 937. The plaintiff had the right to rely upon the appearance of the defendants by their attorneys as valid, and was not required to have the summons served upon Stookey after such statutory appearance. If Mr. Stookey knew of the appearance by attorneys not authorized to appear for him, and of the judgment, and failed to take steps to set the judgment aside within a reasonable time, and notify the plaintiff of the false

position in which he was placed, he was guilty of laches and bad faith, and should not be permitted to reap a benefit from such acts which would cause misfortune to another.

Where a judgment is valid upon its face, the defendant, moving to set it aside on the ground that he made no appearance, and the attorneys professing to appear for him had no authority so to do, must show—First, that he has a good defense; second, that he has been diligent in presenting his grievances to the court; third, that the attorneys in truth had no authority to represent him. *Seale v. McLaughlin*, 28 Cal. 668; *Garrison v. McGowan*, 48 Cal. 592; *Suydam v. Pitcher*, 4 Cal. 280; *Elliott v. Bastian*, 11 Utah, 453, 40 Pac. 713; *Mahoney v. Middleton*, 41 Cal. 41; *Foote v. Richmond*, 42 Cal. 439; *Holmes v. Rogers*, 13 Cal. 191; *Hunter v. Bryant* (Cal.) 33 Pac. 51. The testimony tends to show that the notes upon which the judgment was rendered were given for an indebtedness incurred by Swenson Bros. & Stookey to plaintiff before the dissolution of the partnership, and that all the defendants were indebted to the plaintiff to the amount of the judgment. The judgment was rendered February 21, 1896. Mr. Blyth testified that Stookey knew of this judgment in June, 1896, within four months after it was rendered, and that Stookey then stated that he had taken an indemnity bond from the Swensons to protect himself from plaintiff's claim. Mr. Dey testified that he demanded payment of the judgment from Stookey in September, 1896, within seven months after the judgment was rendered, and that Stookey then promised to have the judgment paid, and claimed to have an indemnity bond from the Swensons to protect him in case of payment. In his affidavit of February 2, 1897, Stookey testified that he had no knowledge of the judgment until a short time immediately preceding the making of that affidavit. In his affidavit made February 19, 1897, he testified that Mr. Dey informed him of the judgment about October 1, 1896, or less than eight months after the judgment was rendered. Yet with this knowledge on his part he made no effort to set aside the judgment until February 13, 1897, long after efforts were made to collect it, nearly twelve months after its rendition, and from four to eight months after he knew the judgment was rendered against him, and four months after he had promised Dey that he would have it paid. There is no testimony in the case that Cherrington & Harkness were not peculiarly responsible, and able to respond in damages for any judgment that might be recovered against them for appearing as attorneys for the appellant without authority from him, if it was found that they did so appear. The authorities are clear that the attorneys would be liable in damages to the injured parties for such unauthorized appearance. 2 Enc. Pl. & Prac. p. 685, and authorities cited.

Under the testimony introduced, the court held that no good or sufficient defense or merits were shown, that the defendant Stookey

had not been diligent in prosecuting his alleged grievances to the court, and that the showing made was not sufficient upon which to set aside the judgment. Speaking with reference to the merits of the case, under section 3256, Comp. Laws Utah 1888, the decision should not be disturbed on appeal unless a clear abuse of discretion is shown on the part of the trial court. *Krause v. Hampton*, 11 Iowa, 457; *Thomas v. Morris*, 8 Utah, 292, 31 Pac. 446. The testimony of Blyth and Dey, if true,—and the court believed them,—would seem to justify the decision of the court.

This appeal is taken from the judgment as well as from the order denying defendant's motion to set aside and vacate the judgment. The judgment was rendered February 21, 1896. The appeal therefrom was taken April 12, 1897. I am of the opinion that the appeal from the judgment should be dismissed because it was not taken until after the expiration of more than one year from the time of the entry of the judgment. 2 Comp. Laws Utah 1888, § 3635; *Henly v. Hastings*, 3 Cal. 341; *Tripp v. Railroad Co.*, 69 Cal. 631, 11 Pac. 219; *Railroad Co. v. McGrath*, 74 Cal. 49, 15 Pac. 360; *Davis v. Donner*, 82 Cal. 35, 22 Pac. 879; *Goyhinech v. Goyhinech*, 80 Cal. 409, 22 Pac. 175; *In re Wiard's Estate* (Cal.) 24 Pac. 45; *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387; *Bornheimer v. Baldwin*, 42 Cal. 31; *People v. Loucks*, 28 Cal. 69. The motion to vacate and set aside the judgment because the summons was not served upon the appellant, Stookey, and because his appearance was entered without his authority, was a proceeding justified by section 3256, Comp. Laws Utah 1888, but became ineffectual to afford a remedy or relief, because the remedy was barred by the statute limiting the time in which the motion must be made and determined, and because the court did not make the order until about fourteen months after the rendition of the judgment. This was caused by the neglect, laches, and want of diligence on the part of the appellant to enter his motion within a reasonable time after he knew of the judgment. He delayed the entry of the motion nearly eight months after he knew the judgment was entered, and over four months after he had promised Mr. Dey, plaintiff's attorney, that he would have the judgment paid. "Although a party may have the right to raise the question of the nullity of a judgment or decree because of an unauthorized appearance by an attorney, this does not excuse, but, in view of public policy, requires him who had been represented by an unauthorized attorney to disavow and disaffirm his action promptly upon receiving knowledge thereof. If he does not thus speak when he ought to, the court will not hear him when he wants to, especially if his delay has been prejudicial to the rights of third parties." 2 Enc. Pl. & Prac. p. 694. This court held in *White v. Pease*, 49 Pac. 416, 15 Utah, —, that any errors committed by the trial court in granting or refusing to grant a new trial under section

3635, Comp. Laws Utah 1888, and any affidavits used on said motion, if properly identified and embodied in a bill of exceptions, or otherwise properly preserved in the record, may be reviewed on appeal from the judgment. Had the appeal been taken from the judgment within the year allowed by section 3635, then the errors assigned on the overruling of the motion, made under section 3635, might have been considered on the appeal from the judgment, even if the motion made before was not decided until after the appeal was taken. The main trouble lies in the fact that the appeal was not taken within the year allowed by law. Comp. Laws Utah 1888, § 3652; *Tripp v. Railroad Co.*, 69 Cal. 631, 11 Pac. 219; *Chouteau v. Nuckols*, 33 Mo. 148; *Anderson v. Sloan*, 1 Colo. 33; *Eastman v. Gurrey*, 14 Utah, 169, 46 Pac. 828; *White v. Pease*, 49 Pac. 416, 15 Utah, 170. Unless the appeal is taken within the time prescribed by law, the court has no jurisdiction to hear the appeal, nor to extend the time in which the appeal may be taken. The time to appeal from a judgment, under our statute, begins to run from the entry of the judgment, and not from the time when the court overrules the motion for a new trial, or other motion with reference to it. See cases cited above. In the case of *North Point Consol. Irr. Co. v. Utah & S. L. C. Co.*, 46 Pac. 824, 14 Utah, 155, it was held that an appeal from an order, made pendente lite, granting a temporary injunction, was not an appeal from a final judgment, from which an appeal would lie under section 9, art. 8, of the constitution. In *Eastman v. Gurrey*, reported in 46 Pac. 828, 14 Utah, 169, this court held that the constitution had taken away the right of appeal from an order vacating and setting aside a judgment, and that such an order was not a final judgment from which an appeal would lie. In the case of *White v. Pease*, 49 Pac. 416, 15 Utah, 170, this court held that an order refusing to grant a new trial comes within the rule laid down in the above cases, and that such an order is not a final judgment from which an appeal will lie to this court under section 9, art. 8, of the constitution. In *Jones v. Insurance Co.*, 47 Pac. 74, 14 Utah, 215, this court held, in substance, that a motion to vacate a final judgment comes too late after the term has expired, and after the time within which a motion for a new trial can be made, and should be denied. An order overruling a motion to set aside a judgment is not a final judgment, under section 3635, and is not an appealable order, under our constitution and the rules laid down by this court. The appeal should be taken from the original judgment, and intermediate orders affecting the judgment may be reviewed on appeal from the judgment. Comp. Laws Utah 1888, § 3652. The appeal in this case was not taken until the expiration of over one year, and the order overruling the motion to set aside and vacate the judgment was not rendered until over fifteen months, after the judgment. The period fixed by stat-

ute, in allowing appeals within one year from the entry of the judgment, is an express limitation of time within which the appeal must be taken, and is not a flexible rule to be varied by extrinsic circumstances. Section 3256, Comp. Laws Utah 1888, provides that: " * * * When from any cause, the summons in an action has not been personally served on the defendants, the court may allow on such terms as may be just, such defendant, or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. * * * " The period within which this discretion can be exercised is expressly limited to one year after the rendition of the judgment, and this time cannot be enlarged or extended by merely giving notice to vacate the judgment within the year. The party is required to act, and must bring his notice to a hearing and determination before the court, at his peril, within the year, or the power to relieve under the statute is gone. This provision is based upon the reasonable presumption that a year affords ample time and opportunity for a party to obtain relief, if he is diligent. *Knox v. Clifford*, 41 Wis. 458; *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713; *Henly v. Hastings*, 3 Cal. 341; *Railroad Co. v. McGrath*, 74 Cal. 49, 15 Pac. 360. In *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713, this court, in construing a part of section 3256, Comp. Laws Utah 1888, said: "It is clear that this section controls the power of courts to grant relief against judgments of the character shown in the case at bar, and limits their discretion. It is unnecessary to discuss their power at common law, or in the absence of statutory provisions. This section is a part of our civil procedure. It is concerning a matter which is a rightful subject of legislation. Though our courts possess common-law and chancery jurisdiction, the Code prescribes limitations beyond which they cannot go. The time within which such relief can be given [in that case] is six months after the adjournment of the term at which the judgment was rendered. The reason of the statute is obvious. There ought to be some fixed time within which the court can exercise this discretion upon the application of the aggrieved party; and there ought, in the interest of the public, to be some period when persons could purchase property which has been the subject of litigation, and have some assurance that the title, while perhaps vulnerable, could not be assailed upon a motion, and a judgment which had given title be vacated, without making them parties, and affording an opportunity to meet the allegations of the moving party upon which the application was based to set aside a solemn and formal judgment,"—and held, further, that the court had no power to vacate a judgment after the period limited by statute, and that the only remedy for a party under such circumstances was by a bill of review, common in chancery practice, which is peculiarly suited

to bring before the court all the parties, and to present all the facts connected with the litigation, including those which are explanatory of the judgment, and the delay, if there be any, in making the application to have the judgment vacated, under which equitable proceedings justice might be done. In the case of *People v. Harrison*, 84 Cal. 607, 24 Pac. 311, it was held that a motion would not lie to set aside a judgment after the lapse of time limited by statute, if the judgment is not void on its face, and that an action brought regularly for that purpose was the proper remedy. 2 Enc. Pl. & Prac. 693; *People v. Temple*, 103 Cal. 453, 37 Pac. 447; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *People v. Goodhue*, 80 Cal. 200, 22 Pac. 66; *People v. Greene*, 74 Cal. 400, 16 Pac. 197. It seems clear, from authority, that in cases where judgments have been obtained without service of process, but which are regular and valid on their face, and the defendant has no knowledge of the judgment until after the statutory time to move to set it aside has expired, or was prevented from making the motion from other causes, named in the statute, over which he had no control, within the time provided by statute, a court of equity would have jurisdiction in the premises, when all the parties in interest have been brought before it. Courts of equity will not ordinarily entertain jurisdiction when the remedy at law is complete.

It is also insisted that this court has no jurisdiction of this case because defendant Stookey, the only defendant appealing, did not serve notice of appeal upon his co-defendants, who were parties interested in the appeal. This court held in *Commercial Nat. Bank v. United States S., L. & B. Co.*, 44 Pac. 1043, 13 Utah, 189, and *Rache v. Stanley*, 49 Pac. 648, 15 Utah, —, that, under section 3633, Comp. Laws Utah 1888, notice of appeal shall be served on a co-defendant who does not appeal; that the term "adverse party," used in the statute, meant every person whose interests required that the order, judgment, or decree appealed from be sustained, or who are interested in opposing the relief, and that every such person must be served with a notice of appeal, regardless of whether he appeared as one of the original parties to the action, or was brought in by order of the court; that it would not be presumed that co-defendants who have not been served with notice of appeal have no interest in the judgment which would be in conflict with a reversal. It is true that both co-defendants were sworn as witnesses on the hearing of the motion, as any other witness would be sworn for the plaintiff or defendant, and gave testimony tending to corroborate the appellant in some respects, but not in all respects; but it does not appear from defendant J. B. Swenson's affidavit that he conceded Mr. Stookey's claim, or that he made no adverse claim. Their interests may be adverse. I cannot presume they had no interest in the judgment that would be in

conflict with a reversal. The question of contribution might arise between them, inasmuch as it appears that the judgment arose from firm indebtedness. Had they been notified, they might have appealed, or contested this appeal. I am of the opinion that the appeal should have been dismissed.

(24 Nev. 92)

STATE ex rel. WILLIAMS v. BECK. (No. 1,505.)

(Supreme Court of Nevada. Sept. 9, 1897.)

OFFICERS—RESIGNATION—WITHDRAWAL.

1. A contingent resignation by a state official is subject to withdrawal by him at any time before the contingency happens, and the action of the governor in refusing to return the resignation when requested to do so before such time is of no effect.

2. A county commissioner sent his resignation to the governor, to take effect if he were not held blameless as to certain charges by an investigating committee, or if such an investigation should not be held within 60 days. *Held*, that the resignation was not absolute, but contingent upon the happening of one of the two events named therein.

3. Before the investigation was held, and before the 60 days had expired, the commissioner wrote to the governor, requesting that his resignation be returned to him. *Held*, that this constituted an absolute withdrawal of the resignation while still contingent.

Bonnifield, J., dissenting.

Quo warranto by the state, on the relation of John B. Williams, against H. H. Beck, to oust respondent from office. Dismissed.

Torreyson & Summerfield and J. R. Judge, Atty. Gen., for relator. Wren & Julien, for respondent.

MASSEY, J. The respondent was duly elected county commissioner of Washoe county, state of Nevada, at the general election held therein on the 3d day of November, 1896, for a term of four years, commencing on the first Monday in January, 1897, duly qualified as such, and has since that time discharged the duties of said office. On the 8th day of April, 1897, the respondent transmitted to R. Sadler, the acting governor, the following letter: "Reno, Nevada, April 8, 1897. His Excellency, R. Sadler, Governor of Nevada, Carson City, Nevada—Sir: In view of serious charges, as appear in the Nevada State Journal of even date hereof, made against me as a public official of this (Washoe) county, I hereby resign said office, to wit, county commissioner of Washoe county, Nevada, and beg you to hold the same subject to the findings of a judicial investigation which I have this day demanded and requested of the proper authorities, to wit, the honorable district judge of our district, and the Honorable T. V. Julien, district attorney of my county. Unless such investigation shall find me blameless, or in case such investigation shall not be held for a term of sixty days from the date

hereof, then, and in either event, you will consider this my final resignation, and proceed under the law to appoint my successor. In the meantime I shall consider my duties as county commissioner suspended. Very respectfully, H. H. Beck." This letter was indorsed by the governor: "Resignation accepted upon the conditions named therein. R. Sadler." The charges published in the Reno Journal, and referred to in the above letter of the respondent, were to the effect that the respondent had voted to allow a bill for disinfecting a room where a child had recently died with a contagious disease, and that there was no authority of law for the allowance of the same. On the 26th day of May, 1897, the respondent wrote and transmitted the following letter to the governor: "Reno, Nevada, May 26th, 1897. His Excellency, R. Sadler, Governor of Nevada, Carson City, Nevada—Sir: Please return to me my conditional resignation, under date of April 8th, 1897. Since then the district judge has called a grand jury, and I am assured that the charges made against me by a local paper will be investigated. Very truly yours, H. H. Beck, Co. Commissioner, Washoe Co., Nevada." On the 29th day of May, 1897, the governor, in answer to said letter, refused to return to the respondent the letter of resignation, assigning as a reason therefor that the same had been filed in the archives of the executive department, and had been accepted subject to the conditions named. Further correspondence passed between the respondent and the governor relative to this matter, but, as the same is not necessary in determining the questions presented by this action, it is omitted. On the 4th day of June, 1897, the grand jury of Washoe county reported to the district court therein the result of the investigation of the matters referred to in respondent's letter of resignation, in which report the grand jury commended the county auditor of said county for refusing to draw his warrant for the amount of said claim, and expressed the belief that the board of county commissioners had acted in good faith, and for the best interests of the people, in taking action to prevent the spread of a dangerous disease. On the 7th day of June, 1897, the relator was appointed and commissioned by the acting governor as county commissioner of Washoe county to fill the vacancy occasioned by the alleged resignation of the respondent, and thereafter took the required oath as such. On the 5th day of July, 1897, the relator demanded of the respondent the possession of said office, which demand was refused, since when the respondent has continued to exercise the functions of said office, and has excluded the relator therefrom. Upon these facts the relator asks the court to adjudge the respondent not entitled to said office, that he be ousted and excluded therefrom, and that relator be admitted thereto, and to all the

rights and emoluments thereof. The character of respondent's act in transmitting his resignation to the governor, the effect thereof, whether the resignation is conditional or absolute, and the effect of the subsequent transactions occurring after the receipt of the resignation by the governor, are the only matters necessary to be considered in determining the question presented in this proceeding.

The relator contends that the letter of April 8, 1897, is an absolute and unconditional resignation of the office of county commissioner. We cannot so hold. The resignation was to become effective at a future date, and upon the happening of two specified contingencies, to wit, in case the judicial investigation demanded should not be had within 60 days from the date of the letter, or in case said investigation should fail to hold the respondent blameless in the matter charged. These are the express conditions named upon which the resignation should become final and effective. The act of the governor in accepting the resignation of the respondent, and in refusing to return the same upon demand, is neither material nor important; for it has been settled by this court that a civil officer has the right to resign his office at his own pleasure and will, and the acceptance or rejection of such resignation can in no manner affect such right. *State v. Clarke*, 3 Nev. 566. The resignation of the respondent being conditional, and not to take effect except upon certain contingencies, and at a future day, there was no vacancy in the office until the happening of the contingencies and until the arrival of such day. In the meantime the resignation was within the control of the respondent, and could be withdrawn at his pleasure; and, if such withdrawal was made by the respondent, he stands as if he had never written or sent said resignation. *State v. Clarke*, supra. The question, then, is, did respondent withdraw his resignation before the happening of the contingencies named therein, and within 60 days from the date thereof? We think he did. The letter of resignation was written and transmitted on the 8th day of April, 1897. On the 26th day of May, 1897, before the 60 days had elapsed, and before an investigation of the charges had been made by the grand jury, the respondent transmitted to the governor the letter in which he asked the return of the conditional resignation under date of April 8, 1897. This letter was an absolute withdrawal of such resignation. At the time he same was written the resignation was subject to withdrawal, and entirely within the control of the respondent. It cannot be a matter of any importance what reasons were assigned by the respondent for the transmission of his letter of resignation, or in transmitting the letter withdrawing the same. Having withdrawn the resignation at a time

when the same was subject to such withdrawal, and before the happening of the contingencies named, there was no vacancy in the office of county commissioner of Washoe county at the time the relator was appointed by the governor, and therefore such appointment conferred no right to such office upon the relator.

Other questions were discussed by counsel for the respective parties, but we do not deem it necessary to pass upon the same. For these reasons the proceedings will be dismissed, at relator's costs, and judgment entered accordingly.

BELKNAP, C. J., concurs.

BONNIFIELD, J. (dissenting). I cannot concur in the conclusion, arrived at in the above opinion, that respondent's letter of May 26th was an absolute withdrawal of his resignation of the 8th day of April, and must therefore respectfully dissent from the judgment. I am of opinion that the respondent was acting in good faith when he notified the governor of his desire to no longer hold his office unless a judicial investigation, which he had demanded, should hold him blameless with respect to what he regarded as "serious charges" made by the Nevada State Journal. His counsel claimed that the respondent, being assured that the grand jury would be called, and that he would be exonerated by them, withdrew his resignation by the said letter of May 26th. From this it appears to me that his withdrawal was based solely on the contingency of his being exonerated; that he did not at that time intend to withdraw his resignation regardless of said charges, and without reference to whether he was exonerated or not. The charges contained in the newspaper article were that a bill presented by Prof. W. McN. Miller to the board of county commissioners for fumigating a room in an hotel at Reno was not a legal charge against Washoe county, that there was no law authorizing said work to be done at the county's expense, and that the board allowed said bill by unanimous vote. After setting out the items of the bill, the author of the article claimed that the charges therefor were not only illegal, but most extravagant, and concluded his comments as follows: "In view of this, there can only be one construction put upon the whole matter, and that is that maudlin sentimentality has overcome the better judgment of sensible men." It seems that the respondent regarded these charges as being of such serious nature that he determined not to retain his office unless he was held blameless by a judicial investigation. Entertaining this view of the matter, he exhibited a commendable public spirit in desiring to be relieved of his official responsibilities,—a spirit, however, not commonly manifested in like manner in official circles. It is clear to my mind that he did not change his mind with respect to his resignation until the 5th day

of June. On that day he wrote to the governor as follows: " * * * Sir: I hereby recall my conditional resignation of date April 8th, 1897. Very respectfully, H. H. Beck. * * *" That letter was evidently intended by him as an absolute withdrawal of his conditional resignation. If he had regarded his letter of May 26th as being such withdrawal, there was no necessity or propriety in absolutely withdrawing it again. If he intended on the 26th day of May to absolutely withdraw his resignation, I am of opinion that he would have done so in the clear and concise form he attempted to withdraw it on the 5th day of June, without reference to any assurance that he had that the charges would be investigated, and without regard to any assurance that he would be exonerated. On the 4th day of June the grand jury reported to the court as follows: "We have examined into the charges made by publication in the Nevada State Journal, alleging certain illegal acts of the board of county commissioners, and find as follows, after examining several witnesses: A child died at the Clarendon Hotel, in this city, on the 21st day of February, 1897, of malignant scarlet fever. That there was great danger of the disease spreading, and that the attending physician notified the chairman of the board of county commissioners of the danger, and advised him of the necessity of having the premises and clothing in the rooms immediately and thoroughly fumigated, and that after further consultation the chairman of the board of county commissioners requested the attending physician to have the necessary fumigating properly done, that the danger of the spreading of the disease might be averted. That it was accordingly done in a thorough manner by him, and under his supervision. Subsequently, at a meeting of the board of county commissioners held April 7, 1897, Dr. Miller presented a bill for \$76.15. That said bill was unanimously allowed by said board, and was later properly vetoed by the auditor, and at a later meeting of the board the auditor's veto was sustained. While we commend the action of the auditor in refusing to draw his warrant in payment of this bill, and believe there was no law authorizing its payment, we believe the chairman and other members of the board of county commissioners acted in good faith, and for the best interests of the people of this community, in thus taking action in preventing the spread of a dangerous and generally fatal disease." Counsel seemed to think that the conditional resignation was simply a foolish act on the part of the respondent, and argued that, however it might be considered, the grand jury had fully exonerated the board from the charges made, and hence that under the terms of the letter of the 8th day of April the conditional resignation never took effect. It is true, the grand jury found that the respondent and the other commissioners acted in good faith in thus taking action in preventing the spread

of a dangerous disease. The jury, however, found that the charges made by said article were substantially true; that is, that said board unanimously allowed said bill of Dr. Miller of \$76.15, and that there was no law authorizing its payment. It was not charged against the commissioners, or either of them, that they acted in bad faith, but their alleged illegal acts were ascribed solely to maudlin sentimentality having overcome their better judgment as sensible men. It appears to me that the respondent was of opinion that he could legally withdraw his resignation at any time before the governor made his appointment, and that on the 5th day of June he changed his mind with respect to his resignation, and concluded to withdraw it absolutely, which he then attempted to do. It is probable that at that time he, too, considered that his conditional resignation was a foolish act. The validity of a resignation does not depend upon the resignation being based on sensible grounds, nor can it be defeated by its being a foolish act. In my view of the case, his resignation took effect on the 4th day of June, when the grand jury submitted their report to the court, and at that time his right of withdrawal ceased.

Ex parte CRAWFORD. (No. 1,509.)
(Supreme Court of Nevada. Sept. 7, 1897.)

HABEAS CORPUS—GROUNDS—JURISDICTION.

1. An imprisonment by virtue of a commitment showing that the prisoner was convicted of threats against life, and sentenced to give bonds to keep the peace, or be imprisoned for a certain time, is a legal imprisonment, and accordingly an application for habeas corpus will be refused.

2. The question of the guilt of a person convicted of a public offense cannot be raised on application for habeas corpus.

Application by James Crawford for a writ of habeas corpus. Denied.

F. H. Norcross, for petitioner.

BELKNAP, C. J. The petitioner is held in custody by the sheriff of Washoe county by virtue of a commitment issued from the court of the justice of the peace of Reno township. The commitment shows that the petitioner was found guilty of a public offense, to wit, threats against life, and is placed under bonds to keep the peace, or be imprisoned in the county jail for the term of six months, or until said bond be given. No objection is made touching the regularity of the commitment, and the jurisdiction of the court is not questioned. Under these facts, it is our duty to deny the application. Gen. St. § 3689. Whether petitioner was guilty or not was the question to be decided upon the trial, and, if it was erroneously decided, the remedy is by appeal, and not by habeas corpus. Ex parte Edgington, 10 Nev. 215.

BONNIFIELD and MASSEY, JJ., concur.

Ex parte TICE.

TICE v. FRAZIER, Sheriff.

(Supreme Court of Oregon. Aug. 31, 1897.)

HABEAS CORPUS—GROUNDS OF REMEDY—JURY—DISCHARGE ON SUNDAY—CONSENT OF DEFENDANT—JEOPARDY—WHEN ATTACHING.

1. Where it is conceded, in a habeas corpus proceeding, that the commitment emanated from a court of competent authority, having jurisdiction of the subject-matter and person, the only question is whether the process is void for illegality.

2. Hill's Ann. Laws, § 208, provides that "while the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury till a verdict is rendered or the jury discharged." Section 928, adopted with section 208, provides that "no court can be opened, nor can any judicial business be transacted on a Sunday," except to give instructions to a jury then deliberating on their verdict; to receive the verdict of a jury, or for the exercise of the powers of a magistrate in a criminal action. *Held*, that section 928 limits the power conferred by section 208, and hence a court cannot discharge a jury on a Sunday in consequence of their failure to agree on a verdict.

3. Within Const. art. 1, § 12, providing that "no person shall be put in jeopardy twice for the same offense," jeopardy attaches when the jury are impaneled and sworn.

4. In a criminal case the authority to discharge the jury on a Sunday because of their failure to agree on a verdict cannot be conferred by the consent of defendant, the act being in contravention of Hill's Ann. Laws, § 928.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Special proceeding by Jonathan Tice against William Frazier, sheriff, in habeas corpus. From a judgment dismissing the proceeding and remanding plaintiff to the custody of defendant, plaintiff appeals. Reversed, and plaintiff discharged.

This is a special proceeding by Jonathan Tice against William Frazier, as sheriff of Multnomah county, to inquire into the cause of his imprisonment, and to be relieved therefrom. The facts are that plaintiff was indicted, tried, and convicted of the crime of forgery; but the judgment thereon was reversed on appeal, and a new trial ordered. *State v. Tice*, 48 Pac. 368. Upon the new trial a jury was impaneled and sworn, the evidence taken, and the cause submitted on Saturday, June 26, 1897; and on the next day, no verdict having been reached, the court, by an order, discharged the jury, and committed plaintiff to the custody of defendant pending a retrial. Thereafter, plaintiff, claiming that the discharge of the jury on Sunday was not authorized by law, and that its order in that respect was equivalent to a verdict of acquittal, moved the court to be discharged; but, the motion being denied, he thereupon sued out a writ of habeas corpus, which was served on defendant, who, for his return, certified that he held plaintiff in prison by virtue of said commitment. A re-

ply alleging the facts hereinbefore stated having been filed, a trial was had, resulting in an order dismissing the proceeding, and remanding plaintiff to the custody of defendant, from which judgment plaintiff appeals.

J. H. Woodward, for appellant. Dan J. Malarkey, for respondent.

MOORE, C. J. (after stating the facts). Counsel for plaintiff contend that, in consequence of the error complained of, their client is unlawfully restrained of his liberty; that he cannot again be put in jeopardy, and the discharge of the jury on Sunday affords a bar to any further prosecution of the charge stated in the indictment; that, such being the case, the sheriff has no legal authority to imprison him, and hence the court erred in dismissing the proceeding and remanding him to the custody of the officer; while counsel for defendant maintain that the act of discharging the jury is ministerial only, and therefore not prohibited on a non-judicial day; that the statute confers upon a trial court the right to receive the verdict of a jury on Sunday, and this grant of power carries with it the corresponding right to discharge a jury on that day; that, the record being silent, it must be presumed that the jury was discharged in pursuance of plaintiff's consent thereto, which now estops him from complaining of such action; and that, if all the points contended for by plaintiff be conceded, the order restraining him of his liberty is not void, and hence habeas corpus is not the remedy, and is ineffectual to procure his discharge.

It being conceded that the commitment under which plaintiff is restrained of his liberty emanated from a court of competent authority, having jurisdiction of the subject-matter and person, the only question presented for consideration in a habeas corpus proceeding is whether such process is void for illegality. Hurd, Hab. Corp. 333; Church, Hab. Corp. § 253; 1 Bish. New Cr. Proc. § 821. "If the judgment," says Allen, J., in *People v. Liscomb*, 19 Am. Rep. 211, "is merely erroneous, the court having given a wrong judgment when it had jurisdiction,—the party aggrieved can only have relief by writ of error, or other process of review. He cannot be relieved summarily by habeas corpus." In *Ex parte Ruthven*, 17 Mo. 541, the facts show that the petitioner was put upon his trial for murder; and, the cause being submitted to the jury, they were, in a few hours after retiring, discharged, without the prisoner's consent, and in his absence, without having agreed upon a verdict. Contending that he could not again be put in jeopardy for the same offense, he moved the court to be discharged from custody under the indictment, but, the motion being denied, he sought to review the alleged error by habeas corpus; but it was held that the means adopted was not the proper remedy for the error complained of. In *Steiner v.*

Norton, 6 Wash. 23, 32 Pac. 1068, the plaintiff was indicted, and, upon entering a plea of not guilty, a jury was impaneled and sworn, and the trial commenced, during which the court, upon motion, and against plaintiff's objection, discharged the jury, quashed the indictment, and permitted an information to be filed, holding the plaintiff to bail, in default of which to be imprisoned in the county jail. Plaintiff, contending that his restraint under said commitment was illegal, because jeopardy had attached under the indictment, and that he could not again be put in peril for the same offense, sought to review the act of the court by habeas corpus, but it was held that the proceeding was ineffectual for that purpose. Dunbar, C. J., in deciding the case, says, "If the petitioner has been before in jeopardy for the same offense, that is a proper plea in bar, to be tried by the court, and from the decision of which an appeal would lie to this court." To the same effect, also, see *In re Gribben* (Okla.) 47 Pac. 1074. But in each of these cases, while the doctrine of former jeopardy was involved, it was not contended that the order or judgment complained of was void, and hence it was held that habeas corpus was not the proper remedy to correct any irregularity occurring at the trial. It has been repeatedly held that, unless the judgment under which a person is committed to the custody of an officer is void, the court will not, on a habeas corpus proceeding, discharge the prisoner, and that irregularities appearing in the record are insufficient to obtain his release. *Fleming v. Bills*, 3 Or. 286; *Barton v. Saunders*, 16 Or. 51, 16 Pac. 921; *Wright v. State*, 5 Ind. 290; *Id.*, 7 Ind. 324; *Com. v. Deacon*, 8 Serg. & R. 72; *State v. Sheriff*, 24 Minn. 87; *Perry v. State*, 41 Tex. 488; *Pitner v. State*, 44 Tex. 578; *State v. Klock* (La.) 12 South. 307; *Ex parte Blzzell* (Ala.) 21 South. 371; *In re Courtney* (La.) 21 South. 729; *Ex parte Gibson*, 31 Cal. 619; *Ex parte McCullough*, 35 Cal. 98; *Ex parte Granice*, 51 Cal. 375; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935; *Ex parte Hays* (Utah) 47 Pac. 612; *People v. Allen* (Ill. Sup.) 43 N. E. 332; *Ex parte Keeler* (S. C.) 23 S. E. 805; *Ex parte Evans* (W. Va.) 24 S. E. 888; *In re Greenwald*, 77 Fed. 590; *In re Eckart*, 17 Sup. Ct. 638. In a note to *Ex parte Crouch*, 20 Cent. Law J. 169 (s. c. 5 Sup. Ct. 96), it is said: "The rule is that, if the error by reason of which it is sought to overthrow the judgment is not of such a character as renders it absolutely void, the defendant imprisoned thereunder will not be relieved on habeas corpus, but will be driven to seek his remedy in a direct proceeding, by appeal, writ of error, or otherwise, to set aside the same, either in the court in which it was rendered, or in a court having jurisdiction to review the proceedings of such court. If the error be an error of fact, he cannot bring habeas corpus, but must resort to a writ of error coram nobis in the court which rendered the judgment." See the great array of authorities collated in support of this

note. In a note to the case of *Com. v. Lecky*, 26 Am. Dec. 37, it is said: "If the court rendering the judgment or issuing the process had jurisdiction of the subject-matter and of the person, and was competent to render such judgment or issue such process under some circumstances, the inquiry will not be carried further, however erroneous the proceedings may have been." Applying this rule to the case at bar, it remains to be seen whether the act complained of is void. We do not deem it necessary to discuss the question whether discharging the jury is a ministerial or a judicial act, for the right of the court to dismiss them necessarily depended upon its consideration that they could not agree upon a verdict; and this conclusion was an exercise of judicial discretion, and, being so, is it void because it was performed on the Christian Sabbath? "Sunday," says Mr. Freeman in his work on Judgments (4th Ed., § 138), "is dies non juridicus, and by the common law all judicial proceedings which take place on that day are void." From the establishment of the Christian religion until the beginning of the sixth century, Sunday was regarded in all Christian countries with no greater favor or veneration than any other day of the week, and justice was administered on all days alike; but in A. D. 517, however, a canon of the church prohibited the profanation of Sunday, and in England, about 500 years thereafter, the laws of Edward the Confessor, emphasizing this prohibition, ordered that from 8 in the afternoon of all Saturdays till Monday morning the peace of God and the holy church should be kept throughout the kingdom. 3 Bl. Comm. *276. Mr. Ringgold, in his *Law of Sunday* (page 153), criticising the assertion so frequently made in this country that Sunday, by reason of these canons of the church, became dies non juridicus at common law, says: "But it is evident that Sunday was not a dies non juridicus by English common law, as adopted in America, because that law is always, in this connection, distinguished from English statutory law; and Sunday has derived its character as dies non juridicus in England from certain easily cited statutes, whose regulations were borrowed from the ecclesiastical or canon law, and whose enactment was one of the many results of that English union of church and state which is nominally repudiated among our people." Sir William Blackstone, in speaking of the laws of Edward the Confessor, says: "These, in short, are the laws which gave rise and original to that collection of maxims and customs which is now known by the name of the 'common law.' * * * Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary." 1 Bl. Comm. *67. In defining this phrase the learned commentator says: "Now, time out of memory hath been long ago ascertained by the law to commence from the be-

ginning of the reign of Richard the First." 2 Bl. Comm. *31. It will thus be observed that Sunday, as dies non juridicus, may have had its origin in a statute, thus depriving it of the strict appellation of *lex non scripta*; but the act in question is nevertheless so ancient that "the memory of man runneth not to the contrary," and hence the prohibition of judicial acts on that day may now be denominated a part of the common law of England, which the early settlers brought to our shores as an inheritance from the mother country. It has been repeatedly intimated that Sunday at common law was dies non juridicus, and also held that any judicial proceeding performed on that day was void. *Van Vechten v. Pad-dock*, 12 Johns. 178; *Pearce v. Atwood*, 13 Mass. 324; *Story v. Elliot*, 8 Cow. 27; *Haynes v. Sledge*, 2 Port. (Ala.) 530; *Johnson v. Day*, 17 Pick. 106; *Kepner v. Keefer*, 6 Watts, 231; *Chapman v. State*, 5 Blackf. 111; *Davis v. Fish*, 1 G. Greene, 406; *Pulling v. People*, 8 Barb. 384; *Blood v. Bates*, 31 Vt. 147; *Merritt v. Earle*, 31 Barb. 38; *Kiger v. Coats*, 18 Ind. 153; *Scammon v. City of Chicago*, 40 Ill. 146; *State v. California Min. Co.*, 13 Nev. 203; *City of Parsons v. Lindsay* (Kan. Sup.) 21 Pac. 227, and notes. Such being the rule at common law, the right to perform any judicial act on Sunday must be sought for in the statute conferring it, which, like all other acts in derogation of the common law, should be strictly construed. The legislative assembly on October 11, 1862, adopted a code of civil procedure, which contained the following provision: "The courts of justice may be held, and judicial business may be transacted, on any day, except as provided in this section. No court can be opened, nor can any judicial business be transacted on a Sunday, on the first day of January, on the fourth day of July, on Christmas Day, on a day on which a general election is held, or on a day appointed by the executive authority of the United States or of this state, as a day of fast or thanksgiving, except for the following purposes: (1) To give instruction to a jury, then deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature." Gen. Laws Or. 1843-1872, c. 11, tit. 7, § 899. This section was amended October 25, 1880, by adding May 30th to the list of legal holidays. Laws Or. 1880, p. 45. The legislature on February 21, 1887, further amended this section by adding to the list of nonjudicial days the first Saturday in June, and by changing the second subdivision so as to read, "To receive the verdict of a jury." Laws Or. 1887, p. 86. And as thus amended it appears in Hill's Ann. Laws Or. as section 928. This section was also amended on February 21, 1893, in reference to the holidays, but no change was made in said subdivision 2. It will thus be seen that a court may receive the verdict of a jury on Sunday, but without their agreement, or some

immediate necessity, it is powerless to discharge them on that day.

It is insisted, however, by counsel for defendant, that section 208, Hill's Ann. Laws Or., which provides that "while the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged," authorizes a court to dismiss a jury on a nonjudicial day; and in support of this doctrine they cite the cases of *People v. Odell*, 1 Dak. 197, 46 N. W. 601, *Meece v. Com.*, 78 Ky. 586, and *Territory v. Milligan* (Okla.) 37 Pac. 1059, where it is held, under similar statutes, that a court may give an instruction to, and receive the verdict of, a jury on Sunday. Sections 208 and 928, Hill's Ann. Laws Or., were adopted at the same time, and have reference to the same subject-matter; and, such being the case, they must be construed in *pari materia*. It is possible, however, that a construction of the former section without the aid of the latter might lead to the conclusion reached by the courts in the cases relied upon; but evidently the legislative assembly, in adopting a code of civil procedure, did not so regard section 208; for, if such had been the case, there would have been no need of enacting section 928, which, in our judgment, limits the power conferred by section 208.

The contention that it must be presumed, in the absence of a recital in the record to the contrary, that plaintiff consented to the discharge of the jury, is without merit; for, if he could agree to their discharge on Sunday, he could with equal propriety consent to be tried in a criminal action on that day; but as the public has an interest in the observance of Sunday as a day of rest, and a right to see that it shall not be desecrated except in cases of urgent need, plaintiff could not waive the public right, and hence the presumption invoked is not applicable to the facts involved. "A party cannot waive the objection to acts done, or contracts entered into, in violation of Sunday laws." 28 Am. & Eng. Enc. Law, 533. These rules show that the court could not sit on Sunday, except upon certain conditions, none of which existed, and hence the order discharging the jury for the cause assigned was *coram non iudice* and void. *Jackson v. State* (Ala.) 15 South. 351. The organic law of this state, emphasizing a maxim of the civil law which was also embodied in the elements of the common law, declares that "no person shall be put in jeopardy twice for the same offense." Const. Or. art. 1, § 12. While there is some conflict of judicial opinion as to when jeopardy attaches, it has been held by this court that it attaches when the jury are impaneled and sworn. *State v. Steeves*, 29 Or. 85, 43 Pac. 947. In *Hillands v. Com.* (Pa. Sup.) 2 Atl. 70, *Mercur, C. J.*, asks the following question: "At what step in the prose-

cution is a person put in jeopardy, to which he shall not be subjected the second time for the same offense?" and answers the inquiry by saying: "Undoubtedly, when the trial begins in which he is charged with a capital offense. It is so charged as soon as the twelve jurors are duly impaneled and sworn. They are sworn well and truly to try and true deliverance make between the commonwealth and the prisoner whom they have in charge. The trial has then begun. The prisoner stands before them as his judges, with his life in their hands." "Nothing," says *Okey, J.*, in *Mitchell v. State*, 42 Ohio St. 383, "is more clearly settled than that jeopardy attaches the moment the jury is sworn, and that if the jury be thereafter discharged without a verdict, when no legal ground of discharge is shown, the effect will be precisely the same as if a verdict of acquittal had been rendered." In *Ex parte White*, 15 Nev. 146, the petitioners were arrested and taken before a justice of the peace on a Sunday, and charged with having committed a misdemeanor, to which they pleaded guilty; and, having been sentenced on that day to pay a fine and be imprisoned, they sued out a writ of habeas corpus; and *Hawley, J.*, in discharging them, says: "In the present case the justice, in receiving the plea, passing sentence, and rendering judgment, acted in the exercise of his powers as a justice of the peace. In this respect he acted without any authority of law. The judgment rendered by him is utterly null and void." In *Maden v. Emmons*, 83 Ind. 331, the petitioner was indicted for larceny, a jury impaneled and sworn to try him, the evidence taken, and the case submitted; but, after retiring, they discovered that one of their number was not a resident of the county, whereupon they went into the court room, in the absence of the judge and of the petitioner, and, having obtained the advice of the deputy clerk, they dispersed without agreeing upon a verdict. The petitioner, contending that jeopardy had attached, and that in consequence of the act of the jury he was entitled to be discharged, applied for a writ of habeas corpus, and, his petition being denied, he appealed; and, in reversing the judgment, *Elliott, J.*, says: "If a jury is discharged by the court without the consent of the accused, it operates to release him, unless there are reasonable grounds for the action of the court. Even where such grounds do exist the prisoner must be present when the order discharging the jury is made. *State v. Wilson*, 50 Ind. 487. If the jury is discharged before the expiration of a reasonable time, it results in the release of the accused. *State v. Leunig*, 42 Ind. 541. A jury cannot of their own volition do that which the court cannot authorize them to do. The separation of the jury in this case was wrongful, and must, under the circumstances, be held to entitle the appellant to a discharge." In *State v. McGlimsey*, 80 N. C. 377, the defendant was tried for murder; and, the cause having been

submitted, the jury retired on Saturday night, and on Sunday evening, not having agreed upon their verdict, were discharged, and the prisoner remanded to jail until the next term of court. A writ of certiorari was thereupon sued out, and, the record being sent up, the supreme court discharged the prisoner. Ashe, J., in rendering the decision, says: "The question presented for the consideration of this court is whether the court below had the right to discharge the jury who were impaneled in the case, and hold the prisoner for another trial. It is a maxim of the common law that no person shall be twice put in jeopardy of life or limb; and this principle, founded on humanity, has been incorporated in the constitution of the United States. It has been adopted and acted upon in our courts from the foundation of the government to the present time. We are aware that in many of the states there has been a strong tendency to ignore the maxim of the common law, and submit the question to the discretion of the courts. But in this state, beginning with *Garrigue's Case*, in 1795, reported in 1 Hayw. (N. C.) 241, through a current of decisions down to the case of *State v. Honeycutt*, 74 N. C. 391, the principle of the common law has been steadily kept in view and adhered to, with some relaxation of the rule. In *re Spier*, 1 Dev. 491; *State v. Ephraim*, 2 Dev. & B. 162; *State v. Prince*, 63 N. C. 529; *State v. Alman*, 64 N. C. 364; *State v. Jefferson*, 66 N. C. 309. By these and other decisions of this court it has been uniformly maintained that where a jury has been charged in a capital felony, and the prisoner's life put in jeopardy, the court has no power to discharge the jury and hold the prisoner for a second trial, except in cases of absolute necessity. These cases of necessity form exceptions to the general rule, and, in every case where the court undertakes to exercise the power of discharging a jury in a capital case, it will be error, unless brought within one of the exceptions. The inability of a jury to agree upon a verdict has been recognized by our courts as an exception to the general rule." In *State v. Shaffer*, 23 Or. 555, 32 Pac. 545, it is held that the inability of a jury to agree upon a verdict, after a reasonable time therefor has expired, affords such a necessity as will warrant their discharge without defendant's consent, and that their dismissal under such circumstances cannot be pleaded in bar of another prosecution. To the same effect, see *State v. Reinhart*, 26 Or. 466, 38 Pac. 822. But this rule can furnish no reason for the discharge of a jury on Sunday in consequence of their failure to agree upon a verdict; and the court, having no authority to sit on that day, was without jurisdiction, and hence its order was of no binding force, in view of which the separation of the jury was as though they had voluntarily dispersed. In the case at bar the court cannot consider the question of the guilt or innocence of the plaintiff, who, having invoked the application of this constitu-

tional guaranty, is entitled to the relief it affords; and hence it follows that the judgment is reversed and the cause remanded, with instructions to discharge the prisoner.

(117 Cal. 681)

PEOPLE v. ROBLES. (Cr. 294.)

(Supreme Court of California. Sept. 3, 1897.)

PERJURY—SUFFICIENCY OF INDICTMENT—STATUTE—CONSTRUCTION.

1. In Pen. Code, § 124, setting forth the time when depositions are deemed complete, the term "deposition" includes "affidavit."

2. Under Pen. Code, § 124, providing that a deposition is deemed complete, within the provisions of the chapter on perjury, when "it is delivered by the accused to any other person with intent that it be uttered or published as true," an indictment for perjury alleging that accused made a false affidavit, without alleging that he delivered it with intent that it be uttered or published as true, is insufficient.

Department 1. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

William Robles was convicted of perjury. From the judgment, and an order denying his motion for new trial, he appeals. Reversed.

A. S. Newburgh and Leon E. Prescott, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

GAROUTTE, J. Defendant has been convicted of the crime of perjury, and appeals from the judgment and order denying his motion for a new trial. He has attacked the sufficiency of the indictment both by demurrer and motion in arrest of judgment, and to that attack we will address our attention.

As appears by the indictment, one Abbott was convicted of grand larceny. She moved for a new trial upon the ground of newly-discovered evidence. At the hearing of the motion her counsel used the affidavit of this defendant, which was sworn to by him before a party duly authorized to administer oaths. By this affidavit, defendant declared that Abbott was not the party who committed the crime, and that he (defendant) was such party. It is further alleged that he made this false affidavit in the action and proceeding entitled "The People of the State of California v. Aggie Abbott." Before a party may be convicted of perjury in making a false affidavit, he must either use the affidavit for a purpose contemplated by section 118 of the Penal Code, or deliver it to some one for such use. This principle of law is recognized and declared by section 124 of the chapter of the Penal Code bearing upon the crime of perjury, where it is declared, "The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true." The word "deposition," here used, includes "affidavit." In effect, this section declares that an affidavit will not support a charge of perjury until it has been delivered by the accused with intent to be uttered as true. The soundness of this doctrine is fully recognized by the trial court, for

the jury were told, as a matter of law, before retiring to deliberate upon a verdict: "Unless the accused, after making the affidavit, if he did make it, delivered it to the deputy clerk who administered the oath, or permitted the deputy clerk to take it away, with the intent on the part of the accused that it be presented to the court and used in behalf of Aggie Abbott in support of her motion for a new trial, the defendant cannot be convicted. It is my duty to state to you that under the statute, even if he made that affidavit before the officer and then kept the paper in his possession, he cannot be convicted of the crime of perjury; and so, before you convict him, you must be satisfied, among other things, that he allowed the officer to take the affidavit away,—delivered it to him, either formally, or in the sense of allowing him to take it away for the purpose of being used in support of the motion for a new trial. He must have so delivered it to the clerk, put it out of his power and custody into the custody of the clerk, or of some one else, for the purpose of being used in support of that motion for a new trial."

The indictment cannot stand the test, when tried by the principle of law we have declared. It does not charge facts sufficient to constitute the offense. Evidence establishing the facts stated in the indictment would not prove defendant's guilt. The fact that the affidavit was used by the attorney of Abbott upon the hearing of the motion adds no strength to the pleading. Perchance it was purloined for the purpose. There is nothing in the pleading to indicate that it was so used at the request or with the consent of this defendant. Perhaps it was never intended to be so used. Perhaps it was used under objection and protest of the defendant. As matter of evidence, inferences and presumptions of fact might be drawn by a jury from all the circumstances surrounding the making of the affidavit clearly indicating defendant's guilt, and such inferences and presumptions of fact be entirely justified. But we are now dealing with the question as matter of law. We are testing the sufficiency of the pleading in the light of law, and, under such circumstances, may not be aided by presumptions and inferences. The indictment must charge a crime in words. Inferences cannot be invoked to aid its sufficiency. Here the indictment only charges the making of the false affidavit. It does not charge enough. It should have declared that the affidavit was delivered with the intent that it be uttered and published as true. Such a statement in the pleading is just as necessary as to charge that the affidavit was made by the accused, or that it was false,—if it were possible, certainly more necessary, for while the affidavit remains in the hands of the accused no mischief is done. It is only when it leaves his hands that evil results follow. And hence the law says there is no crime until that event takes place. The attorney general cites *People v. Naylor*, 82 Cal. 607, 23 Pac. 116, as contrary to these conclusions, but such is not the fact. No question of the delivery of the petition and

schedules in insolvency was there involved. Upon the contrary, it does appear that such petition and schedules were filed. If the indictment had failed to state that they had been filed, a charge of perjury in that case could not have stood. For the foregoing reasons the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(117 Cal. 635)

Z. RUSS & SONS CO. v. CRICHTON, Tax Collector. (S. F. 545.)

(Supreme Court of California. Sept. 4, 1907.)

TAXATION—DEEDS—LIMITATION ON ISSUE—APPLICATION TO STATE—PATENTS—PRESUMPTION OF VALIDITY—ASSESSMENT—UNKNOWN OWNERS—QUIETING TITLE—INJUNCTION.

1. Pol. Code, § 3788, as amended in 1885, provided what should be done with deeds to the lands sold to the state for delinquent taxes, how the lands should again become subject to entry and sale, and closed with the general provision that "in all cases where land has been heretofore sold for delinquent taxes the deed therefor must be made within one year and three months after this act takes effect, and, unless so made, the purchaser shall be deemed to have relinquished all his rights under such sale." *Held*, that the limitation did not apply to the state.

2. Where a complaint alleges that the state sold and conveyed its right, title, and interest in and to certain lands in controversy, by patents duly issued, to the grantors of plaintiff, it will be presumed, as against a demurrer, and in the absence of a contrary showing, that, when the officers of the state charged with that duty executed and delivered the patents, all precedent conditions requisite to their issue had been fully performed.

3. A tax deed reciting that the land therein described was assessed to "Henry Loose, and to all owners and claimants, known and unknown," is void on its face, and it cannot be shown that there was in fact a valid assessment.

4. To constitute such a cloud on title as will warrant equity in restraining the issuance of a tax deed, it must appear that the owner of the property, in an action of ejectment by the adverse party, founded on the deed, would have to offer evidence to defeat a recovery.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Z. Russ & Sons Company, a corporation, against John L. Crichton, as tax collector, for an injunction. From a judgment in favor of defendant, plaintiff appeals. Reversed in part.

J. H. G. Weaver and W. F. Clyborne, for appellant. L. M. Burnell, for respondent.

BELCHER, C. This action was brought to enjoin the defendant, as tax collector of the county of Humboldt, from executing to the state of California, and filing for record in the office of the county recorder of the county, tax deeds for the lands described in the complaint. Three causes of action are set forth in the complaint, to each of which a general demurrer was interposed and sustained. Thereupon judgment was entered that the

plaintiff take nothing by the action, and from that judgment it has appealed.

The facts stated in the complaint are, in substance, as follows: The lands described in the first cause of action were all state lands, and are designated as parcels 1, 2, 3, and 4. The state made a partial sale of the lands, and, on receiving 20 per cent. of the purchase price, issued its certificates of purchase therefor. After the issuance of the certificates of purchase, and prior to the issuance of the patents, certain taxes were levied upon the said lands, which became delinquent; and, after due proceedings had, the lands were sold to the state for the taxes due and unpaid thereon, together with the costs and charges. The lands designated as parcels 1, 3, and 4 were sold to the state on the 5th day of March, 1880, and those designated as parcel 2 were sold to the state on the 3d day of March, 1881, for the delinquent taxes for the preceding years, respectively. The said lands have never been redeemed from these sales. The state sold and conveyed, by its patents duly issued, all its right, title, and interest in and to the said lands, as follows: On January 2, 1884, to A. N. Guptill, the lands designated as parcel 1; on November 28, 1883, to A. N. Guptill, the lands designated as parcels 2 and 3; and on February 27, 1883, and June 27, 1884, to A. Putnam and Joseph Russ (a portion to each), the lands designated as parcel 4,—all of which patents are of record in the recorder's office of the county. The lands described in the second cause of action were government lands, and in January, 1872, and December, 1877, were sold and patented by the United States to one James R. De Lasaux. In 1884 the said lands were assessed to one Emma S. King, and the taxes levied thereon were not paid, but became delinquent. After due proceedings had, the lands were, in March, 1885, sold to the state for the taxes due and unpaid thereon, together with the costs and charges. The said lands have never been redeemed from this sale. The land described in the third cause of action was state land, and was sold and conveyed by a state patent to Joseph Russ in March, 1878. In March, 1875, and prior to the issuance of the certificates of purchase therefor, the said land was assessed to "Henry Loose, and to all owners and claimants, known and unknown," and was so listed upon the assessment books of the county. Taxes were levied thereon, but not paid; and in March, 1876, the land was sold to the state for the taxes due and unpaid thereon, together with the costs and charges. The certificate of sale of the land made and filed with the county recorder stated that the land was assessed for the year ending June 30, 1876, to "Henry Loose, and to all owners and claimants, known and unknown." It is also alleged in the complaint that the plaintiff has become the owner in fee of all the lands described in each of the said causes of action, through various mesne conveyances from the patentees thereof; that the state has never made application for

a deed for any of said lands, and no deed for the same has ever been made or issued to it; and that under the sales set out the defendant, as tax collector, now threatens to, and will, if not restrained, execute to the state, and file for record, his deeds for the said lands, and thereby cast a cloud upon plaintiff's title thereto, and cause an irreparable injury to plaintiff.

It is contended for appellant that the court erred in sustaining the demurrer to the first cause of action, because—First, under the provisions of section 3788 of the Political Code, as it stood from the time it was amended in 1885 to the time it was again amended in 1895, the state had lost all right to demand or receive the tax collector's deeds for the said lands; and, second, when the state patented the said lands it sold and conveyed to the patentees all its right, title, and interest therein and thereto.

1. During the years above referred to, section 3773 of the Political Code provided that in certain cases real property offered for sale for taxes due thereon must be struck off to the state as the purchaser. Section 3780 provided that a redemption of the property sold might be made within 12 months from the date of the purchase, or at any time prior to the giving of the notice and the application for a deed as provided in section 3785 of the Code. Section 3785 provided that, if the property is not redeemed within the time allowed by law for its redemption, the collector, or his successor in office, must make to the purchaser, or his assignee, a deed of the property: provided, however, that the purchaser or his assignee must, 30 days before the time for redemption expires, or 30 days before he applies for a deed, serve upon the owner of the property, or the person occupying the same, a written notice stating, etc. And section 3788 provided what should be done with deeds to the state of state lands sold for delinquent taxes, and how the lands should again become subject to entry and sale, and it closed with the following provision: "In all cases where land has been heretofore sold for delinquent taxes the deed thereto must be made within one year and three months after this act takes effect, and, unless so made, the purchaser shall be deemed to have relinquished all his rights under such sale." The question, then, is, does this last provision apply to the state? In *Tuttle v. Block*, 104 Cal. 443, 38 Pac. 109, it was held that the said provision was "clearly a prospective statute of limitation of the time within which the tax deed must have been made"; and the rule is settled beyond all controversy that statutes of limitation do not apply to or bind the state unless they are made to do so by express words or necessary implication. The language of the provision, "in all cases," etc., is apparently broad enough to include the state; but a statute will not always be held to include every case to which it may appear on its face to be applicable. Section 15, art. 20, of the constitution, provides: "Mechanics, material men, artisans and laborers of

every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens." And section 1183 of the Code of Civil Procedure declares that mechanics and material men shall have a lien for labor and materials furnished by them and used in the construction of any building or other structure. Still, in *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646, it was held that, under these provisions of the constitution and Code, no public property or public building was subject to a mechanic's lien, and no such lien could be enforced against a school house erected by a public school district. And the court quoted approvingly the following language used by Mr. Justice Story in *U. S. v. Hoar*, 2 Mason, 314, Fed. Cas. No. 15,373: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." So in 1893 an act was passed by the legislature entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises." St. 1893, p. 288. The act provided that every franchise or privilege to construct or operate railroads along or upon any public street "shall be granted upon the conditions in this act provided, and not otherwise"; that is, that after advertisement stating certain facts, and calling for bids, the franchise or privilege must be awarded to the highest bidder. In considering this act, it was held in *People v. Craycroft*, 111 Cal. 544, 44 Pac. 463, that its provisions, requiring the sale of railroad franchises in the streets of cities to the highest bidder, must be construed as applying only to cases of street railroads, and not to a steam railroad which seeks to extend its track through the streets of a city en route between its termini. The court said: "It cannot be denied that the language of this act is broad enough to include the franchise and privilege which the petitioner seeks, but a statute will not always be held to include every case which falls within its literal terms. * * * The word 'railroad' is certainly broad enough to cover a steam railroad, and the privilege of laying and operating a steam railroad through a city is clearly included in 'any privilege whatever'; but at the same time, if it is perfectly evident from the whole tenor of this act, and other acts in pari materia, that the legislature could not have intended the consequences of a literal construction of the language above quoted, such a construction cannot obtain." In *Land Co. v. Banbury*, 106

Cal. 129, 39 Pac. 439, it was held that, where land is sold to the state for delinquent taxes, no express authority is conferred upon the controller or attorney general to give notice for the state of an intention to apply for a deed, as required by section 3785 of the Political Code, and hence the state is not entitled to demand or receive the three dollars for giving such notice, which sum the section declares "shall be paid by the redemptioner at the same time and in the same manner as other costs, percentages, penalties and fees are paid." The court said: "The legislative enactments contemplate that the state, in procuring a deed, shall resort to the same processes made necessary for a private purchaser, the scheme of which is set forth in section 3785 of the Political Code. But in so doing the legislature, by oversight, seemingly, failed to empower any officer or agent to give the requisite notice." It is the policy of the state to make assessed property pay the taxes levied upon it when they are not paid by the owner. It seeks to make the burden on the delinquent taxpayer as light as possible, and to afford him ample opportunity to redeem his property; but at the same time the rights of the state to collect the taxes are carefully guarded, and strict provisions have been made to compel all property to bear its burden of taxation. The construction of the provision in question contended for by appellant, if sustained, would prevent the state from ever recovering any of the delinquent taxes due on land sold to it therefor prior to the amendment of 1885. Such a result would be against the policy of the law, and was evidently not contemplated by the legislature. We conclude, therefore, that it does not appear, from any express provision of the statute, or from any necessary implication, that the limitation of time to a year and three months, within which a deed for land sold for delinquent taxes must be made, was intended to apply to the state, and hence it must be held that it did not so apply.

2. As to the patents: The state owned the lands, and when, on payment of a part of the purchase price, it issued its certificates of purchase therefor, an equitable title vested in the purchasers, which was subject to assessment for taxes. And when the lands were afterwards sold to the state for delinquent taxes that equitable title reverted in the state, subject to redemption as provided for by statute. The complaint alleges that thereafter the state sold and conveyed all its right, title, and interest in and to said lands, by patents duly issued, to the grantors of plaintiff, and that plaintiff is now the owner of said lands in fee; and these allegations are admitted by the demurrer to be true. The presumption is that official duty has been regularly performed. Section 1963, subd. 15, Code Civ. Proc. And it must be presumed, therefore, nothing to the contrary appearing, that, when the officers of the state charged with that duty executed and delivered the patents, all precedent condi-

tions requisite to their issuance had been fully performed, and that the patents passed a complete title as alleged. This being so, we think the first cause of action stated facts in this regard sufficient to constitute a cause of action, and that the court erred in sustaining the demurrer thereto.

The second cause of action involves only one point, and that is the same as the one first arising upon the first cause of action. As we have seen, appellant's contention as to that point cannot be sustained, and there was therefore no error in sustaining the demurrer to this cause of action.

In the third cause of action there is also involved only a single point, and it has many times been decided by this court adversely to appellant's contention. The land therein described was assessed to "Henry Loose, and to all owners and claimants, known and unknown," and the certificate of sale contained the same recital. The assessment and certificate were void. *Grotefend v. Uitz*, 53 Cal. 686; *Daly v. Ah Goon*, 64 Cal. 512. "The matters recited in the certificate of sale must be recited in the deed." *Pol. Code*, § 3786. A tax deed containing such a recital is void on its face, and it cannot be shown that there was in fact a valid assessment. *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 385; *Brady v. Dowden*, 59 Cal. 51; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134. As the deed which the plaintiff seeks to have the defendant enjoined from making would be void on its face, it would not cast a cloud upon his title. "The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such evidence would be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed." *Pixley v. Huggins*, 15 Cal. 134; *Archbishop v. Shipman*, 69 Cal. 591, 11 Pac. 343. A court of equity will not enjoin the issuance of a deed void on its face, and the demurrer to this cause of action was therefore properly sustained.

We advise that the judgment, in so far as it is based on the first cause of action, be reversed, and the cause remanded, with directions to the court below to overrule the demurrer, and, in so far as it is based on the second and third causes of action, that it be affirmed.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment, in so far as it is based on the first cause of action, is reversed, and the cause remanded, with directions to the court below to overrule the demurrer; and, in so far as it is based on the second and third causes of action, it is affirmed.

(117 Cal. 673)

LACOSTE et al. v. EASTLAND et al. (S. F. 602.)

(Supreme Court of California. Aug. 30, 1897.)

PARTITION—JUDGMENT—ENTRY—COSTS—NOTICE OF APPEAL—ADVERSE POSSESSION.

1. A judgment decreeing partition contained no adjudication of costs, but merely a direction that parties be given till the next term to file bills of costs. At the next term a separate judgment was rendered against one of the partitioners for the amount of costs assessed to her share. *Held*, that the judgment of costs was no part of the judgment of partition, within the meaning of *Prac. Act*, § 308, providing that the costs, when "included and specified in the judgment" of partition, become a lien upon the several shares.

2. A finding of fact that H. entered into adverse possession of land in 1871, no specific date being given, and held it for six years, and "that at some time during 1875 said occupation and possession were disturbed, but that said H. recovered possession * * * within five years after such disturbance," does not show uninterrupted adverse possession for five years.

3. A judgment entered by a clerk of court who had no authority to enter the same is void.

4. A notice of appeal served upon the attorney that signed respondent's original answer, notwithstanding a different attorney signed the amended answer, is sufficient notice to respondent, where there has been no substitution of attorneys.

Department 2. Appeal from superior court, San Benito county; James F. Breen, Special Judge.

Action by Jean F. Lacoste and others against Joseph G. Eastland and F. A. Hihn for partition. From judgment for Hihn, and from an order denying their motion for new trial, the plaintiffs appeal. Reversed.

S. O. Houghton, for appellants. E. R. Taylor and C. B. Younger, for respondents.

McFARLAND, J. This is an action to obtain partition of certain tracts of land called "Lots 5 and 6 of the Soquel Augmentation Rancho." The plaintiffs are Jean F. Lacoste, Joseph Dazet, and Auguste F. Delmouly. Delmouly first appeared as a minor by his guardian, but he attained his majority shortly afterwards, and was personally a plaintiff at the time of the filing of the amended complaint. The defendants are Joseph G. Eastland and F. A. Hihn. It is averred in the complaint that Lacoste is the owner of an undivided one-eighth of the premises, Dazet the owner of an undivided fourth, Delmouly the owner of an undivided one-half, and that defendant Eastland is the owner of an undivided one-eighth, and that defendant Hihn owns or claims some interest unknown to plaintiffs in the said interest alleged to be owned by said defendant Eastland. The court found that neither of the plaintiffs nor defendant Eastland owned any interest in the premises, but that all the land described in the complaint was owned by defendant Hihn in severalty. The plaintiffs appeal from the judgment in favor of Hihn, and also from an order denying their motion for a new trial.

It is doubtful if defendant Hihn in his answer sets forth his interest, or any interest, in

the premises in controversy in manner as is provided for in section 758, Code Civ. Proc.; but, as the case seems to have been tried upon the theory that he had so set up his interest, we will consider the case as if his answer was in that respect sufficient. The court below found that respondent Hihn had acquired title to said lots 5 and 6 by virtue of sales made under certain executions issued in a certain action entitled "Hihn against Peck et als." This last-named case was an action brought by Hihn, the present respondent, for the partition of the Soquel Augmentation rancho. That action was commenced August 14, 1860, and the final decree of partition was rendered September 14, 1864. Maria Luisa Juan was a party defendant to that action, and in the final decree of partition she was awarded in severally the said lots 5 and 6 involved in this present action. In the final decree there was no adjudication of costs, or any allusion to costs, except that included in the following sentence of the decree: "And that the parties to this suit have until the next term of this court to file their several bills of costs in this action, and have them apportioned among the parties hereto, respectively." At the next term of court, and on December 8, 1864, a judgment in favor of Hihn against the said Maria Luisa Juan for the sum of \$34.56 was rendered; that being her proportion of the costs due said Hihn. Another judgment for costs due the referees in the partition suit was also entered against the said Maria Luisa Juan for a small sum of money. Executions were issued upon these two judgments. Hihn redeemed from the sale made on the judgment in favor of the referee, and he became the purchaser on the sale upon the execution in his favor, and afterwards received the sheriff's deed of the interest of said Maria Luisa Juan. But long previous thereto, to wit, on July 12, 1862, the said Juan had conveyed one-half of her interest in the said rancho to Alfred Moreau and Ramon Don, and on July 20, 1862, she had mortgaged all her remaining interest in the rancho to one Gambert, who had assigned the mortgage to Charles Mulet, who had foreclosed the mortgage, and became a purchaser under the sale; and the court finds that under these proceedings all the interest of said Juan had passed to the plaintiffs herein and to the defendant Eastland, unless the title thus passing was subject to and defeated by the said sale under execution for costs to the respondent Hihn; and this question is the only one calling for extended discussion. We think that the court erred in holding that Hihn obtained title under said execution.

The contention of respondent as to the question just above stated was expressly determined against him by this court in the case of Hihn (the present respondent) v. Parkhurst et al., No. 1,683. That case was not reported, but the transcript, briefs, and opinion of the court have been referred to by counsel on both sides, and are to be found in the

clerk's office and court library. In that case the plaintiff undertook to assert title to the premises here in controversy by virtue of a purchase under the same executions relied on in the case at bar. The plaintiff there had recovered judgment for the premises involved in the present suit, but the judgment was reversed by this court. At the time of the pendency of the suit of Hihn against Peck, and at the time the judgments were rendered in said case, section 308 of the practice act provided as follows: "The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the land divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares and against other property held by the respective parties." In *Hihn v. Parkhurst* the court said: "When the final decree of partition was rendered in September, 1864, the question of costs was reserved until the next term of the court, and on the 8th of December, 1864, judgment was rendered in favor of the plaintiff in the partition, the plaintiff herein, against several persons for costs, and, among others, against Maria Luisa Juan for \$34.65. It is provided by section 308 of the practice act that the costs of partition shall be paid by the respective parties, in proportion to their respective interests in the land, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares and against other property held by the respective parties." It is contemplated by the section that the costs may or may not become a lien upon the several shares of the parties, as the parties to whom they are due may elect; and the solution of the question as to whether they become a lien depends upon whether they are specified and included in the judgment of partition. The statute does not say that the costs shall in all cases become a lien, but that 'in that case'—that is, when they are 'included and specified in the judgment'—they become a lien. The lien here referred to is one that takes effect by relation at the time of the filing of the notice of its pendency, and without docketing the judgment; and the express provision that such lien may be acquired in a particular mode negatives the right to acquire it in any other mode. * * * Although this judgment grew out of the proceedings and judgment in the partition suit, it is clear that it is separate and distinct from, and forms no part of, the judgment of partition. From the time it was docketed, it became a lien upon the real estate owned by Maria Luisa Juan; but, as the interest claimed by the intervenor—one fifty-fourth—had been conveyed to them long before the docket entry was made, it was not subject to the lien of the judgment. Judgment reversed, and cause remand-

ed for a new trial." It is said by respondent that this decision has weight only as authority, and is not binding upon the respondent here as the law of the case. That is true, but as authority it is directly in point, and we see no reason upon principle for overruling it. In the decree of December, 1864, there is no judgment or adjudication whatever upon the subject of costs; no party is awarded costs, and the question as to who shall be entitled to costs is left entirely open. It is entirely different from the ordinary case where a judgment awards costs to a particular party, leaving a blank for the amount thereof, to be filled by the clerk, as provided by a certain section of the Code. In the latter case the clerk is to perform the mere ministerial office of inserting in the judgment the amount of costs which the party adjudged to be entitled to them shall present in his costs bill within the time specified in the statute. But in the case at bar the whole question of costs was left for future adjudication, and, under the statute, as correctly, we think, interpreted by the court in *Hihn v. Parkhurst*, the subsequent judgment for costs became a lien only from the date of its rendition, and at the time of its rendition the title of Maria Luisa Juan had passed from her, and vested in other parties. It is contended by respondent that the transcript in *Hihn v. Parkhurst* did not present the question as it is presented in the case at bar; but we see no material difference in the two transcripts upon this point. In *Hihn v. Parkhurst* the record states that the judgment roll in *Hihn v. Peck* was introduced. The judgment, however, does not appear in full in the transcript, but it is stated that "a final decree was entered on the 14th of September, 1864, partitioning said rancho, and reserving the question of costs until the next term of said court, with leave to either party to file bills of costs before that time"; and it is further stated "that said final decree did not provide for nor ascertain the adequate share of the costs of said partition proceedings to be paid by the respective parties to whom portions of said premises were thereby allotted, but separate judgments were entered against the several defendants for the amounts taxed against them, respectively." This was substantially a correct statement of what actually occurred. The question of costs was reserved, and separate judgments were afterwards entered for costs, and the two transcripts upon this point were thus substantially the same.

In the conclusions of law of the court below the judgment for *Hihn* is placed entirely upon his title under the sale upon said execution; but it is also found as a fact that *Hihn* acquired title to lot 6 by adverse possession, and respondent contends that the judgment should be affirmed upon that finding. This contention, however, cannot be sustained. The evidence that *Hihn* had possession of the lot by actual inclosure is exceedingly slight;

but, in addition to that consideration, while the court finds that *Hihn* entered into the adverse possession in 1871, the time of the year not being given, and held it thereafter for six years, it is also found "that at some time during the year 1875 said occupation and possession were disturbed, but that said *Hihn* recovered possession of said lot 6 within five years after such disturbance." This finding is not sufficient to support an averment of adverse possession during the statutory period of five years.

The court finds that all the facts stated in a certain amendment to the answer of defendant *Hihn* are true, and in that amendment it was averred that in 1876 *Hihn* commenced an action against one *Bowker* for the recovery of the possession of said lot 6; that in October, 1876, he recovered judgment against said *Bowker* for lot 6; that *Bowker* was in possession of said lot, as tenant for the plaintiffs herein and one *Gambert*; that said lessors of *Bowker* were informed of the pendency of said suit, and defended the same through said *Bowker*; and that therefore the judgment against *Bowker* is binding upon plaintiffs, and estops them from maintaining this suit as to lot 6. Without discussing other grounds upon which appellants contest the validity of this judgment as against them, it is sufficient to say that the judgment was entered by the clerk of the court, and that he had no authority to enter the same. It was therefore void. *Stearns v. Aguirre*, 7 Cal. 449; *Kelly v. Van Austin*, 17 Cal. 564; *Junkans v. Bergin*, 64 Cal. 203, 30 Pac. 627.

Respondent makes some 20 distinct "exceptions to the transcript." He also moves to dismiss the appeal from the judgment upon several distinct grounds, and he also moves to dismiss the appeal from the order denying a new trial upon several distinct grounds. We do not deem it necessary to notice these various points in detail. It would require a very lengthy opinion to do so, and it is sufficient to say that we do not think any of them tenable. An affidavit has been filed on the part of respondent to the effect that the defendant *Eastland* died a short time before the appeal was taken, and it is contended that he should have been served with notice of appeal. The appeal is from the judgment in favor of *Hihn*, and it is difficult to see how *Eastland* is interested in, or would be affected by, the appeal. Moreover, the transcript shows that the notice of appeal was served on the attorney of *Eastland*,—that is, upon the attorney who signed *Eastland's* original answer,—and, although another attorney signed an amended answer, there was never any substitution of attorneys; and, under section 763 of the Code of Civil Procedure, the service was good, although *Eastland* at the time of the service was dead. The judgment and order denying a new trial are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

(117 Cal. 652)

PEOPLE v. EBANKS. (Cr. 209.)

(Supreme Court of California. Aug. 23, 1897.)

HOMICIDE—INFORMATION—SIGNATURE—EVIDENCE—OTHER CRIMES—HYPNOTISM—INSTRUCTIONS—COURT REPORTERS—ELISORS—JURORS—SUMMONING—CHALLENGES—SEPARATION—APPEAL—DECISIONS REVIEWABLE—RECORD—PRESUMPTIONS—HARMLESS ERROR.

1. The record showed that a complaint was filed with the justice, a warrant issued, and defendant arrested, and committed for examination on the 17th of September, and held to answer on the 4th of October. *Held*, on appeal from a refusal to set aside the information because such examination was not given until the last-named date, when the justice had lost jurisdiction of the case, that it did not appear but that such examination occupied the entire time intervening between the two dates.

2. Error cannot be predicated on the failure of the record to show the appointment of a shorthand reporter at a preliminary examination, in the absence of proof that he acted, or reported the evidence, or certified thereto.

3. Under Pen. Code, § 800, requiring that the information be "subscribed by the district attorney," an information entitled "In the superior court of the county of San Diego, state of California," charging an offense committed by defendant "at the said county of San Diego, in the said state of California," and signed "A. H. Sweet, District Attorney of the said county of San Diego," was sufficiently subscribed.

4. Where, on defendant's challenge to the panel under a special venire, on the ground of bias on the part of the sheriff, testimony was taken, in the absence of all the jurors, which was embodied in an affidavit, whereupon the challenge was sustained, and a venire issued to the coroner, the filing of such affidavit, if irregular, was not prejudicial to defendant.

5. It was not error, in the trial of a criminal case, to permit the jurors to separate on adjournment from day to day, after having been admonished, as provided by Pen. Code, § 1122, as such action is discretionary.

6. Where the sheriff and his deputies were disqualified, and the coroner was physically unable to perform his duty, the appointment of an elisor to take charge of the jury was proper.

7. In a trial for the murder of a person whose death was caused by bullet wounds, there was evidence that defendant left the room which he had been occupying a few days before the murder, taking with him a revolver and two shirts, marked with the initials of the owner, and also another revolver, a cartridge belt and ammunition, a coat, and other articles, which had been left in the room; that he was seen by several persons with the marked revolver and a flour sack, in which he carried it and other articles in his possession; that on the day preceding the murder he traveled with another man, carrying the flour sack, sleeping in the open air at night, and remaining together on the following day until near the scene of the murder, where he left the other party, but rejoined him later in the day without the flour sack, but having a sack of smoking tobacco, like one that was missed from the place where the murder was committed; that over two months later, a flour sack resembling that carried by defendant, containing the marked revolver, with four empty and two loaded cartridges in the chambers, the belt, one of the marked shirts, and other articles, was found in a thicket near the scene of the murder; and that the other marked shirt and the coat taken from the same room were on the person of defendant when arrested. *Held* to warrant a verdict of guilty.

8. Testimony of a witness that, three days before the murder with which defendant was charged, he came to her house, carrying a flour sack, and that he returned on the following day, and

was found in the evening under her bed, and, on being discovered, ran away, was admissible, as throwing light on defendant's acts at a period not remote from the date of the murder.

9. That such evidence may tend to prove an attempt on the part of defendant to commit another offense, and may therefore tend to the prejudice of defendant in the minds of the jurors, is no ground for its exclusion.

10. Error predicated on the cross-examination of defendant as a witness will not be presumed, but must affirmatively appear.

11. In a trial for murder, testimony of an alleged hypnotist that defendant, while hypnotized, denied his guilt, was properly excluded.

12. A challenge to one of the jurors, pending a trial for murder, on the ground that he was a member of the grand jury which had been impeached before the trial came on, and had not yet been discharged, was properly denied, where the prosecution was by information, and it did not appear that the grand jury had ever had anything to do with the case.

13. Where the death warrant was signed on the third day after the judgment was entered, but not in the presence of defendant or of his counsel, or with the knowledge of either, such order is appealable, under Pen. Code, § 1237, providing that an appeal may be taken by defendant from an order made after judgment, affecting his substantial rights.

14. In an instruction that, "if there is any one single fact proved to the satisfaction of the jury, by a preponderance of evidence, which is inconsistent with the guilt of defendant, to raise a reasonable doubt, and the jury should acquit the defendant," the meaning is involved in doubt.

15. An instruction that "it is better that a hundred guilty persons escape punishment than that one who is innocent be punished" is uncalled for in a murder case.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Joseph Japhet Ebanks was convicted of murder in the first degree, and from the judgment, and from an order denying a new trial, he appeals. Affirmed.

J. S. Callen, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

SEARLS, C. The defendant, Joseph Japhet Ebanks, was charged by information with the murder of Harriet Stiles at the county of San Diego, state of California, on the 10th day of September, 1895, and upon a trial had under said information was convicted of murder in the first degree, and sentenced to death. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

Defendant moved to set aside the information upon the grounds: (1) That before the filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county of San Diego, state of California.

The record shows that a complaint was filed with the justice, a warrant issued, the defendant arrested, and committed for examination on the 17th day of September, 1895. The order holding the defendant to answer for the crime of murder is dated October 4, 1895. The contention is that it does not appear that the defendant was given an examination until said last-mentioned date, and hence that the justice lost jurisdiction of the case. The

record shows that at the hearing of the motion to set aside the information, among other things, the depositions of the witnesses taken upon the preliminary examination of the defendant were in evidence, but they are not set out in the record, and when they were taken does not appear; non constat, but that the justice may have entered upon the examination immediately after the 17th day of September, and continued to conduct the same until October 4th, the date of the commitment. It is further objected that there is no evidence that any shorthand reporter was appointed to take the evidence at the preliminary examination, except the certificate of the reporter himself.

I find no such certificate in the record, and no evidence that a shorthand reporter was appointed or acted, except in the judgment roll, under the head of "Proceedings in the Superior Court of November 21, 1895," the following entry: "The following appears by the transcript thereof filed in the superior court, to wit: Fred H. Robinson is appointed to act as shorthand reporter." Counsel refers to folio 210 of the record in support of his contention, but folio 210 in the transcript is a blank. If, however, it be true that Robinson was not appointed reporter in the justice court, we fail, in the absence of proof that he acted or reported the testimony, or certified thereto, to see how error can be predicated thereon. The further objection that the information was not properly signed by the district attorney is without merit. The information is entitled, "In the superior court of the county of San Diego, state of California." In the body of the information it is charged that the defendant "at the said county of San Diego, in the said state of California," etc., and it is signed by "A. H. Sweet, District Attorney of the said county of San Diego." The objection is that the officer omitted the words "the state of California" after the words "county of San Diego." Section 809 of the Penal Code requires that the information shall be "subscribed by the district attorney," but does not require him to add to his signature the name of the county or of the state. In *People v. Ashnauer*, 47 Cal. 98, the district attorney signed an indictment "Henry Starr, District Attorney," without adding the name of the county, and it was held sufficient. The courts will take judicial notice that the county of San Diego is in the state of California. *Humboldt Co. v. Dinsmore*, 75 Cal. 604, 17 Pac. 710. The motion to set aside the information and the demurrer thereto, for like and other causes, were both properly overruled.

At the trial the regular panel of jurors drawn having been exhausted without securing a sufficient number of competent jurors, a special venire issued to the sheriff, commanding him to summon additional persons to act as jurors. Counsel for defendant interposed a challenge to the panel under this special venire, upon the ground of the sheriff being

disqualified by reason of bias, etc. The challenge was traversed by the district attorney. All the jurors, including those accepted and those summoned under the special venire, were excluded from the court room, and testimony taken; the sheriff testifying to facts clearly showing him to have been biased, and to having had and expressed an unqualified opinion, etc.; whereupon the people confessed the challenge, and the court directed an affidavit to be made by the sheriff, embodying the substance of his testimony as given, which was verified and filed, the challenge sustained, and a venire issued to the coroner.

Defendant objected to filing the affidavit, moved to strike it out, and predicates error on the action of the court in refusing so to do. It would seem to the ordinary mind that, defendant having secured the only object of his challenge, it could matter but little to him as to the form in which the facts appeared of record, where, as here, the jurors were not present, and he could by no possibility be injured by the testimony or affidavit. Conceding, therefore, without deciding, that filing the affidavit was an irregularity, it was one which did not injure the defendant, and affords no ground for reversal. Pen. Code, § 1258.

During the progress of the trial, the court upon the several adjournments from day to day, after admonishing the jurors, as provided by section 1122 of the Penal Code, permitted them to separate, and this is assigned as error. This was a matter resting in the discretion of the court, and was not error. Pen. Code, § 1121.

The next error assigned is as follows: "The jury retire in charge of B. P. Hill, elisor. See folio 277. The minutes of the clerk and the records fail to show any disqualification of the coroner." Had the learned counsel turned to folios 274, 275, he would have seen that an affidavit was filed, showing that by reason of sickness the coroner was physically unable to perform the duty of coroner, that the sheriff and his deputies were disqualified therefrom, and that therefore Benjamin P. Hill was appointed an elisor, to take charge of the jury, etc. Under the circumstances this was entirely proper.

At this point, and to the end that some of the objections taken to the introduction, and refusal by the court to permit the introduction, of evidence may be the better understood, it is necessary to state the more salient facts in the case. On the 6th day of September, 1895, Leroy R. Stiles, aged 65 years, his wife, Harriet Stiles, aged 60 years, and J. B. Borden, the father of Mrs. Stiles, aged 85 years, all residents of Riverside, went to the ocean beach about 15 miles above Oceanside, in the county of San Diego, for a week's recreation. They were camped in a tent on the beach. On the morning of the 10th day of September, 1895, Mr. Stiles, accompanied by Mr. Borden, left Mrs. Stiles at the tent, and went up the beach a distance of say one and one-half miles, Mr. Stiles fishing as he went along, and

Borden accompanying him. While fishing Mr. Stiles saw two men on the bluff above him, who were going south down the coast toward his tent, and soon after called the attention of Borden to the fact, and advised the latter to return to the tent, as the strangers might frighten or annoy Mrs. Stiles. Mr. Borden started for the tent, which was not in sight from Stiles' position. Some time later, and probably about 10:30 a. m., Mr. Stiles started back for his camp, and on reaching the tent found Mrs. Stiles and her father, Borden, both dead in the tent. The death of Borden was caused by two bullet wounds, one in the head and the other in the left breast; and the body of Harriet Stiles showed that she had received three wounds, which were caused by two bullets. An autopsy showed that one bullet had passed through the body of Borden, through a gunny sack upon which he was lying, and was found in the sand under him. Another bullet had passed through a cot which was in the tent. The wounds and the bullet found indicated that they were fired from a 45-caliber Colt's revolver. The testimony connecting the defendant with the murder was circumstantial, and, as is frequently the case where circumstantial evidence is relied upon to convict, consisted of a long chain of circumstances. Defendant made a statement after his arrest to the officers, and was also a witness in his own behalf. According to his own testimony, he had resided in San Diego in the summer of 1895, and had become interested in religious subjects, and in July of that year he went from San Diego, in part on foot, in part by rail, and in part by wagon, to the vicinity of Downey, to attend a camp meeting of Adventists, Salvationists, or some religious sect. He seems to have spent his time at Downey and in that vicinity until about the 6th of September, with the exception of a trip to San Pedro, where he worked nearly a week, and then returned to Fullerton, a town or village a few miles from Downey, Anaheim, etc. He had made the acquaintance of an aged member of the society holding the camp meeting, by the name of Adams, who resided in Fullerton, and who permitted him to sleep in a room in his house when in town. When he left Fullerton, two pistols, which had been left in the room occupied by him, one a large white-handled Colt's revolver of 45-caliber, and the other a smaller one, a cartridge belt with ammunition in it, a dagger, two shirts, all of which belonged to R. F. Gibson, were missing. The larger revolver and the shirts had the initials of the owner, R. F. G., marked upon them. A coat and a few other things were taken from the same room at the same time. Defendant testified and admitted that for the last few nights he occupied the room in Adams' house, also spoken of as the Adams & Baxter house. He was excessively drunk, and knew little or nothing of what occurred. Admitted that he had a faint recollection of taking and pawning or selling the smaller revolver, and that a day or two

later he found himself on his way toward San Diego with the coat, but denied emphatically the taking or possession of the large white-handled revolver, or that he had any revolver, or that he had a flour sack in which he carried clothes or other things, but averred that he did have a bundle in a white handkerchief or handkerchiefs. The question as to the large white-handled pistol and the flour sack became leading factors in the case, as we shall presently see. Several persons in Fullerton and vicinity saw a large white-handled pistol in the hands of defendant at Fullerton, saw him with a white flour sack, and one person saw him place the pistol, belt, etc., in the sack. One of the witnesses who saw the pistol was familiar with it, and asked defendant if it was not "Gibson's gun," and he answered "no." One or two other witnesses who were familiar with the Gibson pistol saw the one with defendant, and said it resembled it, and they thought it the same, and one of them recognized the scabbard by a patch on it. From the 6th of September until the 9th several witnesses met and saw defendant on his way to San Diego, with a flour sack, and some hard substance in it, which caused the sack to protrude; one thought it probably a boot heel, another the handle of a frying-pan, etc. On the 9th of September defendant met one Garges near El Toro station, and they traveled south together, walking on the railroad track. Garges was a repairer of watches and clocks, and was plying his vocation about the country. He describes defendant as carrying a white flour sack, which he says "appeared to be an empty flour sack, something more than half full." It appeared to have clothing in it and some hard substance, like a cooking utensil. They walked south that day, slept in the open air at night, and on the morning of the 10th defendant stopped at a section house on the railroad at San Onofre, procured some bread from a lady named Florence Steele, who wrapped it in a newspaper called the "Ladies' World," from which she had made a clipping, which paper she identified afterwards, as stated herein. They followed the railroad south, saw a man fishing (presumably Stiles), and later a tent on the beach, and a person apparently bathing in the surf, who defendant said was a woman. Defendant fell behind at this point, and was soon lost sight of by Garges, who continued on his journey until say 2 o'clock p. m. of the same day, when, while resting, he was again joined by the defendant, who said that, having lost Garges, he thought the latter had taken the wagon road, and that he, defendant, had done the same, etc. They parted soon after, Garges leaving the main line of road to go to Fallbrook, and defendant going to San Diego, where he arrived on the night of September 11th, when he visited the room of an acquaintance, requested permission to sleep with him, and to be put on board an English ship in the stream, and about to sail in the morning. This was declined, and defendant requested

his friend to say nothing of his presence there. He was arrested a few days later some 30 miles in the interior, where he said he had gone to hunt work. Over two months later, a white flour sack, much soiled, and resembling that carried by defendant, was found in a thicket near the scene of the murder, containing Gibson's revolver, with four chambers of the cylinder containing empty, and two chambers loaded, cartridges, with the belt, cartridges, dagger, one of Gibson's shirts, with his initials on it, a few slices of bread wrapped in the newspaper identified by Florence Steele, etc. The other shirt of Gibson and the coat taken from the same room were on the person of the defendant when arrested.

It should also be stated that Garges testified that, when defendant joined him on the afternoon of the 10th of September, he did not have the flour sack which he had previously carried. Also that Stiles had a small bag of Durham smoking tobacco in his tent, which was missing after the murder, and that defendant, who had been previously begging tobacco, had, when he rejoined Garges, a sack of Durham smoking tobacco. There are other inculpatory circumstances, but these are deemed sufficient to show (1) that the evidence was sufficient to warrant a verdict of guilty; (2) to show, by the character of the testimony, that the objections to evidence, which must, in the aggregate, reach into the hundreds, and which cannot be considered in detail, were mainly destitute of merit.

We here notice what the learned counsel for appellant terms a flagrant and gross error on the part of the court in the admission of evidence and refusal to strike out the same, and which he asserts calls for reversal: The testimony of Mrs. Aurelia Price was to the effect that she resided nearly two miles south of Santa Ana, and some ten miles from Fullerton. That on the 7th day of September defendant came to their place, with the white flour sack, so often described. She described his dress, etc., and identified the sack presented in court as one like that carried. On the next day, viz., Sunday, September 8th, about 11 o'clock a. m., he came again to the Price ranch or house with the same sack, etc. At 7 p. m. of the same day Mrs. Price entered her bedroom, and, smelling the fumes of tobacco, which her husband did not use, she lighted a lamp, and looked under the bed, where she found the defendant, who rushed out, and, before the witness could get to a shotgun, he was out of the door, and from the manner he carried his hand she thought he was going to shoot, although she did not see a pistol, and witness ran out of doors. Defendant came to a screen, and witness asked him if his sack was in the house, and he said "yes." Witness went in the house after it, and defendant ran off the place. The husband of the witness was at the barn when this occurred. It will be borne in mind that the incident related is one occurring during the trip of defendant from Fullerton to San

Diego, and that it occurred during and at the time when defendant afterwards testified that he was at least partially unconscious from intoxication. The Sunday morning alluded to is that mentioned by him as succeeding the night when he slept in a box car near Santa Ana, and first found he had the coat, but he did not know how he came by it, etc. The declared object of the prosecution was to show his conversation in reference to the sack, and to show that defendant had a pistol. In the latter respect the testimony of the witness only showed that from defendant's actions she thought he had one, but the evidence was admissible as an incident throwing light upon the acts of defendant, his appearance, and his belongings, at a period not remote from the 10th day of September, the day of the alleged murder.

As was said in *People v. Rolfe*, 61 Cal. 541: "It all consisted of circumstances more or less direct, tending to connect the defendant with the perpetration of the robbery, and to establish his guilt. Evidence that he was seen at different places not far distant from the robbery, and on days not remote from that on which the crime was committed; that he was seen in company with Hampton, the accomplice, who was used as a witness on behalf of the state; that they were armed,—one with a rifle and pistol, and the other with a shot gun; that they had the same dog with them; that they stopped at certain houses, procured meals there, and walked off in certain directions; that they made various inquiries, and otherwise conducted themselves in a suspicious manner,—were all circumstances in the case which were properly submitted to the jury."

Touching the suggestion of counsel that the evidence tended to prove the attempt of defendant to commit another offense, and thus prejudice him in the eyes of the jury, the case of *People v. Walters*, 98 Cal. 138, 32 Pac. 864, is in point. In that case the court, speaking through Beatty, C. J., said: "It is true that, in trying a person charged with one offense, it is ordinarily inadmissible to offer proof of another and distinct offense, but this only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. These remarks are applicable to any case in which two persons are murdered or assaulted at the same time, and as part of the same transaction." See, also, *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, and 6 Pac. 700, 846; *People v. Smith*, 106 Cal. 74, 82, 39 Pac. 40; *People v. Craig*, 111 Cal. 460, 468, 44 Pac. 186; *People v. Bidleman*, 104 Cal. 613, 38 Pac. 502; *People v. Lane*, 101 Cal. 517, 36 Pac. 18; *People v. Walters*, 98 Cal. 138, 32 Pac. 864; *People v. McGilver*,

67 Cal. 53, 7 Pac. 49; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *Moore v. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Pierson v. People*, 79 N. Y. 424; *Com. v. Coe*, 115 Mass. 481, 501; *Com. v. McCarthy*, 119 Mass. 354, 355; *State v. Patza*, 3 La. Ann. 513; *Kramer v. Com.*, 87 Pa. St. 299, 301; *Goersen v. Com.*, 99 Pa. St. 388, 399; *Swan v. Com.*, 104 Pa. St. 218, 220; *Goersen v. Com.*, 106 Pa. St. 477, 496; *State v. Myers*, 82 Mo. 562. These cases are quoted and cited to meet, not only the foregoing point, but many other objections offered in the trial of the cause, which space will not permit us to discuss at length; among which may be mentioned objections to evidence of the death of Borden, the bullet and cot offered in evidence, the taking of the pistols and clothing at Fullerton, etc.

There is a large group of objections made by defendant to questions put to him on cross-examination, upon the ground, so far as we can determine, that they were not legitimate cross-examination, or in explanation of anything he had testified to in chief. The only reference made to most of them is in the following style: "The matter elicited over the objection of defendant in folio 1608 was clearly error and prejudice." "The objection was well taken to the introduction of the testimony admitted." See folios 1661, 1662, 1664, 1666, 1667, 1670, 1672, 1673, 1674, 1675, 1676, 1678, 1679, 1680. We shall content ourselves with saying that a careful review of the scope of the testimony given by the defendant in his examination in chief leads to the conclusion that one and all of the questions propounded to him on cross-examination were within the rules enunciated by this court in previous decisions, or were unproductive of injury to defendant. *People v. Russell*, 46 Cal. 123; *People v. Lee Ah Yute*, 60 Cal. 96; *People v. Robles*, 29 Cal. 421; *People v. Murray*, 85 Cal. 350, 24 Pac. 666; *Sharp v. Hoffman*, 79 Cal. 405, 21 Pac. 846; *Jackson v. Water Co.*, 14 Cal. 24; *Neal v. Neal*, 58 Cal. 288; *Harper v. Lamping*, 33 Cal. 641.

Defendant was asked on cross-examination concerning a trip made by him in, say April, 1895, to Los Angeles. This may or may not have been proper. The record does not contain all of defendant's testimony on direct examination. It shows that on January 16, 1896, "Joseph Japhet Ebanks [defendant] resumed the stand, and proceeds with the question: 'You spoke about your parentage yesterday, Mr. Ebanks. What nationality was your father? You said your parents were European,'" etc. None of his testimony of the previous day is in the record, and he may have testified as to his visit to Los Angeles. Error must affirmatively appear, and will not be presumed. *People v. Winters*, 20 Cal. 661; *People v. Barton*, 88 Cal. 176, 25 Pac. 1117; *People v. Gibson*, 106 Cal. 458, 39 Pac. 864; *People v. Rellly*, 106 Cal. 648, 40 Pac. 13.

But, as stated above, if this is not correct, there was nothing in his answers which could have injured defendant.

Defendant called as a witness one B. A. Stephens, and offered to prove by him that he was an expert hypnotist, that he had hypnotized defendant, and that when hypnotized defendant had made a statement to him in regard to his knowledge of the affair, from which statement witness is ready to testify that the defendant is not guilty, and that defendant denies his guilt while in that condition. The court sustained an objection to the testimony. The court said: "The law of the United States does not recognize hypnotism. It would be an illegal defense, and I cannot admit it." The court then repeated, in substance, what it had said to the jury, and told them to disregard the offer. We shall not stop to argue the point, and only add the court was right.

After the trial had been pending some 10 days, but before the prosecution closed its case, counsel for the defendant interposed a challenge to W. A. Begole, one of the jurors impaneled to try said cause, upon the ground that he was a member of the grand jury of the county which had been impaneled before the trial of this case came on, had taken a recess to meet in the future, and had not yet been discharged, and that such facts were unknown to the defendant or his counsel at the time said Begole was accepted as a juror in this case. The challenge was denied. The defendant was prosecuted by information filed long before the grand jury met, and there is no intimation that it ever had anything to do with this case. "Having served on a grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information," afford grounds for challenge. Pen. Code, § 1074. But this case does not come within that provision. Appellant gives us no reason for holding the juror incompetent, and we know of none. We find no error in the rulings of the court upon impanelling the jury.

It is urged that the death warrant was on the 9th day of April, 1896, signed by the superior judge, "not in the presence of the defendant, nor in the presence of his counsel, and without the knowledge or consent of the counsel of defendant, or of the defendant himself." The judgment was entered on April 6, 1896, consequently the order referred to was an order made after judgment, from which an appeal will lie under section 1237 of the Penal Code. *People v. Sprague*, 54 Cal. 92; *People v. McNulty*, 95 Cal. 594, 30 Pac. 963. Defendant has appealed from the judgment, and from an order denying his motion for a new trial, but not from the order made after final judgment, of which he now complains.

The court refused to give two instructions asked by the defendant, which are as follows: "The jury are instructed that, if there is any

one single fact proved to the satisfaction of the jury, by a preponderance of evidence, which is inconsistent with the guilt of the defendant, to raise a reasonable doubt, and the jury should acquit the defendant. Refused. Pierce, J. You are instructed that it is the settled policy of the law that a person charged with a crime must be acquitted, unless the evidence on the case establishes his guilt beyond all reasonable doubt, and it is better that a hundred guilty persons escape punishment than that one who is innocent be punished. Refused. Pierce, J." The meaning of the first of these instructions is involved in doubt, and the final clause of the second instruction is uncalled for. The whole doctrine of reasonable doubt was fully and properly laid before the jury by the court in the instructions which it gave apparently on its own motion, and also in those given on behalf of defendant, marked 1, 2, 4, 5, 6, 8, 10, 11, and 12. We quote the fifth, sixth, and eighth of those instructions of the defendant given by the court. They are as follows: "It is not sufficient to warrant a conviction in a criminal case that the evidence is merely such that a man of prudence would act upon it in his own affairs of the greatest importance. Men frequently act in their own grave and important concerns without a firm conviction that a conclusion upon which they proceed to act is correct; but, having deliberately weighed all the facts and circumstances known to them, they form a conclusion, upon which they proceed to act, although they may not be fully convinced of its correctness. But this degree of certainty is wholly insufficient to authorize a verdict of guilty in a criminal case. In such a case the jury should be fully convinced of the correctness of their conclusion that the defendant is guilty, and that conviction should be so clear and strong as to exclude from their minds all reasonable doubt that their conclusion is correct. Given. Pierce, J." (6) "You are instructed that mere probabilities are not sufficient to warrant convictions; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegation of the information; nor is it sufficient that, upon the doctrine of chances, it is more probable that the defendant is guilty than that he is innocent. To warrant a conviction the defendant must be proved to be guilty so clearly and conclusively that there is no reasonable doubt upon which he can be innocent, when all the evidence in the case is considered together. Given. Pierce, J." (8) "The court further instructs the jury that in this case the law does not require of the defendant that he prove himself innocent, but the law imposes upon the prosecution to prove that the defendant is guilty in the manner and form charged in the information, to the satisfaction of the jury beyond all reasonable doubt; and, unless this has been done, it is your duty to find the defendant not guilty. Given. Pierce, J."

The instructions, taken as a whole, are quite

as favorable to the defendant as the facts and law will warrant.

The other alleged errors need not be noticed. We have studied the printed record of 696 pages with the care and solicitude which the importance of the case and the grave results to the defendant demand at our hands, and, as a result, we recommend that the judgment and order appealed from be affirmed, and that the court below be directed to bring the defendant before it, and then and there fix a day for carrying the judgment into execution.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed, and the court below is directed to bring the defendant before it, and then and there fix a day for carrying the judgment into execution.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Commissioner SEARLS; but what is said in the opinion on the subject of hypnotism must be taken as applicable to the testimony offered on that subject in this case, which was clearly inadmissible, and not as covering the whole subject. It will not be necessary to determine whether or not testimony tending to show that a defendant committed the act charged while in a hypnotic condition is admissible until a case involving that precise question shall be presented.

We concur: HENSHAW, J.; VAN FLEET, J.

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PEOPLE v. WILSON. (Cr. 216.)

(Supreme Court of California. Sept. 4, 1897.)

ASSAULT WITH INTENT TO MURDER—EVIDENCE OF INTENT—RESISTING ARREST WITHOUT WARRANT—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. On a trial for an assault with intent to murder, it was shown that defendant shot a man, and that two police officers went to defendant's saloon to watch him, while the sergeant was getting information about the shooting; that defendant knew that he was to be arrested, because he was questioned by the officers; that the sergeant, having learned that defendant did the shooting, afterwards came in, and ordered defendant's arrest without a warrant; and that defendant then fired on the officers, and wounded one of them. *Held*, that evidence of the first shooting was properly admitted, as tending to prove the motive with which defendant fired on the officers.

2. One of the officers testified that defendant seemed very nervous and excited, and that his face was drawn in a peculiar way; that "he looked as if he meant business, some way or another." The sergeant testified that he saw from defendant's actions that he was not to be taken without trouble, and that, as soon as he ordered his arrest, defendant reached for his pistol. *Held*, evidence of an intent to murder.

3. The court charged that "there is no evidence before you that a felony had in fact been committed by defendant before any attempted arrest by police officers, and whether he committed a felony that night is not material in the case." *Held* no error, since the charge must have been understood as referring to the off-

cer's right to make the arrest on reasonable cause to believe that a felony had been committed, whether it had been or not.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Frank Wilson was convicted of an assault with intent to murder, and from the judgment and an order denying a new trial he appeals. Affirmed.

J. S. Callen and M. L. Ward, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

HAYNES, C. The defendant was indicted by the grand jury of San Diego county for the crime of an assault with a deadly weapon, with intent to murder, committed upon the person of John M. McInnes. Upon his trial he was found guilty as charged, and sentenced to imprisonment for three years in state's prison, and this appeal is from the judgment and an order denying a new trial.

Defendant was the keeper of a saloon in the city of San Diego. On the night of December 16, 1895, three policemen—Sergeant Cota and Officers Warner and McInnes—went to defendant's saloon for the purpose of arresting him for shooting a soldier named Kelley, which had been reported to the police officer by telephone. Sergeant Cota first sent Warner and McInnes to the saloon to watch the defendant while he went to the hospital for information as to the alleged shooting, and was there informed that Kelley had been shot by defendant in the saloon. The sergeant returned two or three minutes before midnight, and told defendant "to consider himself under arrest for shooting that soldier." Defendant asked if he had a warrant. The sergeant replied, "No, I don't need one now." Defendant then ordered all persons—there were others besides the officers there—to leave the saloon, as it was closing up time. The sergeant then directed the officers to arrest him. The defendant then reached for his pistol, and as he raised it the sergeant shot at him. Several shots were fired, some by the defendant and some by the police, and one of defendant's shots hit Officer McInnes; and it was for shooting McInnes that he was indicted and found guilty in this proceeding. Upon the trial Kelley and his companion, Carrington, were called as witnesses for the prosecution, and were permitted to testify, over the objection of the defendant, to the circumstances of an assault committed by him upon Carrington for "pulling a gun" on him, and also to the shooting and wounding of Kelley, which occurrences took place in the same saloon between 10 and 11 o'clock the same night, and grew out of a controversy between defendant and Kelley in shaking dice, Carrington being the stakeholder.

Appellant contends that the ruling of the court was erroneous, in that it permitted the prosecution to prove the commission of a separate and distinct offense, and that he was prejudiced thereby. It is undoubtedly the

general rule that evidence of another offense than that under investigation is not admissible when not relative to the issue being tried. It is contended by respondent, however, that the evidence objected to is relative, as "it shows defendant's motive, and tends to prove his intent in resisting arrest and assaulting Officer McInnes." If such is the effect of the evidence, it must be admissible, because the motive and intent are within the issue being tried; and the fact that the testimony also had a tendency to show that defendant had been guilty of another assault upon another person, prior to the assault for the commission of which he was being tried, would not be sufficient to exclude it, if it were otherwise competent. *Moore v. U. S.*, 150 U. S. 61, 14 Sup. Ct. 26. It is true the officers were not being tried for making an unauthorized arrest, but, nevertheless, it was competent to show that the arrest was authorized, and that the defendant knew the fact which justified the arrest, because such knowledge negatived his right to resist arrest, and therefore tended to characterize the assault upon the officer for which he was being tried; and in this view of the evidence it was admissible, as affecting the intent with which the assault was made, and to negative any possible claim that he was resisting an unauthorized arrest.

In support of this view of the evidence in question, the learned attorney general cites a large number of cases which more or less directly support the view we have taken. Among these may be named *People v. Craig*, 111 Cal. 460, 468, 44 Pac. 186; *People v. Bidleman*, 104 Cal. 613, 38 Pac. 502; *People v. Lane*, 101 Cal. 517, 30 Pac. 16; and *People v. Walters*, 98 Cal. 138, 32 Pac. 864. If there had been no prior assault committed by the defendant upon Kelley or Carrington, the intent with which he fired upon McInnes would necessarily appear to be different from his intent in doing the same act with the personal knowledge that he had committed the prior offense.

In *Hendrickson v. People*, 10 N. Y. 13, 31, it is said that "considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense, for human minds would differ in their ideas of adequacy according to their own estimate of the enormity of the crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life." This view, we think, is in entire accord with the conclusion of the learned counsel for the defendant, as stated at the close of their argument upon this branch of the case, viz.: "It results that the only purpose which this evidence served was to influence the jury to believe that defendant was of a murderous disposition, and therefore it tended powerfully to affect their conclusion on the question of the intent to murder, charged in the indictment." I think that it did have a tendency to show

defendant's intent, and because it had such tendency the evidence was properly admitted.

It is further urged on behalf of appellant that there is no evidence tending to show a specific intent on the part of the defendant to take life. Where an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved; but it is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant (*People v. Mize*, 80 Cal. 45, 22 Pac. 80); "and if there was evidence tending to prove that the intent was as alleged in the indictment, the verdict will not be set aside on the ground that the evidence is insufficient to sustain the verdict" (*People v. Estrada*, 53 Cal. 600, and *People v. Swalm*, 80 Cal. 46, 22 Pac. 67). "A sane man must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts; * * * but, when the intent is the gist of the crime, this presumption, though a very important circumstance in making the proof necessary upon this point to convict, is not conclusive, nor alone sufficient, and should be supplemented by other testimony to avoid a reasonable doubt." *Rice*, Cr. Ev. p. 450.

Officer Warner testified that defendant "seemed to be very nervous and excited, and his face seemed to be drawn in rather a peculiar way. I did not understand his looks when he went around the counter; it was rather peculiar to me. It seemed as if his face was drawn, kind of rigid, rather peculiar, his actions." The same witness further testified: "He looked as though he meant business, some way or other; that is the way he looked to me. I paid no attention to that until after he drew his gun, then I seen that there was trouble."

Sergeant Cota testified that he saw by the way the defendant was acting that he was not going to be taken without trouble, and that, as soon as he directed the officers to "take him," he went for his pistol. The evidence in the transcript is very voluminous, and a large number of witnesses were examined, and it is not necessary to rehearse the evidence in detail bearing upon this point. It is sufficient to say that soon after the defendant shot Kelley the two officers, Warner and McInnes, went to the saloon, and remained there until the sergeant returned from the hospital. When the officers went to the saloon, they asked defendant about the trouble there had been there, or whom he had the trouble with, so that he was aware of the purpose of the officers' visit, and had time for reflection, and to determine upon the course he would pursue in case they undertook to arrest him. Under these circumstances, the fact that he seized his pistol as soon as the sergeant ordered his arrest, and used it upon the officers, would seem to be evidence tending to show that he intended to kill, and, if so, such killing, if McInnes had died, would

have been murder. At least there was evidence, aside from the presumption arising from the use of a deadly weapon, tending to prove the intent to murder; and the question of intent having been submitted to the jury as a question of fact, and there being evidence of the character above indicated, we are not at liberty to set aside the verdict upon that ground.

Counsel for appellant comments upon the following instruction given to the jury by the court: "I further charge you that there is no evidence before you that a felony had in fact been committed by the defendant before any attempted arrest by police officers, and whether he committed a felony that night is not material in the case."

It is said by counsel that this instruction does not cure the error arising from the reception of the evidence relating to the assaults upon Kelley and Carrington. I think counsel misconceives the meaning and purpose of this instruction. The arrest was made without a warrant, and, in order to justify the officers in thus arresting the defendant, they must have had reasonable cause to believe that a felony had been committed; but it was not necessary to prove that a felony had, in fact, been committed. This instruction evidently relates, when read in connection with the other instructions given to the jury, to the assaults made upon Kelley and Carrington as affecting the right of the officers to make the arrest, and informed the jury that it was immaterial whether it had been committed or not. The language of the first part of the instruction is not apt, but was evidently intended, and we think must have been understood by the jury, to mean that any evidence relating to the prior assaults upon Kelley and Carrington were not for the purpose of determining the fact whether those assaults were felonious; nor was it necessary to withdraw that evidence from the jury, because, as we have already said, it was properly received, and there was no error upon that point to be corrected.

I think the verdict is justified by the evidence, and find no error which would justify a reversal, and advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(118 Cal. 6)

HASS et al. v. MUTUAL RELIEF ASS'N OF PETALUMA. (L. A. 230.)

(Supreme Court of California. Sept. 3, 1897.)
BENEFICIAL ASSOCIATIONS—BY-LAWS—AMENDMENT—CONSTRUCTION—RESERVE FUND—APPEAL—PRESUMPTIONS.

1. The by-laws, rules, and regulations of a beneficial association, whether referred to or not, form part of the contract made by a member in joining.

2. Such contract is not violated by a subsequent change in the by-laws, made in pursuance of provisions thereof.

3. Where certain payments by a beneficial association are contingent upon the existence of an excess in the reserve fund, and no reserve fund is created or defined by the rules or by-laws, it will be deemed to consist of moneys not specially devoted to other purposes.

4. In considering questions of fact, on appeal from an order granting a new trial, the presumption is against the findings of the court below.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Rosa Hass and others against the Mutual Relief Association of Petaluma on a contract of membership. From an order granting a new trial after judgment for the plaintiff, the latter appeals. Affirmed.

J. F. Conroy, for appellant. Lippitt & Lippitt and J. T. Houx, for respondent.

TEMPLE, J. The complaint in this case *inter alia* shows that the defendant is an incorporation, the purpose of which is to secure certain money benefits to the friends of deceased members. By-laws are set out which promise to the nominee of a member dying in good standing "one dollar in coin for every member of this association in good standing at the time of said death." Also a by-law which provides that the nominee of a deceased member who had been such member for ten years "shall receive two thousand dollars, though the association may not have that number of members at the time of his death."

It is averred that one Lena Brenner became a member of the defendant, and, having made the plaintiff her nominee, died on the 5th day of June, 1894; that she was a member in good standing at the time of her death, and had been such member for more than 10 years immediately prior to her death. Due presentation of her claim to defendant, and its rejection, are averred.

The answer admits the facts set up, except that, in effect, it shows that only a portion of the contract is set out in the complaint, and proceeds to show the other portions of the contract, which provide that the balance of the \$2,000, over and above the number of members, is payable only out of the reserve fund of the association when there is a surplus in such fund over \$50,000 sufficient to meet such further payment. It is averred that there was not at the time of Lena Brenner's death, and has not since been, a surplus fund equal to \$50,000, or exceeding \$35,000. It also avers that the membership of the association at the time of Lena Brenner's death was only 800, and it denies that there was due to plaintiff, as the nominee of Lena Brenner, any sum in excess of \$800, which sum had been allowed, tendered, and refused.

At the trial the plaintiff submitted her case upon the pleadings, and the defendant then proved the existence of the by-law set up in the answer and put in evidence, which tended to show that at the time of Lena Brenner's

death there was not, nor has there been since, \$50,000 in the reserve fund, or even of assets belonging to the defendant. After some evidence in rebuttal, the court found that all the allegations in the complaint are true, but further found the contract as alleged in the answer. It also found that paragraph 8 of section 6 was not in force when Lena Brenner became a member, and that the reserve fund at the time of Lena Brenner's death amounted to \$54,222.90. The court further found that prior to 1893 the defendant had paid dividends to certain of its members to the amount of \$84,458, and also in 1893 the sum of \$2,459; that all such payments were made out of the reserve fund with intent to reduce the fund to less than \$50,000, and thereby evade payment of the indebtedness of \$2,000. Judgment was rendered for the plaintiff for the sum of \$2,105.40 and costs of suits. Upon motion of defendant the court afterwards granted a new trial, and from that order this appeal is taken.

There is no merit in the appeal. The first contention is that the contract between Lena Brenner and the association was an absolute contract for the payment of \$2,000. The section providing that the balance of the \$2,000 shall be paid out of the reserve fund only when there is a sufficient excess over \$50,000, was not a by-law when Lena Brenner joined. I do not see that it would matter whether it was there or not, since the amendment was made in pursuance of a by-law which permitted it, and which was in existence, when Lena Brenner became a member; but at that time there was a rule which provided that the payments should be made only when there would be left in the fund \$200,000. The change was not detrimental to the appellant.

Counsel also say that the answer admits that two by-laws providing for the payments are correctly set out in the complaint, whereas they are not. As set out, the answer omits the words "as hereafter provided," which are in the by-laws, and which may be held to refer to subsequent provisions, which limit the rights of nominees of deceased members. No doubt, counsel make this point with extreme reluctance, and will be pleased to find that it does not affect the rights of the parties. All the by-laws, rules, and regulations become part of the contract, whether referred to or not. There was no other contract entered into. All these must be read together.

The finding above alluded to holding that the reserve fund had been purposely depleted in order to evade payment of dues, finds no excuse either in allegation or proof. It is not supported by a scintilla of evidence. The interest on money was applied to the annual dues of members of long standing, in pursuance of a by-law which was a part of the original scheme. Lena Brenner must have participated in these dividends. They may have kept the fund below \$50,000, but her beneficiary cannot complain, for it was a part of her contract that it might be done. Many such societies promise more than they can

perform, and, somehow, promises to do the impossible always attract. If the court was right in finding as to the amount in the reserve fund, this finding could not have been deemed important; and, even if the finding were sustained by evidence, it would not be the equivalent of the finding of such a fund, and in this case was relevant to no possible issue.

The finding that there was more than \$50,000 in the reserve fund was also unsustained by the evidence. In considering these questions, it must be remembered that the court granted a new trial. The presumption is therefore against the findings, and not in their favor.

The by-laws speak of a reserve fund, and, as we have seen, provide for payments out of the excess of that fund over \$50,000. There is, however, no by-law or rule creating a reserve fund, or defining of what it shall consist. Certain moneys are specially devoted to other purposes. Under such circumstances, I think we may treat all the net assets as belonging to that fund which are not specially devoted to other purposes. The assets of defendant for 1894, during which year Lena Brenner died, were not shown. But the assets for 1893 were shown. Waiving the point that this does not meet the necessities of the case, and that the burden of proving that there was an excess in the reserve fund was on plaintiff, we find that the assets of 1893 amounted to \$52,312.32. In this list of assets was included \$1,483.10 due for interest, which, under the by-laws, is devoted to dividends, and \$1,386.22 due for assessments, which belong to the nominees of deceased members, and there is an overdraft of \$10,439.77, which must be deducted from bills receivable. Certainly the court properly granted a new trial. Order affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

OUTCALT v. JOHNSTON.¹

(Court of Appeals of Colorado. June 14, 1897.)

CONTINUANCE—PROMISSORY NOTES—PLEADING AND PROOF—NEW TRIAL—GROUNDS—LIMITING NUMBER OF WITNESSES.

1. No abuse of discretion in overruling defendant's motion for continuance, on the ground of the absence of witnesses, was shown, where the case was placed on the trial docket on the first day of the term, and was not called for trial until the ninth day thereafter, and it did not affirmatively appear that the required diligence had been exercised, and where the record disclosed that one of the alleged absent witnesses was present and testified, and that there was testimony by other witnesses on defendant's behalf as to the matters which the alleged absent witnesses were expected to prove.

2. Where the note described in the complaint purported to provide for attorney's fees in case of nonpayment at maturity, and the one offered in evidence did not, such variance did not affect

defendant's substantial rights, it appearing that the execution of the note and defendant's liability thereon were not denied, except as to the claim for attorney's fees, for which no allowance was included in the verdict.

3. Where defendant sought to recover for services, evidence that the work had been done by others than defendant was admissible under the general denial.

4. Under Code, § 224, providing that the entry of judgment shall not prejudice a motion for a new trial made in due time, defendant was not prejudiced, where no stay of judgment was prayed, by the entry of such judgment prior to the hearing of his motion for a new trial.

5. Where plaintiff attempted to impeach the character of defendant by the testimony of two witnesses, and defendant produced and examined four in support of his character, it was not an abuse of discretion to refuse to permit him to introduce more.

6. The fact that defendant was surprised by certain evidence is no ground for a new trial, where such surprise was not indicated at the time of the introduction of such evidence.

7. Alleged newly-discovered evidence, merely cumulative, and which might, with the exercise of reasonable diligence, have been produced at the trial, is not ground for a new trial.

8. It was not error to refuse a new trial for alleged misconduct of the jury, where the preponderance of the evidence was against the truth of such charge, and where nothing appeared from which prejudice could be inferred.

Appeal from district court, Gunnison county.

Action by Jane R. Johnston against John B. Outcalt. From a judgment on a verdict in favor of plaintiff, defendant appeals. Affirmed.

Alexander Gullett and Goudy & Twitchell, for appellant. Sprigg Shackleford and S. D. Crump, for appellee.

WILSON, J. This action was begun on a promissory note executed by defendant, Outcalt, to plaintiff, and which reads as follows: "Gunnison, Colo., Aug. 3, 1892. \$539.55. Ninety days after date, I promise to pay to the order of Jane R. Johnston five hundred and thirty-nine 55-100 dollars at the office of William W. Outcalt, Gunnison, Colo., with interest at 1½ per cent. per annum from date until paid, and ——— per cent. attorney's fees, if not paid at maturity. Value received. [Signed] John B. Outcalt." Indorsed on back: "September 15, 1894. By cash, \$200." The copy was not inserted in the complaint, and it was described as being one which provided for the payment of a certain amount as principal, with interest specified, and also a reasonable attorney's fee, in the event that it was not paid at maturity. The answer admitted the execution of the note so far as concerns the statement of principal and interest due, but denied that it provided for the payment of attorney's fees. Defendant also, by way of cross complaint, alleged that plaintiff was indebted to him in the sum of \$1,360, with interest, on an account for work and labor performed, and for money laid out and expended, for the use of plaintiff, and at her instance and request. Plaintiff replied by a general denial of each and every allegation of the answer and cross complaint. Upon trial, verdict and judgment were in favor of plaintiff for the full amount of principal and inter-

¹ Rehearing denied, September 13, 1897.

est claimed to be due upon the note, except the amount claimed for attorney's fee, which was disallowed by instruction of the court. From this judgment, defendant appeals.

There are 15 assignments of error. The first is to the action of the court in overruling the motion of defendant to suppress the deposition of Mrs. Johnston, the plaintiff. A careful search of the record before us fails to disclose any such motion. We find the order of court overruling such a motion, but not the motion itself, and hence we are not advised as to the grounds upon which it was based. Defendant filed numerous objections to certain questions and answers in this deposition, and all of them save two were sustained by the court. In these two instances we think the court was correct; the testimony sought to be stricken out being relevant and admissible.

Previous to the commencement of the trial, and on the same day, defendant filed a motion for a continuance, on the ground that he was not prepared to proceed with the trial, because of the absence of material witnesses, and in support thereof presented his affidavit. The overruling of this motion is assigned for error. To grant or refuse a continuance is a matter wholly within the discretion of the trial court, and can only be reviewed when the discretion has been abused. *Dawson v. Coston*, 18 Colo. 495, 33 Pac. 189. We fail to see any abuse of discretion in this instance. The motion did not show the exercise of the required diligence, and did show that the matters expected to be proven by the absent witnesses could be shown by two others, the plaintiff and his wife. In addition to this, one of the witnesses alleged to be absent did appear and testify in behalf of defendant on the trial. The court docket appears to have been called on the first day of the term, and this cause placed upon the trial docket. It was not called for trial until the ninth day of the term, and yet it does not appear from the affidavit that defendant had made any effort to ascertain the whereabouts, or secure the attendance, of the absent witnesses. There is an allegation that he had endeavored to ascertain their whereabouts, but he does not state in what his efforts consisted, nor when he had first learned that the witnesses were absent from the county. Defendant attempts to excuse his want of diligence by the statement that he did not know that the case would be for trial until the day previous to its commencement. This is not sufficient, for the reason that there is no claim that his counsel were absent during the previous days of the term, and knowledge by them was notice to him. The court did not abuse its discretion in refusing the continuance, especially in view of the fact that it appears from the record there was testimony on behalf of defendant at the trial as to the alleged facts desired to be shown by the absent witnesses.

The third and fourth assignments are to the effect that the court admitted improper evidence over the objections of defendant, and

refused to admit proper, competent, and material evidence offered in behalf of defendant. No specific evidence admitted or offered and refused is pointed out either in the bill of exceptions or in the motion for a new trial. It appears from the record that there were very few objections made to the introduction or to the offer of any testimony; and the ruling of the court upon such as were made, so far as we can see from a careful examination of the record, was substantially correct. Defendant was at least in no case harmed. Counsel for defendant did object to the introduction of the note in evidence, claiming that it was not the one described in the complaint. A variance is alleged, because the note, as described in the complaint, called for the payment of attorney's fees in case of its nonpayment at maturity, and that offered in evidence did not. It is manifest from the defendant's answer, as also from the whole course of the trial, that the variance between the complaint and the note was not a matter of surprise or injury to the defendant, and did not in any manner affect his substantial rights. The execution of the note and defendant's liability thereon was not denied either in the pleading or on the trial, except so far as there was a claim for attorney's fees. The court held that the note did not provide for the payment of attorney's fees, and instructed the jury to make no allowance therefor. This instruction was followed, as appears from the amount of the verdict, and hence defendant was in no wise injured by the receipt of the note in evidence. For these reasons, there was no error in this respect. *Salazar v. Taylor*, 18 Colo. 547, 33 Pac. 369.

Counsel complain in their brief that plaintiff should not have been permitted to give testimony that the improvements for the making of which defendant sought to recover in his cross complaint were placed upon the land by Outcalt Bros., or by any person other than defendant; such matters not having been specially pleaded. Defendant alleged in his cross complaint that plaintiff was indebted to him for work and labor done and money expended by him in the making of certain improvements upon plaintiff's land. The replication was a general denial, which, of course, put in issue, among other things, the alleged fact that defendant had made these improvements. This was a material allegation, and we know of no manner by which it could have been more successfully or conclusively controverted than by showing that the improvements were placed there by other persons. It was not new matter, and the testimony complained of was relevant to the issue, and competent.

The errors assigned to the giving of instructions by the court to the jury cannot be considered, for the reason that it nowhere appears from the record that defendant made objection to them, or to any of them. We have no hesitancy in saying, however, that, taken as a whole, they were very clear and

correct, and none were of such character as to give plaintiff any just or legal cause of complaint.

There was much conflict of testimony, and, as usual in litigation between relatives, much bitterness of feeling was exhibited, but the evidence was amply sufficient to sustain the verdict and judgment. In such case, it is well settled that an appellate court will not interfere. This has been so frequently held by this and the supreme court that it is unnecessary to assign the reasons therefor, or to cite authorities.

It is further assigned as error that the judgment was entered prior to the hearing and ruling upon the motion for a new trial. It does not appear that defendant prayed a stay of judgment until the motion could be heard, and Code, § 224, expressly provides that the entry of judgment shall not prejudice any motion for a new trial made in due time. The motion was made, heard, and determined in apt time, and there is no attempt to show that defendant was prejudiced by the previous entry of judgment.

During the trial there was an attempt on the part of the plaintiff to impeach the character of defendant for truth and veracity, and two witnesses were introduced on that point. The defendant, in surrebuttal, produced and examined four witnesses in support of his character. His counsel then announced that three other witnesses were "on their way to the courthouse, to testify to the reputation of defendant," and that they desired to introduce them. The court announced that it would not hear any more witnesses on that subject, "because four is enough on the question, in view of the fact that that is more than was introduced by the other side." Defendant excepted to this, and assigned such ruling as error. It rests largely in the discretion of the court as to how many witnesses may be allowed to testify on a given point. If it were otherwise, the length of a trial could be protracted to an unreasonable and unwarrantable extent, and the time of the court consumed by the useless and unnecessary reiteration of testimony. There was no abuse of the discretion in this instance, and the court did not err in its action, even if the witnesses had been present in the court room.

It is further urged that the court erred in overruling the motion of defendant for a new trial. All of the grounds set forth in the motion have been referred to in this opinion except three, and these were surprise, newly-discovered evidence, and misconduct of the jury. The evidence pointed out in the affidavit of defendant in support of his motion as that which was a surprise does not appear to have been very material to the issues, but, even if it had been, defendant did not, at the time of its introduction, indicate to the court that it was a surprise, or ask for time within which to secure evidence to rebut it, or for a continuance. In the opinion in *Lee-Clark-Andreesen Hardware Co. v. Yankee* (rendered

at the present term of this court) 48 Pac. 1050, it was said: "The plaintiff waived its surprise by its own neglect, failure, or refusal to invoke its proper remedy, and this court will not undertake to interfere with the discretion of the trial court in refusing to grant a new trial in such case." It is well settled that a party cannot avail himself of this plea unless he calls the attention of the court to the matter at the time when it occurs, and asks for proper relief. It is too late for him to manifest his surprise for the first time after the cause has been submitted to the jury, and a verdict rendered against him.

As to the newly-discovered evidence set forth in defendant's affidavit, it was such as he should have been prepared with at the trial, it being pertinent to the issues. Besides, there was on the trial testimony offered and received in his behalf of the same character as that described in his affidavit as newly-discovered evidence. It also does not appear from the affidavit in support of the motion that, with the exercise of reasonable diligence, defendant could not have secured the attendance of the witnesses mentioned, who, he asserts, would have testified to the facts which he terms newly-discovered evidence.

The only allegation of fact to support the charge of misconduct of the jury which merits notice is that one of the witnesses for plaintiff, who seemed to manifest much interest in the suit, did, during a recess of the court during the trial, invite two of the jurors to drink with him at a public bar, and that upon such invitation said jurors did drink intoxicating liquors with him. Without determining the question as to whether this would be sufficient ground upon which to grant a new trial, unless it further appeared, by positive testimony or reasonable inference from the circumstances, that the defendant was prejudiced thereby, it is sufficient to say that the allegation is not supported by the affidavits. The charge was made in the affidavits of two persons, but afterwards one of these, in a subsequent affidavit, modified his statement, to the effect that he did not intend to say that he saw the witness purchase any liquor for any of said jurors, and that in fact he did not see any such occurrence during the trial. Each of the two jurors and the witness who was charged with treating them made affidavit positively denying this statement in toto. The great weight of the testimony being against the truth of the charge of misconduct, and there being nothing in the record from which the court could infer that the defendant was in the slightest degree prejudiced by the conduct of the jurors, or any of them, or of plaintiff's witness, the court did not err in refusing to grant a new trial on this ground.

Being unable to perceive any material error disclosed in the voluminous record before us, we must affirm the judgment, and it is so ordered. Affirmed.

(17 Wash. 406)

WESTERN SECURITY CO. v. LAFLEUR
et al.

(Supreme Court of Washington. July 19, 1897.)

TRIAL—NOTICE—JUDGMENT—REQUISITES—VACATION—APPLICATION.

1. The statute providing that notice of trial of a cause shall be given to defendants does not require notice of the time when the cause will be tried, but notice merely that the cause will be set for trial.

2. It is not essential to the validity of a decree or judgment that it be served upon any party to the cause after it is filed.

3. An application to set aside a decree of foreclosure and a sale thereunder cannot be granted if it does not disclose any valid defense in favor of applicant.

Appeal from superior court, Stevens county; Jesse Arthur, Judge.

Action by the Western Security Company against Joseph Lafleur, Douglas Griffiths, and others, to foreclose a mortgage. Default was entered against Lafleur and others, and afterwards judgment was also rendered against Griffiths and others, decreeing foreclosure and a sale of the property. From an order granting a motion to vacate the judgment and set aside the sale, plaintiff appeals. Reversed.

Crow & Williams, for appellant.

REAVIS, J. Appellant brought an action against defendants to foreclose a mortgage executed by defendants Lafleur and wife on real estate in Stevens county. Default was entered against defendants Lafleur and wife, Spokane Falls & Northern Railway Company, and Frank C. Sharkey, for failure to appear in the action. Defendants Douglas Griffiths and Nuzum and wife appeared and demurred to the complaint, and afterwards, on January 5, 1897, filed their answer nunc pro tunc as of date October 20, 1894. On May 28, 1895, appellant served a notice that the cause would be set for trial on the law day appointed by the rules of the superior court for setting causes for trial. The cause was set for trial on December 9, 1895, and was tried, and findings of fact and conclusions of law filed by the court in accordance with the allegations of the complaint. There was no appearance of the defendants at the trial. Respondents afterwards objected to signing the decree, but in January, 1896, the decree of foreclosure was entered in conformity to the findings and conclusions. An order of sale was issued on the decree, and the mortgaged premises were sold, and purchased by appellant, which received a certificate of sale from the sheriff. On December 29, 1896, respondents served and filed a motion to set aside the judgment on the ground that it was irregular and improperly granted, and such motion was supported by the affidavit of the attorney. On January 5, 1897, the court entered an order granting the motion, and vacating the decree and judgment, and setting aside the sale which had been made. Appellant excepted to this order, and appeals therefrom.

The complaint is the usual one in a foreclosure of mortgage. The only mention of the respondents is in one paragraph, in which it is stated that they claim some interest or lien in or to the mortgaged premises, which lien appellant alleges is inferior and subsequent to the lien of the mortgage. Respondents deny the material facts of the complaint, on information and belief, and admit that they claim some right or interest or lien in the mortgaged premises. They do not set up what their claim or interest is. The only reason assigned by respondents in their application to the court for vacation of the judgment was that no notice of trial or hearing of said cause was given these defendants, or either of them, or their attorneys, at the time said hearing was had and judgment taken, and that no copy of the said decree or judgment has ever been served upon them. The affidavit in support of this motion states: "No notice of bringing this cause to trial at the time it was brought to trial and decree rendered was ever served on myself or said defendant, and no copy of said decree or judgment was ever served upon us, or either of us, or our attorneys, to my knowledge." It may be said upon this motion, and upon the facts stated in the affidavit, that the statute does not require notice of the time the cause will be tried, but only requires a notice of setting the cause for trial shall be served on the opposite party three days before any time fixed by the rules of the court for setting the cause for trial, and that the case will be brought on for trial at such time as the court shall fix. It is not necessary for the validity of a decree or judgment that it be served upon any party to the cause after the same is filed, and again there was no showing of merits in favor of respondents, or any valid defense disclosed in the application to vacate the judgment. This is essential. The order to vacate the judgment was made without any grounds to sustain it. It is therefore reversed, with directions to the superior court to annul the order of vacation and reinstate the judgment and decree of foreclosure.

SCOTT, C. J., and ANDERS and GORDON, JJ., concur.

(17 Wash. 399)

HINCHMAN v. POINT DEFIANCE RY. CO.
et al.

(Supreme Court of Washington. July 19, 1897.)

APPEAL—EFFECT OF PART REVERSAL—REHEARING—PROCEEDINGS NOT IN RECORD.

1. When two mortgages are claimed to cover the same property, and a decree is rendered adjudicating the rights of the mortgagees, and ordering a sale of the property, at their united request, a subsequent reversal of the decree as to the rights of the parties will not invalidate the sale, but will merely alter the disposition of the proceeds.

2. The appellate court on rehearing an appeal will not notice proceedings taken in the case in the court below since the appeal was taken.

On rehearing. Modified.

For former decision, see 44 Pac. 867.

GORDON, J. This cause was before the court at the January term, 1896, and was reported in 14 Wash. 349, 44 Pac. 867. A petition for rehearing was filed by the respondent, in which, among other things, it was stated that that part of the former opinion of the court to which the petition for rehearing was directed was "based and predicated upon a mistake of fact, and upon the assumption that the Lewis mortgage covers poles, wires, and electric equipments south of South Ninth street." Continuing, the petition further states: "If such were a fact, then the conclusion reached by your honors would necessarily be correct." Upon consideration of the petition for rehearing the following order was made: "Ordered, that a rehearing be granted in the above-entitled cause on the point as to whether or not the John C. Lewis mortgage covers any other or different line of railroad than that from Point Defiance to South Ninth street, in the city of Tacoma, and that this cause be set for argument at the October term." What the court really intended by the order was to direct argument to the question of whether the Lewis mortgage covered any property which was not covered or embraced within the terms of the Hinchman mortgage; it being the contention of the respondent, throughout his petition for rehearing, that the property embraced within the two mortgages was identical. It may be conceded that, so far as real property was included or embraced within the terms of either mortgage, it was confined to the line of railway north of South Ninth street. At the time when the Hinchman mortgage was executed the maker of that mortgage, the Point Defiance Railway Company, owned no property south of South Ninth street; and, so far as the record discloses, it never was any part of the purpose or intention of that company to secure, by purchase or otherwise, any line of railway extending south of that street. It had, in addition to the line which it was then operating, surveyed and purposed extending its line northerly from the north end of its road as then operated, and this extension was thereafter completed; and we have held in our former opinion, and still adhere to the conclusion reached in that regard, that such extension was fairly included within the terms of respondent's mortgage. But the Lewis mortgage was made at a much later date, by a new company, which had not only acquired all of the property owned by the maker of the Hinchman mortgage, but, in addition thereto, had in the meantime acquired by purchase an additional line of railway, of several miles in length, known as the "Wapato Park Belt Line," all of which was south of South Ninth street. We quote from the testimony of Stewart Rice, one of respondent's witnesses: "Question. What is the fact about the Point Defiance, Tacoma & Edison Company purchasing certain railways after it bought the railway of the Point Defiance Railway Com-

pany? Answer. We purchased another line of railway at the same time, but none afterwards.

Q. What was the other line of railway? A. That was the Wapato Park line of railway. Q. That road connects with the line of railway we have been discussing here, does it not? A. It does, through the Tacoma Railway & Motor Company's line; yes, sir. Q. That is known as the 'South End'? A. Yes, sir; spoken of as the 'South End.' Q. And the line in controversy here is called the 'North End'? A. Yes, sir." The Wapato Park Belt Line, which was purchased at or about the same time as the other, was at the time of the purchase operated solely by steam power, whereas the Point Defiance railway was at the time of its purchase in part operated as an electric street railway; that is, about 1½ miles was being so operated, and the balance thereof was being equipped for operation as an electric street railway. Shortly after purchasing these two theretofore independent lines of railway, the Point Defiance, Edison & Tacoma Railway Company, the then owner of both roads, entered into contracts with the Northwest General Electric Company and the Edison General Electric Company for cars, motors, and other appliances needful and necessary in operating an electric road, and the construction of a distribution circuit and equipment for 13 miles of track. These contracts were made subsequent to the time of acquiring both roads, and all cars and motors so purchased were afterwards operated upon the entire line of road, both north and south of South Ninth street; in other words, between Edison, the south end of the system, and Point Defiance Park, the north end of the system. Just when this consolidation took place, or when the new company commenced to run its cars over the entire system, is, we think, entirely immaterial. It is enough that it did so prior to the execution of the Lewis mortgage, and that mortgage, contrary to the contention of the respondent, includes within its terms "all passenger cars, both open and closed (supposed to be twelve or more in number), freight cars (of which there is supposed to be one or more), construction cars, flat cars, car bodies, trucks, including both those on which cars are now mounted and those on which none are now mounted, motors now in use for operating said cars, and motors designed for such use, but not now in use therefor, and all trolleys, trolley stands, controllers, rheostats, car wires, car fixtures, lamps, spare parts, tools, and instruments, and in fact everything pertaining to the complete electrical equipment of said cars now owned by said party of the first part, and used or intended for use, wholly or in part, on either or any line or lines of street railway owned, leased, or operated by said party of the first part, whether the line or lines of street railway on which such cars or electrical equipments thereof, or any thereof, are used, lie northerly or southerly of said South Ninth street, in said city of Tacoma, or wheresoever such cars or electrical equipments thereof may lie, or wherever the same may be used." The testimony of

Mr. Hurley, the receiver, shows that at the time he took possession, viz. May 8, 1894, the cars were being operated both north and south of South Ninth street. He testified that they were being "indiscriminately run" over the whole line. Also: "Question. The cars, in other words, were running through from Point Defiance Park to the south end of the system? Answer. Yes, sir. Q. There is a road running south of South Ninth street which forms really a part of the Point Defiance road, is there not? A. Yes, sir. Q. How does that run, and what is its terminal point? A. Edison. It runs to Edison. Q. And, at that time you took possession of the property which you describe, they were running the cars clear through from Point Defiance Park to Edison? A. Yes, sir."

The decree directed that all of the property be sold as an entirety, and it is urged by the respondent that inasmuch as no appeal has been taken from that part of the decree, and appellant did not demand a separate sale of the property on which he claims an exclusive lien, the relief which he seeks should not be granted, for the reason that it would nullify those parts of the decree from which no appeal was taken. We do not think that a reversal would affect the title of the purchaser, and what appellant is concerned in is the application of the fund derived from the sale. Each party was before the court, seeking a foreclosure of his mortgage. It was proper enough that the entire property should be sold in *solido*. All parties were seeking to have it sold, the real contention being the application of the proceeds. In this connection the appellant has asked us to direct the court below to take proof as to the value at the time of the sale of that part of the property sold upon which the appellant was entitled to an exclusive lien, and to ascertain the respective values upon such proof, and to thereupon award appellant, as trustee, a personal judgment against respondent, Hinchman, for such proportion of the amount for which the entire property was sold at said sale as will bear the same ratio to said entire amount which the value of said property upon which appellant was entitled to an exclusive lien would bear to the value of the entire property. We think we would not be justified in making such direction. We are not called upon in this case to, nor can we properly, notice any proceedings taken below since this decree was entered and the appeal was taken. The present investigation must be confined to the record now before us, from which we must determine whether the decree was or was not erroneous. The rights of the parties upon facts occurring subsequent to the appeal cannot become the subject of the present investigation, and in the exercise of its appellate function this court will not direct the superior court to proceed to act unless that court has first had an opportunity to proceed—as the law presumes it would upon request—in accordance with law. If appellant is entitled in the present proceeding to the relief he now seeks, it is to be presumed that the lower court will, upon request, grant it. We hold that it is a question not pre-

sented by the appeal in the present instance. Therefore we decline to express any opinion upon the subject of whether appellant is or is not entitled thereto.

After a full review of the entire record, we are satisfied that the conclusion reached in the former opinion was right, and we adhere to it, with this modification, viz.: That the appellant will not be entitled to a priority of lien upon any of the poles, wires, or overhead equipment upon the line of railway north of South Ninth street; but as to the trucks, motors, cars, and other electrical equipments purchased by the Point Defiance & Edison Railway Company subsequent to the execution of respondent's mortgage, our conclusion is that appellant is entitled to a decree establishing the lien of his mortgage as a first lien thereon; and the cause will be remanded to the superior court for further proceedings in accordance herewith.

SCOTT, C. J., and ANDERS and REAVIS, JJ., concur.

H. C. MAHRT CO. v. HYMAN-HALL CO.
(Supreme Court of Washington. July 29, 1897.)

PRINCIPAL AND AGENT—POWERS—EVIDENCE.

Upon the question of authority of an agent to act for his principal in making a contract with a purchaser of goods, evidence is admissible to show that the agent made contracts for his principal with other purchasers.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the H. C. Mahrt Company against the Hyman-Hall Company. From a judgment for defendant, plaintiff appeals. Affirmed.

McClure & Bass, for appellant. McCutcheon & Gilliam, for respondent.

REAVIS, J. Appellant commenced an action in the superior court of King county to recover the sum of \$691, claimed as a balance due from respondent. Respondent answered, admitting the indebtedness alleged by appellant, but averred an accounting between appellant and respondent, and also set up as a counterclaim a breach of contract between appellant and respondent, and claimed damages in the sum of \$1,000. The appellant is a wholesale manufacturer and dealer in cigars and tobacco at Dayton, Ohio, and respondent was a broker and dealer in cigars in Seattle. There was testimony at the trial tending to prove that there were two contracts between appellant and respondent, the first made in the summer of 1894, and the second March 23, 1896, and that both these contracts were made by respondent with E. B. Gaze, an agent of appellant. The last contract was in writing. Substantially, these contracts were an engagement by appellant to sell respondent cigars at a certain price, and particularly a certain brand, known as the "Waterloo," in Western Washington; such sale of the Waterloo cigar to be made exclusively to respond-

ent. About the quantity of cigars to be thus furnished by appellant to respondent was estimated, and, under these contracts, respondent was to bear a portion of the expense of advertising the particular cigars and push their sale in the district mentioned. Respondent did this, and appellant furnished the cigars. But appellant also furnished the same cigars under another brand in the same district, and respondent claimed it was damaged by this breach of the contract, and offered evidence tending to prove such damages; and appellant also refused to furnish cigars until the contract expired, for which damages were claimed. In the spring of 1896, E. B. Gaze, who had made the contracts with respondent, and through whom the purchases of the cigars had first been made, made settlement with respondent of the claim of \$691, and made various allowances, some for damages sustained by respondent for sale of cigars in the district which respondent claimed, and at such settlement took the notes of respondent for \$500, and gave a receipt for the indebtedness claimed to be due from respondent to appellant. Appellant maintains that Gaze had no authority to make these settlements, or to receive the notes of respondent in payment of any sum due appellant, or to make the last contract. But there was testimony tending to show that Gaze had the apparent authority to represent appellant in such a settlement. There was also testimony tending to prove that Gaze had authority to make the contracts for appellant which he made with respondent. There is much conflict in the testimony, particularly the conclusions of the witnesses who testified; but the jury have found for the defendant upon the testimony, and their verdict will not be disturbed unless there was error in the admission or rejection of testimony. Many objections were made by appellant to the introduction of testimony tending to show that Gaze made contracts for appellant with other customers. This testimony was proper, as tending to show acts on the part of appellant giving Gaze authority as an agent.

We have examined the instructions of the court to the jury, and, without reviewing at length the exceptions made by appellant, we find no error in them. We think the case was fairly submitted to the jury, and its verdict is sustained by substantial testimony. The judgment is affirmed.

SCOTT, C. J., and ANDERS and GORDON, JJ., concur.

STATE v. SHELTON.

(Supreme Court of Washington. Aug. 4, 1897.)

INTOXICATING LIQUORS—LICENSE—BURDEN OF PROOF.

Concurring opinion. For majority opinion, see 48 Pac. 258.

GORDON, J. I concur in the result, but not in the holding that the burden was upon the defendant to prove his license. Decisions almost without number might be referred to as bearing upon this question, and it is probably true that in point of number they support the rule laid down in the opinion of the majority, but I think the trend of modern authority is the other way. The rule was founded in necessity, and the impossibility in many cases of the government being able to make proof of the nonexistence of a license. In the earlier periods, when mere private licenses were generally in vogue, the license itself constituted the sole and only evidence of its existence; and the difficulty of proving a negative justified the adoption of the rule that, where the subject-matter of a negative averment was peculiarly within the knowledge of the other party, the averment was taken as true, unless disproved by that party, and this was the extent of the limitation. 1 Greenl. Ev. § 79. But under our statute on the subject a public record is required to be kept for all liquor licenses, and the question of whether a particular person has or has not a license is clearly not one "peculiarly within the knowledge" of such person, but can readily be determined from the record. Therefore the rule has no application to existing conditions in this state. The necessity for its application does not exist. If the indictment in this case had failed to charge the nonexistence of a license, the other acts which it charges the defendant with committing would constitute nothing illegal or immoral. The act of selling is not of itself illegal, but becomes such when unaccompanied by a license. Logically, the rule adopted by the majority makes it unnecessary for the state to make any proof whatever of the only fact which constitutes the crime charged, and disregards that humane principle of the law which presumes every defendant innocent until his guilt is established by the proof.

KIZER v. CAUFIELD.

(Supreme Court of Washington. July 29, 1897.)

MORTGAGE FORECLOSURE—SUBORDINATE INTERESTS—ADVERSE TITLE—PLEADING—DEMURRER—MOTION TO STRIKE—TAX SALES—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.

1. A complaint for mortgage foreclosure alleged that defendant C. (not the mortgagor) "claims some interest in or title to said property inconsistent with the rights of plaintiff, and that the lien of plaintiff is prior to any lien of said C. against the said described lots, or either of them." C. moved to strike out the phrase "inconsistent with the rights of plaintiff," as presenting an issue of adverse title. *Held*, that plaintiff intended to allege merely that the interest of C., whatever it might be, was subordinate to that of plaintiff.

2. In foreclosure, a defendant other than the mortgagor pleaded a purchase of the property at a sale under a judgment in a back-tax suit. In reply, plaintiff set out facts to show that the tax judgment was void. Defendant moved to strike out the allegations as incompetent, immaterial, irrelevant, and redundant. *Held* that, if the facts stated were insufficient to show that the

judgment was void and subject to collateral attack, the objection should have been taken by demurrer.

3. In a judgment, a recital that defendants were duly and regularly cited to appear, and that they made default in that behalf, and that the default was duly and regularly entered, it being uncontradicted in the record, is, on all parties and their privies, a conclusive adjudication on the point of jurisdiction of the persons of defendants.

4. In foreclosure, the title of a defendant cannot be litigated, if it is alleged to be paramount and hostile to the title of the mortgagor.

5. Where a back-tax suit was properly brought under the statute, the judgment cannot be collaterally attacked on the grounds that it was rendered for an aggregate amount of taxes against all of the lots involved, and against all the lots for a specified sum, together with penalty, interest, and costs, while the sale was made for an amount largely in excess of the taxes, penalty, interest, and costs due against the property; these being mere matters of defense to the tax suit, and not going to the court's jurisdiction.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Frank Kizer against Thomas Caufield and others. From portions of a judgment in favor of plaintiff, defendant Caufield appeals. Reversed.

Merriam & Merriam, for appellant. Felgham & Ludden, for respondent.

ANDERS, J. This action was instituted in the superior court of Spokane county to foreclose a mortgage on nine lots in McCarter's addition to Spokane, executed by William Hawthorne and Leona Hawthorne, his wife, in favor of the plaintiff and respondent, on November 23, 1894. The defendant and appellant, Caufield, was made a party, as having some interest in or claim to the mortgaged premises. The mortgagors did not appear in the cause, and judgment went against them by default. The defendant Caufield answered, denying each and every allegation of the complaint except those admitted or qualified, and alleging affirmatively that a judgment and order of sale were entered in the superior court of Spokane county on November 30, 1892, in a suit for taxes assessed and levied for the year 1890, in which suit Spokane county was plaintiff, and Libble J. Everhart and William Hawthorne, as mortgagor, were defendants; that in pursuance of said order of sale the sheriff of said county sold the property described in the complaint at public auction on the 3d day of February, 1893; that at the time of said sale the said defendant Caufield was the highest bidder, and became the purchaser of said lots for the sum of \$44; that said sum was duly paid to the said sheriff, and a certificate of sale issued to said Caufield on the day aforesaid; that said sale has been duly confirmed by the court; and that the defendant is now the holder of a deed from the sheriff of said county for the said premises,—and praying that the title and lien of defendant be declared prior and paramount to plaintiff's lien. Plaintiff, replying to the answer of the defendant, admitted the sale of the property, as set out in the answer, for

taxes, and the execution of the sheriff's deed therefor, and that said defendant is the holder of said deed, but denied that said sheriff had any warrant or authority for making said sale; and for a defense to the affirmative matter set up in the answer the plaintiff alleged that the county commissioners failed and refused to certify to the state board of equalization the amount of taxes necessary to be raised in Spokane county in the year 1890; that the state board of equalization did not fix or determine the rate of taxation and the amount of levy, and that in fact and in truth there was no legal or proper levy for that year, and no taxes levied upon said property by any authorized person or persons; that said land was sold under said pretended order of sale for a sum greatly in excess of the taxes that were due and ought to have been levied upon said land, and that the judgment included items and amounts not authorized by law, and for which said land ought not to have been sold, to wit, the sum of \$10 attorney's fee included in said judgment, and also the sum of \$1 charged against said land as fee for abstract, and that each and all of said sums were not a lien upon said land, or a tax upon said land, and that the sale and judgment authorizing such sale were null and void; that the sum claimed by the county of Spokane against said land was largely in excess of the sums for which said land was liable for the year 1890; that the judgment was for a sum larger than the amount legally due and chargeable against said land as taxes, interest, and penalty; that by reason thereof the pretended judgment was and is void, and said sale and deed thereunder conveyed no title to the defendant Caufield. And the prayer of the reply was that the said judgment be declared to be void and of no effect, and that the deed thereunder be canceled and set aside, and that the defendant Caufield be adjudged and declared to have no title or interest in the land described in the complaint and answer herein. The cause was tried on the issues formed by the foregoing pleadings; and, after filing its findings of fact and conclusions of law, the court rendered a judgment in favor of the plaintiff, adjudging and decreeing the judgment in the tax suit to be void and of no effect, and that said sheriff's sale and the deed of said sheriff to Thomas Caufield are illegal and void, and the deed does not convey said property, or any part thereof, to said Caufield, and is hereby canceled and set aside, and that Thomas Caufield have no title or interest whatever in said described lots, and that the claim and lien of said Caufield be barred and held for naught. From those portions of the judgment the defendant Caufield has appealed to this court.

Concerning appellant, the complaint alleges that "one Thomas Caufield claims some interest in or title to said property [describing it] inconsistent with the rights of the plaintiff, and that the lien of the plaintiff is prior to any lien of said Thomas Caufield against

the said described lots, or either of them." Appellant moved the court to strike from the complaint the allegation that "Caulfield claims an interest in the said property inconsistent with the rights of the plaintiff," as being immaterial, irrelevant, and redundant. The court denied the motion, and appellant excepted. We think there was no error in this ruling. It is claimed by appellant that that portion of the complaint which he moved to strike out amounted to an allegation of adverse title in the defendant, and therefore presented an issue which could not be tried in this action. But the words "inconsistent with the rights of the plaintiff" must be considered with reference to all the allegations in respect to the defendant, and when so considered it becomes apparent that it was merely the intention of the plaintiff to show by his pleading that the interest of the defendant, whatever it might be, was subordinate to that of the plaintiff.

The defendant also moved to strike out all of the new matter set up in the reply, on the ground that the same was incompetent, immaterial, irrelevant, and redundant, which motion was also denied by the court, and appellant here alleges that the ruling of the court was erroneous. The argument in support of appellant's position is that this new matter constituted a collateral attack upon the judgment set up in the answer, and that such an attack was not permissible or proper, under the facts pleaded. Plaintiff doubtless intended simply to state facts showing that the judgment in the tax suit was void and of no effect, and that the sale thereunder was also void; and, that being so, it can hardly be said that the matter pleaded was either incompetent, immaterial, or irrelevant. If the facts stated were insufficient to show that the judgment was void, and therefore invalid, the objection should have been taken by demurrer, and not by motion. Nor do we think the motion should have prevailed on the ground that the reply was in effect a collateral attack upon the judgment in the tax proceeding. A void judgment may be attacked collaterally as well as directly. It is entitled to no consideration whatever in any court as evidence of right. But an erroneous judgment is not necessarily void, and therefore subject to attack in a collateral proceeding. When the court has jurisdiction both of the subject-matter of the action and of the defendant, its judgment cannot be collaterally questioned on account of mere errors or irregularities in the proceedings. "The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. 'It is one which has been adopted in the interest of the peace of society, and the

permanent security of titles.'" *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1052. See, also, *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117; *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525; *Hahn v. Kelly*, 34 Cal. 391. This salutary and politic doctrine has been recognized from very early times by the courts of this country. As far back as the year 1800 it was announced and applied in the case of *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, by Kent, J., in the following terse and concise language: "Every person is bound to take care of his own rights, and to vindicate them in due season and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded. * * * The general rule is intended to prevent litigation and to preserve peace; and were it otherwise men would never know when they might repose in security on the decisions of courts of justice, and judgments solemnly and deliberately given might cease to be revered, as being no longer the end of controversy and the evidence of right. The principle prevails both in courts of law and of equity. In bills of review which are brought before the same tribunal to review a former decree, it is a settled maxim of equity that no evidence or matter in the knowledge of the party, and which he might have used in the former suit, shall be the ground of a bill of review." Now, if the judgment sought to be avoided in this case has the same force and effect as a judgment of the same or a like court in any other action, it follows that, if valid, that judgment and the sale made under it effectually and completely cut off all right and title of the defendant Hawthorne, respondent's mortgagor, to the premises in question; and the said Hawthorne, not having redeemed the same from the sale, had thereafter no interest therein subject to mortgage or sale. And that such a judgment stands upon the same footing as a judgment in an ordinary action seems to us too plain for argument. But we are, however, not without authority upon the proposition. The point was raised and expressly determined in the case of *Eitel v. Foote*, 39 Cal. 439, in which the court said that the validity of the judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and is subject to attack in the same mode and by the same means, as a judgment in an action of any other class. The question, then, is, did the superior court have jurisdiction in the action for taxes to render the judgment which was rendered therein? We have no doubt that it had. It manifestly had jurisdiction of the subject-matter, and the judgment itself recites that the defendants were duly and regularly cited to appear, that they made default in that behalf, and that the default was duly and regularly entered;

and that recital, there being nothing in the record to contradict it, was an adjudication upon the point as conclusive upon all parties and their privies as the determination of any other fact in the cause. *Hahn v. Kelly*, supra.

Upon the introduction of the judgment and judgment roll in the tax case, the order of sale, the order confirming the sale, and the sheriff's deed, it became obvious, if, indeed, it was not obvious from the answer, that the title to the mortgaged premises asserted by appellant was paramount and adverse to the title of the mortgagor Hawthorne. An issue was thus presented which should not have been tried in that case. While this court has on several occasions ruled that the question whether the claim of a defendant in a foreclosure proceeding is or is not prior to the lien of the mortgage,—*Investment Co. v. Gilbert*, 13 Wash. 684, 43 Pac. 941; *Johnson v. Irwin* (Wash.) 48 Pac. 345,—we have, in common with nearly every other court in this country where the question has been determined, uniformly held that the title of a defendant, which is paramount and hostile to the title of the mortgagor, cannot be litigated in an action to foreclose a mortgage,—*California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co.*, 12 Wash. 138, 40 Pac. 732; *Murdoch v. Leonard*, 15 Wash. 142, 35 Pac. 751. In *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223, the court, in speaking of the impropriety of trying paramount titles to mortgaged premises in foreclosure suits, used this language: “* * * It has been held, uniformly and repeatedly, that such a title cannot be litigated in an action to foreclose a mortgage. * * * For to allow such issues to be litigated in an action to foreclose a mortgage, when the sale under the decree carries to the purchaser merely such title as the mortgagor had, would be to sanction a condemned practice, and confuse litigation. Titles like that asserted by appellant ‘must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance.’” But, notwithstanding this general rule of law, the learned trial court did try and determine appellant's title, against his objection, and, in our judgment, came to an erroneous conclusion upon the facts found and stated by the court. It set aside its own judgment in the back-tax case, not for want of jurisdiction in the court to render it, but for the reasons (1) “that said judgment and order of sale was entered for an aggregate amount of taxes against all said lots, and was not rendered against each lot for taxes due thereon”; (2) “that said judgment and order of sale was rendered against all said lots for the sum of \$7.56, together with penalty, interest, and costs”; and (3) “that said sale was made for an amount largely in excess of the taxes, penalty, interests, and costs due against the said property.” None of these grounds, nor all of them combined, were sufficient to justify the action of the learned trial judge. These objections were matter of defense to the original cause of ac-

tion in which the judgment was rendered, but they were not matters which could be properly considered in the case at bar, for the reasons already indicated. The learned counsel for respondent have cited a number of cases in their brief, in support of the ruling of the court below, in which courts of equity enjoined tax sales, set aside certificates of sale and tax deeds as clouds upon the plaintiff's title, and the like, but they are manifestly inapplicable to the case at bar. In those cases the sales were made, or attempted to be made, by ministerial officers, in the exercise of a power expressly conferred upon them by law. And the rule in such cases is that the mode of procedure prescribed by the statute is the measure of official power. But no such rule obtains with regard to judgments of courts of superior jurisdiction. Nor is the case of *Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346, an authority in favor of the respondent. In that case the defendant appeared, and in a proper manner, and “in due season,” asserted his rights, and appealed from the judgment which was rendered against him; and the judgment of the lower court was reversed upon the ground, among others, that the assessment of his property was not made in accordance with the statute, and consequently was void. The difference between that case and the tax case here under consideration is perfectly plain and palpable. The case of *Jones v. Driskell* (Mo. Sup.) 7 S. W. 111, is directly in point, and determines almost every proposition relied on by the respondents in accordance with our view of the law applicable to this case. That was an action of ejectment. The plaintiff had judgment in the circuit court, from which the defendant appealed. Plaintiff claimed title under a sheriff's deed to one D. P. Stratton, who purchased said real estate at execution sale on a judgment rendered by the circuit court of Cedar county against the defendant Holland in a back-tax suit, and by mesne conveyances from said Stratton to himself. The court said: “The defendants contend that plaintiff failed to acquire defendant Holland's title to said real estate by virtue of said conveyances, because—First, the judgment rendered in said tax proceeding is void; second, the sheriff's deed fails to properly recite the judgment; and, third, the judgment, upon review, was set aside before plaintiff purchased and received a conveyance of said real estate. The particular objections urged to the validity of the judgment are that the suit in which it was rendered was for delinquent taxes for the years 1869, 1871, and 1875, and that the assessor's book for 1869 was not verified as required by law, and that the taxes for 1871 and 1875 had been paid before the suit was instituted, and that the suit was for taxes assessed upon two distinct tracts of land, and the judgment was in solido for the gross amount found due on both tracts. These objections to the validity of the judgment may be considered together, for, unless they go to the jurisdiction of the court in which the judg-

ment was rendered, they can avail the defendants nothing. * * * The jurisdiction of the circuit court of Cedar county, upon the filing of the petition and the back-tax bill, followed by order and proof of publication of notice thereof to the defendant Holland, became absolute and complete, alike over the subject-matter of the action and of the person of said defendant, to determine all matters in controversy in the issue tendered by the petition. The matter to be inquired into was whether the amount of money claimed to be due and unpaid as taxes upon the real estate described in the petition and tax bill for the years therein mentioned was in fact so due and unpaid. The determination of this issue involved the consideration and determination of the question whether the tax claimed had been legally levied upon an assessment made in conformity to law, as well as whether the same remained due and unpaid, and chargeable upon the lands described. These were the issues tendered by the state in its petition. The law made the back-tax bill *prima facie* evidence of the truth of its affirmation. The defendant had his day in court to deny and disprove this *prima facie* case, by showing either that the tax charged was not a valid and subsisting tax, by reason of the fact that the property had not been legally assessed, the tax thereon had not been legally levied, or that, having been so assessed and levied, the tax had been paid before the institution of the suit. In such proceeding the defendant would have had the right to show that the tax for the year 1869 was not a legal charge upon said real estate, for the reason that there was no legal evidence that it had been assessed for such taxes, in that the assessor's book, the only legal evidence thereof, was not verified as required by law, and to show that the taxes for 1871 and 1875 had been paid before the institution of the suit, and therefore could not be charged upon said real estate. These were matters of defense to be set up and pleaded to the cause of action set out in plaintiff's petition in the back-tax suit, and, not having been so set up and pleaded, the defendant cannot now be heard to urge them in a collateral attack upon the judgment rendered in that action. As to all such matters the judgment is final and conclusive upon the defendant in any collateral proceedings; as much so as if such judgment had been rendered upon the same issuable facts in a case between private individuals. * * * The remaining objection to the validity of the judgment, that the sum was not against each tract separately for the amount found to be due on such tract, is answered by the case of *Gray v. Bowles*, 74 Mo. 419, and *Brown v. Walker*, 11 Mo. App. 226: 'Although the judgment, for that reason, may be erroneous, and subject to correction on error or appeal, it is not void; and, having been rendered by a court having jurisdiction of the person and subject-matter, the title of a purchaser of property bought at execution sale under such judgment is not affected by such er-

ror.' This case so completely covers and determines the questions raised in the case at bar that no other citation of authority is deemed necessary. It is conceded that the tax suit was properly brought under the provisions of the act of 1891 (chapter 6, tit. 9, 1 Hill's Ann. Code), and it appears from the record that the statute was substantially complied with. The judgment and decree of the court below, in so far as it adjudged that the judgment in the tax suit was null and void, that the sale by the sheriff and appellant's deed were invalid and of no effect, and that appellant had no right or title in or to the mortgaged premises, is, for the foregoing reasons, reversed.

GORDON and REAVIS, JJ., concur.

BROWN v. ELWELL.

(Supreme Court of Washington. Aug. 4, 1897.)

MORTGAGES—ASSIGNMENT—PLEADING AND PROOF—LIENS ON HOMESTEAD—VALIDITY—ESTOPPEL—CORPORATIONS—STOCK—POWERS—ADMINISTRATION—PROOF OF DEATH.

1. In foreclosure of a mortgage given to another than plaintiff, an allegation that plaintiff is the owner and holder of the note and mortgage, and that she obtained the same by purchase and assignment for a valuable consideration, is sufficient to admit evidence showing an assignment of the mortgage to another than plaintiff, and an assignment to plaintiff by a certain person, as administrator of the first assignee, in the absence of a motion to make the complaint more definite.

2. Letters of administration on the estate of a certain person are *prima facie* proof of the death of such person.

3. The general powers of a corporation include the power or right to loan money.

4. 1 Hill's Ann. Code, tit. 18, c. 1, prohibiting corporations from doing business until the whole amount of their capital stock is subscribed, but excepting corporations engaged exclusively in loaning money, even if it applies to foreign corporations, is no obstacle to the foreclosure of a mortgage given to a foreign corporation whose capital stock was not all subscribed, and which has power to do other business than loan money, where there is no evidence that such other power was ever exercised in the state.

5. A mortgage on land which is the mortgagor's homestead creates a lien thereon, though it does not contain an express surrender of the homestead rights, or mention the homestead, where it is in the ordinary form, purporting to convey the right, title, and interest of the mortgagor and wife to the mortgagee and its assigns, subject to the defeasance, and is properly acknowledged by both husband and wife.

6. Where the grantee in a deed of a homestead assumes payment of a mortgage thereon, he is estopped from denying its validity.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by Mary Brown against Estella M. Elwell and others to foreclose a mortgage. From a decree in favor of plaintiff, defendant Elwell appeals. Affirmed.

Phil. Skillman, for appellant. O. G. Ellis, for respondent.

SCOTT, C. J. This action was brought by the plaintiff to foreclose a mortgage on real estate executed by Freeman W. Brown and

wife to the Lombard Investment Company, which mortgage, and the debt secured thereby, plaintiff claimed to have been transferred to her. After the execution of the mortgage, Brown and wife sold the property to one McKenny, and he sold the same to defendant Elwell, who appeals from a judgment rendered against her in favor of the plaintiff. Her first contention is that the court erred in permitting plaintiff to show an assignment of the mortgage to Edward T. Brown, and an assignment from John S. Brown, as administrator of the estate of Edward T. Brown, to plaintiff, on the ground that no sufficient foundation therefor was laid in the complaint, and that there was no proof of the death of Edward T. Brown. On the trial the plaintiff introduced in evidence an assignment of the note and mortgage from the Lombard Investment Company to said Edward T. Brown, and an assignment by John S. Brown, as administrator of his estate, to the plaintiff, and also a certified copy of the letters of administration issued to John S. Brown, as such administrator, by the orphans' court of Delaware county, Pa.

The complaint contains an allegation that the plaintiff is the owner and holder of the note and mortgage, and that she obtained the same by purchase and assignment for a valuable consideration. No motion was made to make the complaint more definite in this respect, and the allegation was sufficient for the admission of the proof. The ultimate fact to be proven was the assignment of the note and mortgage to the plaintiff, and her ownership thereof; and the prior assignment by the Lombard Investment Company to Edward T. Brown was but a step in the proof going to prove title in the plaintiff, and it was not necessary to plead this assignment, especially in the absence of a motion to make the complaint set out the assignment more particularly. The grant of letters of administration to John S. Brown was *prima facie* proof of the death of Edward T. Brown, and there was no error in the particulars mentioned.

The complaint contained an allegation that the Lombard Investment Company was a corporation having power to loan money, and appellant contends that the articles of incorporation introduced in evidence showing that this corporation had general powers did not sustain this allegation; but this point is not tenable, for the right to loan money was included within its general powers.

It is next contended that the Lombard Investment Company had no authority to transact business in this state, for the reason that the capital stock of the corporation was \$4,000,000, and that at the date of the loan and the execution of the mortgage only \$2,600,000 thereof had been subscribed. It is insisted that said corporation had no authority to transact business in this state until all of its

capital stock had been subscribed. It appears that the corporation had complied with the provisions of the law authorizing any foreign corporation to do business in this state, under chapter 2, tit. 18, 1 Hill's Ann. Code, without reference to the provisions of chapter 1 of said title, which the respondent contends applies only to domestic corporations, but which the appellant contends applies to all corporations, whether domestic or foreign. But, conceding the contention of appellant in this respect, it is provided that the requirements thereof shall not apply to corporations engaged exclusively in loaning money on real estate, and the evidence shows that said corporation was only engaged in the business of loaning money on real estate within this state; and, although it had power to do other business under its articles, it is not shown that such power was ever exercised in any way here. There could be no presumption that it had ever engaged in any other business from the mere fact that it had power to do so. The finding of the court that said corporation was engaged in the business of loaning money in the state of Washington is sustained by the proof, and this is sufficient to support the judgment of the court, without entering upon any consideration of the question that the Lombard Investment Company was a corporation *de facto*, and that, the assignors of the appellant having entered into a contract with it for the negotiation of the loan, appellant could raise no question of its right to make it in an action to recover. The action in question is essentially different from one to enforce the collection of stock subscriptions, to which the cases cited by the appellant from this state relate.

It is next contended that the mortgage was not sufficient to create a lien upon the homestead right of Brown and wife. The fact that it was a homestead is conceded, and it is contended that the mortgage should have contained an express surrender of homestead rights, and that, as it did not contain a special clause to that effect, the deed by Brown and wife to McKenny, and by McKenny to the appellant, transferred such homestead to the appellant free of the mortgage lien. The mortgage was in the ordinary form, purporting to convey the whole right, title, and interest of Brown and wife to the Lombard Investment Company and its assigns, subject to the defeasance, and it was properly acknowledged by both of the mortgagors. It was not necessary, under the law, as we view it, for the mortgage to expressly mention the homestead in order to create a lien thereon by the mortgage. Furthermore, said appellant, in the deed to her, assumed the payment of the mortgage debt, and would be estopped from denying its validity. Affirmed.

ANDERS and REAVIS, JJ., concur.

LANCASTER SAV. BANK v. ELWELL.
(Supreme Court of Washington. Aug. 4, 1897.)
CORPORATIONS—PROOF OF INCORPORATION—AC-
CEPTANCE OF CHARTER.

In an action by a bank, purporting to be a foreign corporation, to foreclose a mortgage assigned to it, the only proof of incorporation was a legislative act of the foreign state incorporating it. *Held*, that possession of the note and mortgage, with proof of purchase and assignment to plaintiff in its corporate name, proved prima facie that they were purchased by plaintiff in a corporate capacity, and showed acts of user indicating an assertion of corporate functions, and hence an acceptance of the charter.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by the Lancaster Savings Bank, a corporation, against Estella M. Elwell and others, to foreclose a mortgage. From a decree in favor of plaintiff, defendant Elwell appeals. Affirmed.

Phil. Skillman, for appellant. O. G. Ellis, for respondent.

SCOTT, C. J. This action is similar to that of *Brown v. Elwell* (just decided) 49 Pac. 1068, but the appeal presents one other question not passed upon in that case. Appellant contends that there was no sufficient proof of incorporation, the only proof introduced thereon being a certified copy of an act of the legislature of the state of New Hampshire incorporating the plaintiff. It is contended that the plaintiff should have gone further, and shown an acceptance of the charter. It is conceded that such acceptance might be shown by the books of plaintiff formally accepting the grant, or by user. In view of this, it seems to us that the purchase and taking of the assignment of the note and mortgage sued on, and the bringing of the suit, are all acts of user sufficient to indicate an assertion of corporate functions. The possession of the note and mortgage, with the proof of the indorsement of the note and assignment of the mortgage from the Lombard Investment Company to the plaintiff, in its corporate name, proves, prima facie, that they were purchased by the plaintiff in a corporate capacity. This is sufficient to sustain the judgment of the court, without considering other grounds urged by the respondent in support of it. Affirmed.

ANDERS and REAVIS, JJ., concur.

ANDERSON et al. v. STADLMANN.
(Supreme Court of Washington. Aug. 2, 1897.)
HOMESTEAD—ACQUISITION—MORTGAGES—RIGHTS OF
WIFE—ABANDONMENT—STATUTES—REPEAL.

1. Laws 1877, p. 72, § 346, provides that to entitle a person to a homestead, he or she shall cause the word "homestead" to be entered in the margin of the recorded title. In 1881, said act was repealed by 2 Hill's Ann. Code, § 481, providing that the homestead may be selected at any time before sale. *Held* that, where husband and wife continuously dwelt on land from and after

1880, and in 1892 the husband mortgaged the land without the wife's consent, the wife might thereafter claim the land as a homestead, as against the mortgagee, though the entry of homestead under act 1877 had never been made, and the land had never been claimed as a homestead since that act was repealed.

2. Act March 13, 1895, changing the method of selecting a homestead, did not repeal 2 Hill's Ann. Code, § 481, providing that the selection may be made at any time before sale.

3. Where separate property of the husband was impressed with the homestead, and was afterwards mortgaged by him without the wife's consent, the wife might have the mortgage declared void, under 2 Hill's Ann. Code, § 483, providing that "nothing herein shall be construed to prevent the owner of a homestead from voluntarily mortgaging the same," and that "no mortgage shall be valid against the wife of the mortgagor, unless she shall sign and acknowledge the same"; and this whether or not the wife was precluded by 1 Hill's Ann. Code, § 1404, from selecting a homestead from the husband's separate property.

4. Upon change of law in the manner of the selection of a homestead, the neglect by an insane wife to make a selection under the new law, as required, does not work an abandonment of a homestead already selected by her.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by A. C. Anderson and others, executors of the will of James Osborne, deceased, against John Stadlmann, individually and as guardian of the estate of Emma Stadlmann, an insane person, to recover on a note, and to foreclose a mortgage securing the same. There was a judgment for plaintiffs against defendant individually on the note, but the mortgaged land was declared a homestead in favor of the insane person, and plaintiffs appeal. Affirmed.

White, Munday & Fulton, for appellants. John L. Neagle and Frank B. Wiestling, for respondent.

REAVIS, J. On May 3, 1892, John Stadlmann, defendant, executed his promissory note in the sum of \$1,300, payable in one year to the order of Osborne, deceased, and to secure the payment thereof executed and delivered a mortgage upon certain premises in the city of Seattle. In October, 1876, Stadlmann acquired this property by purchase. He was then an unmarried man. In October, 1880, he was married to the intervener and respondent, Emma Stadlmann, and they jointly took up their residence on the premises thereafter mortgaged, and have continuously resided thereon; and with two children, who had been born to them, were residing thereon on May 3, 1892, when the mortgage was executed by the defendant, John Stadlmann, his wife, Emma Stadlmann, not joining in the execution of the instrument. In September, 1892, the intervener, Emma Stadlmann, was adjudged insane by the superior court of King county, and committed to the asylum at Stellacoom, where she has since been confined. In September, 1898, the defendant, John Stadlmann, was, upon his own petition, appointed general guardian of the estate of his wife, Emma Stadlmann. The executors of the will of James Osborne, deceased, commenced this ac-

tion for judgment upon the note, and to foreclose the mortgage against the premises occupied by Stadlmann and wife and children. To the complaint in foreclosure the intervener and respondent, Emma Stadlmann, appeared by her guardian, and, by leave of court, filed a complaint in intervention, setting out the facts substantially as above stated, and praying that the premises described in the mortgage be adjudged and decreed the homestead of the defendant, John Stadlmann, and his family, and that the same be declared exempt from forced sale under execution to satisfy the note for which the mortgage was given as security.

No exceptions are taken by appellants to the findings of fact. The court found that John Stadlmann, for himself, he being the head of the family, both neglects and refuses to claim said above-described premises as the homestead exemption of himself and family as exempt from sale under execution to satisfy the note and mortgage. The superior court concluded that the plaintiffs were entitled to a judgment against the defendant, John Stadlmann, for the amount evidenced by the promissory note, and that the mortgaged premises, prior to and at the time of the execution and delivery of the mortgage, constituted, and ever since have constituted, and do now constitute, the homestead of the defendant and his wife and children; that the mortgage thereon is void as against Emma Stadlmann, the wife; and that the described mortgaged premises are exempt from sale under foreclosure to satisfy the note; and decreed a homestead exemption and costs in favor of intervener and respondent, Emma Stadlmann.

It is maintained by counsel for appellants that the premises, as separate property of the husband, could not be selected by the wife as a homestead, under section 1404, 1 Hill's Ann. Code. But this section provides that only one homestead shall be selected or held for the family, and it must embrace the dwelling house in which one or both of them reside. Appellants also maintain that when the defendant, Stadlmann, and wife fixed their residence upon the mortgaged premises, the act of November 8, 1877, was in force (Laws 1877, p. 72, § 346), providing that, to entitle a person to the benefit of the homestead exemption, he or she shall cause the word "homestead" to be entered of record in the margin of his recorded title to the same, and the date of such entry. Such entry was not made in this case, but the foregoing act of 1877 was repealed in 1881. Since 1881, section 481, 2 Hill's Ann. Code, has been the law, and provides such homestead may be selected at any time before sale. This court has held in *Wiss v. Stewart*, 47 Pac. 736, that the act of March 13, 1895, does not affect the provision in relation to the time of making the selection of a homestead, but simply undertakes to direct the manner of such selection; and the provision that such homestead may be selected at any time before sale is still in ef-

fect. Under the law of 1881, which was in force when the mortgage in controversy was executed by defendant, John Stadlmann, the only evidence of the homestead exemption in this state was occupancy by the family of the premises, and dwelling thereon. In the case at bar, John Stadlmann established his residence thereon with his wife, the intervener, and they had lived thereon for many years, and were residing there when the mortgage was executed. The wife could not make selection of any other dwelling, because it required the occupancy of the family to impress upon it the homestead character, and there could be but one homestead appropriated by the family. This court said in *Philbrick v. Andrews*, 35 Pac. 358: "It is necessary that the homestead should be occupied as such, and this is probably the only way by which it can be selected under our present laws. Certainly, it is the most effectual way; and the defendant, with his family, was so occupying the land in question during all of said times, and appellant was bound to take notice of such occupancy when he purchased,—in fact, he had actual notice." So, in the present case, at the time of the execution of the mortgage, the mortgagee had actual notice of the residence of the defendant, Stadlmann, and his family upon the premises. Section 482, 2 Hill's Ann. Code, provides: "When any person dies seised of a homestead, leaving a widow or husband or minor children, the survivors shall be entitled to the homestead." We think the homestead was impressed upon the mortgaged premises by the actual and continued residence thereon of the defendant, Stadlmann, and family. Section 483, 2 Hill's Ann. Code, provides: "Nothing herein shall be construed to prevent the owner of a homestead from voluntarily mortgaging the same. But no mortgage shall be valid against the wife of the mortgagor, unless she shall sign and acknowledge the same." The policy of the homestead exemption in this state is well understood, and, while counsel for appellants contend there is a distinction between the statutes of California, Michigan, and Wisconsin (particularly referred to by respondent) and the statutes of this state, we conclude that the object in each of them is the same. The purpose of the homestead exemption is to secure a shelter and home for the wife and family, and the policy of the law will permit an abandonment of such home only in the manner strictly pointed out by the statute. *Thomp. Homest. & Ex.* § 474, says: "Where the statute provides that, in order to make a valid conveyance of the homestead, the wife of the owner must join in the deed, a conveyance of the homestead by the husband alone is held by most courts to be void, not only as to the wife, but also as to the husband."

But it is urged by appellants that the failure of the defendant to select the homestead in the manner designated by the act of March 13, 1895, supra, must be treated as an aban-

donment of the homestead. If this were true, a conclusive answer to the contention would be that the intervener has been insane since the law went into effect, and that, in any view, she could at any time before sale make such formal selection, in conjunction with her husband; but, if the husband now declines to claim such homestead, the mortgaged premises having once been impressed with that character by him, the wife would, perhaps, so long as such residence continues, have the right to protect the homestead, when she had stated such refusal on the part of her husband. At any rate, the wife, who did not join in the execution of the mortgage, now in a formal manner in court asks that the homestead be released from the force and effect of a void mortgage.

As suggested heretofore, there is no substantial difference to be found in distinguishing the statutes from the states in the cases cited by respondent. The following cases are noted in consonance with these views: *Barber v. Babel*, 36 Cal. 11; *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551; *Dye v. Mann*, 10 Mich. 291, especially 296; *Williams v. Starr*, 5 Wis. 550; *Association v. Burghardt* (Mont.) 48 Pac. 391. The judgment of the superior court is affirmed.

SCOTT, C. J., and GORDON, J., concur.

STATE ex rel. RIPPETOE v. CHEETHAM,
Auditor.

(Supreme Court of Washington. Aug. 26, 1897.)

STATUTES—VETO—APPROPRIATIONS—STATE OFFICERS—DUTIES.

1. Laws 1895, p. 58, § 1, providing that it is unlawful for state officers "to create a deficiency or incur liability or to expend a greater sum of money than is appropriated" for the use of their departments, is binding upon the state auditor when asked to issue salary certificates to teachers in a school for which no appropriation at all has been made.

2. The mention of a certain school in an enumeration of schools contained in an act establishing a uniform school system for the state, together with a general provision therein for the payment of teachers' salaries and other lawful debts, did not nullify a previous veto of an appropriation for that school, made by special item in a general appropriation bill.

Application for mandamus by the state, on the relation of J. J. Rippetoe, against Neal Cheetham, state auditor. Defendant demurs to the petition. Demurrer sustained.

Graves, Wolf & Graves, for relator. Patrick H. Winston, Atty. Gen., for respondent.

DUNBAR, J. This is an original action in mandamus to compel the state auditor to issue a certificate to the plaintiff, the principal of the Cheney Normal School, for the sum of \$200, stipulated price for a month's salary as president of said normal school. It is conceded that the plaintiff was duly appointed principal of said school by the board of trustees of said institution prior to the 1st day of April, 1897,

and contracted with them to act as principal of said school for said month of April at the agreed and stipulated price and salary of \$200; that he duly qualified as such principal, and entered on the performance of the duties thereof; that he continued in the said office of principal, and performed the duties thereof, with the knowledge and consent and approval of the said board of trustees, and carried on the said normal school in that capacity, during the said month of April; and that his said salary, by the contract with the board, was payable monthly, and that said salary should continue at the sum of \$200 per month, payable monthly, so long as he should perform the duties of said office. A demurrer was filed to this petition, to the effect that it did not state facts sufficient to constitute a cause of action, and the case is to be determined here upon the demurrer. The refusal of the auditor to issue the certificate prayed for was based upon the action of the governor in vetoing the appropriation for the normal school of Cheney, which appropriation was passed by the last legislature. It is conceded by the plaintiff that the auditor could not be compelled to issue a warrant in his favor, but that he can be compelled to issue the certificate demanded under the provisions of section 22 of the act of March 27, 1890. Whether this is a case that would fall within the provisions of said act is not necessary to determine, for we are satisfied that such provisions were annulled by the act of March 7, 1895 (page 58), section 1 of which is as follows: "That it shall be unlawful for any of the state officers or trustees, managers, directors, superintendents or boards of commissioners of any of the public institutions of the state of Washington, or for the officers of any of the departments of the state of Washington, to create a deficiency, incur liability, or to expend a greater sum of money than is appropriated by the legislature for the use of said public institution or department." And section 2 provides the penalty for violation of the provisions of section 1. It is claimed, however, by the plaintiff that this act does not apply, because it is alleged that it is impossible to receive an appropriation when there has been no appropriation, and it is impossible to incur liability or spend a greater sum than appropriated when none has been appropriated. We do not think this reasoning is sound. It seems to us that this is exactly the kind of case which was intended to be met by the act just above quoted, and if, as is argued by the plaintiff, this certificate constitutes no claim against the state, then the court should not be called upon to compel a state officer to do a useless thing. The governor is clothed by the constitution with authority to veto. He is a part of the legislative department, and has exercised his constitutional right to veto this appropriation, and the veto act has all the force and effect of an act of the legislature refusing to make the appropriation. No appropriation, then, having been made, the act of March 7, 1895, is conclusive of this case.

It is also insisted by the plaintiff, and is true,

that by the fifth subdivision of section 215, Act March 19, 1897, it is made the duty of the trustees to audit all accounts and certify bills allowed to the auditor, and it is then made his duty to draw warrants for such as he may find to have been properly or legally allowed. This bill was signed by the governor four days after he had vetoed the appropriation for the Cheney Normal School, and it is contended that the fact that this bill especially provides for this school, and directs the trustees to conduct it, would work a repeal of the act of 1895; and, also, that, being a later act than the act of the governor in vetoing the appropriation, it would have the effect of repealing, in a sense, the veto. We do not think this contention can be sustained. The act of March 19, 1897, is a general act, relating to the conducting of schools generally. It is known as the "Code of Public Institutions of the State of Washington," and is an act to establish a general uniform system of public schools in this state. It is true that the Cheney Normal School is included in an enumeration of the various normal schools then in existence, but other normal schools were included in the bill, the appropriations for which had not been vetoed, and we know of no rule of interpretation which would warrant us in holding that the passage of this general act worked a nullification of the veto of a special item in the general appropriation bill.

We think the complaint does not state facts sufficient to constitute a cause of action against the auditor, and the demurrer will therefore be sustained.

SCOTT, C. J., and REAVIS and ANDERS, JJ., concur.

DENNY v. HOLLOWAY, Clerk.

(Supreme Court of Washington. Aug. 28, 1897.)

CLERKS OF COURT—FEES—EXAMINATION OF GUARDIAN'S ACCOUNT.

Code 1881, § 2086, allowed the judge of probate for examining accounts, each 100 words, counting two figures for a word, 25 cents. Const. art. 27, § 10, vests in the superior court the jurisdiction of all proceedings in probate, and all the business of the probate court. The law of 1891 (2 Hill's Ann. Code, § 845) imposes on the judge of the superior court the duties of settling the accounts of guardians, etc. Laws 1891, p. 380, § 2, requires all the records of the probate court to be kept, and the fees allowed under the probate act to be collected, by the clerk of the superior court. *Held*, that such clerk is a mere ministerial officer, and is not authorized to make an examination of a final report of the guardian of an insane person, and hence he is not authorized to collect a fee of 15 cents a folio for making such examination, by St. 1893, p. 421, div. "Clerks of the Superior Court," § 1, subd. 27, which provides as a fee "for examining accounts, counting each two figures as one word, per folio, 15 cents."

Appeal from superior court, King county; William Hickman Moore, Judge.

Motion by D. T. Denny, as guardian of the estate of John H. Nagle, an insane person, for a writ of mandamus to compel George M. Holloway, as clerk of the superior court in

and for King county, to file such guardian's account and report, or show cause why he did not file the same. From a peremptory order directing the clerk to file such account and report, he appeals. Affirmed.

James F. McElroy and John B. Hart, for appellant. W. W. Wilshire, for respondent.

REAVIS, J. The respondent, Denny, as guardian of the estate of Nagle, an insane man, presented to the appellant, Holloway, who is clerk of the superior court of King county, his final report and account as such guardian for filing, preparatory to requesting an order of court fixing the time and prescribing notice for the hearing and settlement of the account, and therewith tendered to appellant, as such clerk, all the fees prescribed by law for filing the account and report, and all the papers connected therewith, but refused to pay, upon demand of the clerk, 15 cents per folio as fee for an examination to be made by the clerk of the report and account. Appellant refused to file the account and report and papers connected therewith, on the ground that it was his duty as clerk to make such examination, and to collect the fee therefor as public revenue accruing to the county. There was no order of the superior court requiring the clerk to make an examination of the account and report. Respondent then filed his affidavit, and moved for a writ of mandamus to compel the clerk of the court to forthwith file the account and report, or show cause why he did not file the same. The appellant appeared by the prosecuting attorney, and demurred to the affidavit and order to show cause, on the ground that they were insufficient to justify a peremptory writ. On hearing the court overruled the demurrer, and entered a peremptory order directing the appellant, as clerk, to file a final account and report, from which peremptory order this appeal is taken by the clerk.

The question involved is whether appellant, as clerk, is authorized, of his own motion, against the objection of respondent, to require respondent to submit a report and account to the clerk's examination, and to pay 15 cents per folio as a fee therefor, in addition to the other fees prescribed by law for the filing of the papers. Appellant rests his contention entirely upon the statute (section 1, Fee Bill; St. 1893, p. 421, div. "Clerks of the Superior Court," subd. 27), which provides as a fee "for examining accounts, counting each two figures as one word, per folio 15c," and argues that, under section 1299 of the Code of 1881, it was the duty of the probate judge, in the settlement and allowance of accounts of executors, administrators, and guardians, to allow or reject claims against the estate of the deceased or insane person. Under section 2086, Code 1881, div. "Judge of Probate Court," the judge of said court was allowed for examining accounts, each one hundred words, counting two figures for a word, 25 cents, which said judge collected as a fee for his own use.

But the jurisdiction of all proceedings in probate, and all the business of the probate court, was by the constitution vested in the superior court. The law of 1891 (2 Hill's Ann. Code, § 845) imposed the duties of settling the estates of deceased persons, and the accounts of executors, administrators, and guardians, and the allowance or rejection of claims against their estates, on the judge of the superior court. All the records of the probate court are, by Laws 1891, § 2, p. 380, kept by the clerk of the superior court, and the fees allowed under the probate act are collected by him. The clerk of the superior court is a mere ministerial officer, and is not authorized to make any examination of such an account and report as was filed by respondent. The examination and settlement of the account is vested in the judge of the superior court.

We do not think the clerk is authorized to collect any fee for examination of the report and account, and the judgment of the superior court is affirmed.

SCOTT, C. J., and DUNBAR and ANDERS, JJ., concur.

NEWTON v. BARNES.

(Supreme Court of Oklahoma. July 30, 1897.)

INJUNCTION—POSSESSION OF LAND.

One in whose favor a decision has been rendered in a contest before the United States land department cannot maintain an injunction suit to obtain possession of part of the premises affected by the decision, of which he has never been in possession, and which the other party to the contest has for a long time had possession of; the remedy at law being adequate, and this being an invasion of the right to jury trial. Per McAttee, J., dissenting.

Dissenting opinion. For majority opinion, see 48 Pac. 190.

McATEE, J. (dissenting). It appeared from the amended petition, answer, and reply upon which this case was heard that the plaintiff had been for four years preceding the commencement of the action an actual resident upon a part of the tract of 160 acres of land here contended for as a homestead, and in actual possession of 121 acres thereof, and that the defendant was residing upon a portion of the land, and in actual possession of 39 acres of it; that the defendant would, unless restrained by the court, continue to reside upon, improve, and cultivate a portion of the tract of land; and that, as it was alleged, he was trespassing upon the right of the plaintiff to the full and exclusive possession of all of said tract of land, and that he would, "unless restrained by the court, break out and destroy all the meadow and pasture land on the said tract"; and that the continued trespass thereon constituted an irreparable injury to the plaintiff, for the reason that the plaintiff had no adequate remedy at law; and declared that he "believed the defendant to be utterly insolvent,"

and that the "plaintiff would have no recourse in damages." The petition prayed for a mandatory injunction restraining the defendant, and all persons acting under him, from continuing to reside upon, improve, or cultivate any portion of said tract of land, and requiring him and all persons under him to remove from said tract of land within a reasonable time, and that he should be perpetually restrained and enjoined from using or occupying any portion of the land, or interfering with the full possession by the plaintiff of the whole tract of 160 acres. A demurrer of the defendant to the amended petition that (1) it did not state facts sufficient in law to constitute a cause of action against the defendant, and to entitle the plaintiff to a mandatory or any other injunction, and (2) that the court had no jurisdiction of the subject-matter, the title to the tract of land described therein being in the United States, and no final certificate or patent having been issued to the plaintiff, was by the court overruled, and the defendant permitted to answer. The defendant, by his answer, denied that the plaintiff was the equitable owner, or had any equitable or any other interest in the premises described in the petition, and denied any right of possession on the part of the plaintiff; set up a state of facts upon which he averred that he was at law entitled to have the patent for the land under the homestead laws of the United States; averred an utter failure of evidence on the part of the plaintiff in the land contest; set forth and charged facts which, if true, would have amounted to a fraud upon the rights of the defendant; averred that the rulings of the land department against the defendant were made under a mistake and misapprehension of both the law and the facts of the case, and without any valid evidence, and upon false and fraudulent statements of the plaintiff; and set forth facts charging that the land department had never acquired any jurisdiction over the defendant, had never made him a party to the proceedings in the land department, and that all the actions under the proceedings in the land department were illegal, and absolutely void. Upon the state of facts as recited, the defendant declared the equitable title and right to the land to be in himself; that by the rulings in the land department, and upon the mistakes and frauds aforesaid, he could not be divested of his constitutional right to a hearing and determination in this court upon the questions of law affecting the same, and applicable to the facts stated in the answer. The defendant averred that the plaintiff had come upon the land and taken possession of all except the 39 acres in question in the case, and throughout the last four years had been a trespasser upon and forcibly occupying all of the land except said 39 acres. Thereupon a mandatory injunction was issued. The plaintiff filed a joint demurrer and reply, demurring to the facts contained in the

second and fourth paragraphs of the answer of the defendant, which averred the acts of fraud and perjury, and that by these acts the plaintiff had procured the cancellation of the defendant's entry, upon the ground that these averments did not constitute a defense to the facts alleged in the petition of the plaintiff, and for an answer denied the facts set out in the third paragraph of the answer. The court thereupon decreed that the defendant should be "restrained and enjoined from in any way interfering with the entire possession of the plaintiff to the land described," and "from residing upon, cultivating, pasturing, improving, or occupying any portion of the land mentioned," and undertook to order that the defendant should be permitted at any time within 60 days to remove his buildings and improvements, and to provide that he "might be permitted to reside upon said land for said period of sixty days," and "should have the right to use and occupy a tract of land not exceeding ten acres immediately surrounding his house, and should only be permitted during said period of sixty days to enter upon the land of which he had been in possession for the purpose of removing in a lawful and peaceable manner his improvements thereupon." A certified copy of a motion for review in the general land office, showing said motion had been finally overruled by the secretary of the interior, was filed in the case as evidence in support of the petition, showing that the motion for review had been finally overruled, and that the entry made by the defendant had been canceled. The plaintiff does not aver a patent from the United States. He makes out and stands upon an inchoate right to the land, as based upon the final order made by the secretary of the interior.

Upon this state of facts appearing upon the pleadings, the court below, having undertaken to give to the plaintiff possession of the 89 acres shown to be in the complete possession of the defendant, was sustained by the opinion of the court here. In this conclusion I cannot concur. I understand the case to be one in which the statutes of the territory afford a plain, adequate, and sufficient relief at law, in which the defendant is entitled to a jury; and I understand that, even in the absence of a special statute, the defendant would be entitled to a jury to try his right of possession by reason of that provision of the organic act (section 9) which provides that "the district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." And it is provided by article 7 of the constitution of the United States that in suits at common law, where the value in controversy shall exceed \$20, "the right of trial by jury shall be preserved and no fact tried by a jury shall be other-

wise re-examined in any court of the United States than according to the rules of the common law." These provisions are limitations upon, and prescribe the jurisdiction of, the district courts of this territory and the supreme court of this territory, and they prescribe the right of trial by jury in all cases which at the time of the enactment of the constitution of the United States were suits at common law. It is therefore one of the guaranties of the constitution of the United States that "the right of trial by jury is preserved,"—that is, kept just as it was at the time of the enactment of that constitution,—and it is my understanding that the right of possession of real estate is one which, at the time referred to, was never otherwise put at stake than in a court of law, in which either party was entitled to a trial by jury. Among the authorities which are cited to the converse of the proposition are High, Inj. § 360, and note, and 2 Story, Eq. Jur. § 959. These authorities do not sustain the proposition contended for by the court, for, while it is stated in High, Inj. § 358, that if there is a "neglect to execute such decrees" it "will warrant a mandatory injunction to deliver possession," yet this proceeding will, according to the authority of this text writer, only be taken after "proceedings have been instituted to establish, in a court of equity, the title to real estate," and the authority upon which the passage is based, to wit, a citation from *Garretson v. Cole*, 1 Har. & J. 373, is that "it is directed in certain cases by the aforesaid act of assembly, * * * after a title to land has been established by the adjudication of a court of equity." And in confirmation of the position taken by the court here a further citation is made from the note to section 358, being an extract from 2 Story, Eq. Jur. § 959, to the effect that "a judicial writ or execution for possession of the property in controversy" will issue out of courts of equity to effectuate their own decrees. So far, then, the authorities upon which the court reached its present conclusion go to the extent of declaring that "when courts of equity, in pursuance of the aforesaid act of assembly," the character of which is not indicated, and "after the title to land has been established by the adjudication of a court,"—as, for example, in foreclosure proceedings,—and having acquired jurisdiction under some other ground and for some other purpose, admitted as a necessary ground of equity jurisdiction, "It sometimes effectuates its own decrees" by writs for possession of the property in controversy. No conclusion can be drawn from these authorities that a court of equity has ever taken the initiative solely for the purpose of delivering the possession of real estate from one in whom it has been complete for years to another who has had it not. On the contrary, it is declared in High, Inj. § 360, that: "Where the object of an injunction bill is merely to obtain pos-

session of land upon which defendant has entered and committed trespasses and removed the products of the land, the relief will be denied, the remedy at law being ample and complete for the recovery of the premises;" citing *Pfultz v. Pfultz*, 14 Md. 376; *Schlecht's Appeal*, 60 Pa. St. 172; *Tomlinson v. Rubio*, 16 Cal. 202; *Tevis v. Ellis*, 25 Cal. 515. In order to authenticate his position that writs of possession will sometimes be granted by courts of chancery in order to "effectuate their decrees," Judge Story has referred to *Eden, Inj. c. 17*, pp. 363, 364, 380, and to *Kershaw v. Thompson*, 4 Johns. Ch. 612-618, and confirms the position by liberal citations from the views of Chancellor Kent in the fourth volume of the Commentaries (pages 191, 192, lect. 58) that: "Upon a decree for a sale [of mortgaged property] it is usual to insert a direction that the mortgagor deliver up possession to the purchaser." And Chancellor Kent further proceeds to remark that the "power of a court of equity to require delivery of possession by injunction" is founded upon the simple elementary principle that the right "of a court to apply the remedy is co-extensive with the jurisdiction of the subject-matter." And among the few authorities relied upon by him for this declaration of the doctrine are the cases of *Garrettson v. Cole* and of *Kershaw v. Thompson*, in which Judge Story says that the "whole of the leading authorities have been historically and critically examined." The case of *Kershaw v. Thompson*, thus relied upon by both Chancellor Kent and Judge Story, was a case for the foreclosure of mortgage, and simply declared that upon "foreclosure of the equity of redemption and sale of the mortgaged premises" the court would order the possession to be delivered to the purchaser, and not drive him to an action of ejectment at law; and said that it "might safely be laid down as a general rule that the power to apply the remedy is co-extensive with the jurisdiction over the subject-matter," and that "a bill to foreclose the equity of redemption is a suit concerning the realty, and in rem; and the power that can dispose of the fee must control the possession. The parties to the suit are bound by the decree; their interests and rights are concluded by it; and it would be very unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court." A brief marginal statement of the case was that it was a bill to foreclose an equity of redemption of a mortgage, and was a suit in rem, and that possession followed the decree, and would be enforced by the court. The decree in the case was that of Chancellor Kent himself, and it supported no other doctrine than that when for some purpose a court of equity had properly attained control of real estate—as, for example, in the foreclosure of a mortgage—it would give the right of possession in order

to effectuate its own decrees; and neither of these authorities justifies the conclusion sought to be drawn from them that a court of equity may assume control of real estate for the purpose of delivering possession, and as a primary object of the proceedings.

It is again said, however, by the court here, upon the authority of 1 Spell. Extr. Relief, § 370, that the rule is announced by that author as follows: "But it is a general principle that the legal remedy which warrants the refusal of relief by injunction must be plain and adequate; in other words, as practical and efficient for attaining the ends of justice and its prompt administration as that of equity." And that in the same section the author says: "The test of equitable jurisdiction in the application of this principle to a particular case usually depends greatly upon the character of the case as disclosed in the proceedings." The author thereupon cites a large number of authorities. I have examined them all, and in not one of them does the court undertake to hold, as an original proposition or motive of equitable proceeding, that the judge, sitting as a chancellor and without a jury, has the right to transfer the possession of real estate. Nor do they go further, when rights in relation to real estate have been the subject of decision, than to declare that the court will not even interfere to prevent a mere trespass, unless the complainant has been in the previous undisturbed possession of the property. But the same author does, under a claim of right, in section 369 of his work, next preceding the section cited as authority by the court here, state that "a preliminary injunction should not be granted to restrain" even "a trespass which can be compensated in damages, even if it should appear that the defendants are irresponsible, unless there be some pressing injury or danger in the delay. And the complainant should show clearly the absence of an adequate remedy at law." And the author, for his authority, says in a note that: "This rule was expounded by Chancellor Kent, with his usual ability, in *Stevens v. Beekman*, 1 Johns. Ch. 318, where he said: 'This is a case of ordinary trespass upon land and cutting down the timber. The plaintiff is in possession, and has an adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction, and, if the precedent were once set, it would lead to a revolution in practice, for trespasses of this kind are daily and hourly occurring. I doubt exceedingly whether this extension of the ordinary jurisdiction of the court will be productive of public convenience.' " The chancellor concluded that: "There is nothing in this case so special and peculiar as to call for this particular relief, and especially when I am not justified by any established practice and precedent." The case of *Watson v. Sutherland*, 5 Wall. 74, cited as authority, was a case in which the plaintiff was threatened with loss of trade, destruction of his credit, and failure of his business prospects, and the consequences of an execution,

if levied upon his entire stock in trade upon a judgment against another person, and his application was based upon the imminent ruin of his business, and the destruction of his future prospects, if the immediate intervention of the court was not given, and in that case Mr. Justice Davis most properly gave the relief, and made the statement, cited by the court, that "a particular case must depend altogether upon the character of the case as disclosed by the pleadings." The case of *Boyce v. Grundy*, 8 Pet. 210, also relied upon by the court, was a case where a bill in chancery was filed in the circuit court of West Tennessee by Felix Grundy against the appellants, the executors of Boyce, to enjoin a judgment at law, and to rescind a contract. The case had nothing to do with the possession of real estate. The case of *English v. Smock*, 34 Ind. 115, cited by the court here, was an injunction to restrain the issuing of county bonds. Neither of the cases thus cited by the court as fortifying its position has any reference to the possession of real estate, and furnishes to us no guide whereby we may be directed, as Chancellor Kent made it his rule to be, "by established practice and precedent."

In support of its position the court has further cited the case of *Wood v. Murray*, 85 Iowa, 505, 52 N. W. 356. The case was one in which the defendant entered, as a homesteader, certain land in possession of the widow and children of the decedent, who had filed his declaratory statement under the pre-emption law, and the question of title was pending before the secretary of the interior. The plaintiff had been in quiet, peaceable, and actual possession of the land for two years. Her continuous and actual possession of the land was undisputed, and the court granted a temporary injunction "restraining the defendant from cultivating said land, or in any manner interfering with the peaceable possession of the plaintiff in the same," and said that the question was, "under the facts and circumstances, simply whether the defendant should be restrained from interfering with the plaintiff's possession pending the determination of her rights by the secretary of the interior." The injunction was granted by the court, as it was declared, "simply to maintain the parties in statu quo until their rights are determined by the proper tribunal." The order granted by the court went no further than to restrain the defendant from continuing certain acts of trespass. The case was not one asserting the original jurisdiction of a court of equity to take the possession of land from one person and give it to another. Again, the court cites *Lee v. Watson* (Mont.) 38 Pac. 1077. The case was one brought to restrain interference with the possession of land, in which the petition averred that the defendant had been guilty of repeated trespasses; that the plaintiff was the owner and in possession of the land in question. Those averments were not controverted, and the conclusion of the court goes no further than that, "the plain-

tiff, being the legal owner of the land, and in possession, either actual or constructive, this showing was sufficient as against mere trespassers; that is, as against those who do not show some right of possession,"—citing *Gonzales v. Ross*, 120 U. S. 605, 7 Sup. Ct. 705. In the case of *Jackson v. Jackson* (Or.) 19 Pac. 847, also cited in the opinion of the court as a precedent, it appeared upon petition for injunction that the plaintiff had been in quiet possession of the land in question for two years, complying with all the requirements of the laws of the United States in doing all necessary acts of residence and cultivation up to the 8th of February, 1888, at which time the defendant unlawfully and wrongfully took possession of the premises and had driven and forcibly resisted the plaintiff from taking possession thereof. The court said that the case was one which required a speedy and summary remedy, otherwise the plaintiff would necessarily lose the benefit of his pre-emption right to the premises, and that, therefore, the court held "that he is entitled to the possession of the premises for the purpose of performing those acts required to be done by the pre-emption law; and that no other person has a right to enter the land, or to interfere with his occupancy thereof, so long as his entry remains uncanceled." The ground of the injunction was that the plaintiff's right might not be jeopardized to prevent his title thereto under the laws of the United States.

These cases do not support the position of this court that a plaintiff, having been for four years in the actual, peaceable, and complete possession of 120 acres of the land of a homestead, and having had the final award in the land department made to him of the whole homestead as far as the jurisdiction of the land department was concerned, as his rights not being jeopardized by having no established residence upon the land, would be granted an injunction, and a contestant deprived of his similar peaceable and complete possession of the remaining 40 acres of said tract of land, and that a court of equity has power to interfere for the purpose of transferring the possession of land at such a juncture, and under such circumstances, as a general proposition. And it certainly does not sustain the contention of this case that an order of the chancellor is an adequate and constitutional substitute for a trial by jury, that the plaintiff has obtained his award in the land department by the instrumentality of fraud, mistake, and perjury, which are specifically alleged, and admitted by the demurrer, for all the purposes of this case, and to its whole extent upon the pleadings. And the cases cited and relied upon by the court thus furnish no warrant or authority for the step which it has here concluded to take. Nor, so far as I have been able to discover, can any "established practice or precedent" for this course be found. On the contrary, I believe the rule to have been universally held, not only prior to the 4th day of July, 1776, and prior to the time of the enactment of the

constitution of the United States, but also since that time, in both the English courts and the supreme court of the United States, as well as the most respectable courts of this country, to regard the recovery of the possession of land as an original motive of proceeding to belong to the domain of law; and, when the defendant is found in the peaceable possession of a specific tract of land, courts of chancery have heretofore uniformly refused to assume jurisdiction for the purpose of putting one party out of possession and another into possession, without the right of trial by jury; and that such a construction of general maxims as are quoted in the opinion of the court is aside from their true meaning and intent. On the contrary, the equity jurisdiction has been uniformly refused when applied for to recover the possession of real estate. It was said in *Bracken v. Preston*, 1 Pin. 584, that "courts of equity will rarely, and only under peculiar circumstances, entertain jurisdiction" even "in cases of tort"; and that when they do "an injunction will be granted to restrain trespasses in order to quiet the possession, or when there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the mischief, or where the courts of law cannot give a complete remedy"; and that, in order to justify the interference of a court of equity even to restrain trespasses the complainant must, in general, be in possession, or have established his right at law to bring an action to recover possession; and the court will act in such cases with great caution, and they will not afford relief even to restrain the commission of tortious acts when the complainant is out of possession. And it was declared that "the plaintiff's exclusive right must be admitted by the defendant or established by law to warrant an interference of a court of chancery," and that an injunction will then only be issued in aid of a decree in chancery in putting a purchaser into possession, and is followed by a writ of assistance, for authority, upon the authorities cited above,—*Eden*, Inj. 261, *Story*, Eq. Jur. 226, 227, and *Kershaw v. Thompson*, 4 Johns. Ch. 609,—and then declared that "the injunction would never be granted in a case like the one now under consideration," which was an application for injunction to restrain the defendants from digging mineral on the land pending an action of forcible entry and detainer, it appearing that the defendants were in possession under a claim of right. And the declaration is expressly made that, "if an appeal should be made for the possession of land, which is commonly called an 'ejectment bill,' it would be demurrable, for the proper redress is at law."

The case of *Tomlinson v. Rubio*, 16 Cal. 203, was upon an application to restrain the defendants from taking possession of certain real estate in which the plaintiffs averred title and possession to be in themselves, and that, if the court did not grant the injunction, and if the defendants were permitted to take the posses-

sion which was sought to be restrained, that the plaintiffs would be ruined in their business, and their property would be destroyed, and it was held upon that state of facts that these allegations were insufficient to authorize an injunction. There being no averment of insolvency of the defendants, and the complaint not showing that there is no adequate remedy at law, the court declared that in such cases forcible entry and detainer would be a speedy mode of regaining possession, if taken by the defendant; and for other damages the usual proceedings at law would suffice. In *Ross v. Hobson* (Ind. Sup.) 26 N. E. 775, in an action to rescind the sale of land, the defendant, by a cross complaint, sought to recover possession of the land, and to quiet his title thereto, and declared that the issues should be tried by the court. The application was refused, "since the issues in the cross action were clearly triable by a jury as a matter of right, upon the request of either party." *Martin v. Martin*, 20 N. E. 763, was a case in the supreme court of Indiana (decided April 6, 1889) in which the relief sought was the possession of real estate. The court declared that: "Whenever the cause of action is one that can only be enforced by invoking the equitable powers of the court, then the right of trial by jury does not maintain; but, if the cause of action does not depend on the equity jurisdiction of the court, then a jury trial may be demanded." In *Tevis v. Ellis*, 25 Cal. 515, the plaintiff was in actual possession of land, and sought equitable relief for the protection of that possession; but it was refused, the court saying that "the remedy at law would be speedy, adequate, and complete." And in *Donahue v. Melster*, 25 Pac. 1096, the supreme court of California declared that under the constitution of that state, which provided "that the right of trial by jury shall be secured to all, and remain inviolate, defendant, in an action to quiet title under the Code of Civil Procedure of California (section 738), is entitled to jury trial on the issues of prior possession and ouster when his verified answer shows that shortly before the commencement of the action he was rightfully in possession, and was ousted by the plaintiff, and wrongfully kept out of possession by him." The court declared that: "It is quite clear that the legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the state constitution which says that the right of trial by jury shall be secured to all, and remain inviolate." And the court goes on to say that under the laws of that state, if a decree is to deal "with ordinary common-law rights clearly cognizable in courts at law it is to that extent an action at law; that the proper course to be pursued in such a case is clearly pointed out by Judge Field in *Curtis v. Sutter*, 15 Cal. 259; and that the legislature attempted in several different acts to avoid the right of trial by jury by providing new proceedings in equity for the

determination of issues which parties clearly had the right to have determined by courts of law and juries; and in every instance the court held, either that the act was unconstitutional, or that it should be so construed as not to cut off the right of trial by jury. In one of those cases the court, commenting on the attempt above stated, says: 'If this could be done, there is not an ejectment in the common-law courts which, by the inversion of parties, could not be brought into a court of equity.' *Haines' Appeal*, 73 Pa. St. 172. In another case the court, speaking of the provisions of the constitution, says: 'It cannot mean that the legislature conferred upon the supreme court and the courts of chancery any question which has always been triable according to the course of law by a jury.' *Norris' Appeal*, 64 Pa. St. 281. In another case the court say that: 'An act of the assembly transferring any part of the jurisdiction of the common-law courts to a court of chancery would be unconstitutional.' *Tillmes v. Marsh*, 67 Pa. St. 508. The limits of this opinion will not allow more extended quotations from other cases, but the point will be found to be fully discussed and pointedly decided in *Coal Co. v. Snowden*, 42 Pa. St. 488; *Norris' Appeal*, 64 Pa. St. 275; *Haines' Appeal*, 73 Pa. St. 169; and *Tillmes v. Marsh*, 67 Pa. St. 507."

Coal Co. v. Snowden, 42 Pa. St. 488, was upon a bill in equity to obtain the enjoyment of mining rights and privileges upon the land described in the bill. The supreme court of that state, by Strong, J., afterwards of the supreme court of the United States, said that the bill was what "is sometimes called an 'ejectment bill,' and is demurrable," and "charges nothing to give the court equity jurisdiction. * * * It has never been held that equity courts have jurisdiction of actions founded on legal title, brought by one tenant in common against an alleged co-tenant to obtain possession or enjoyment of land"; and that there is, "and always has been, a class of cases which are exclusively cognizable in courts of law, and over which courts of equity have no jurisdiction, is not to be doubted, and we think the complainant's is one of them"; and that "trial, according to the course of a court of chancery, then, is trial by a single judge"; and that, "if there is any right to which, more than others, the people of Pennsylvania have clung with unrelaxing grasp, it is that of trial by jury. They brought it with them from the land of their fathers. In every constitution which has been adopted they have taken care to secure it against infringement, and put it beyond the power of either executive, the legislature, or the courts to take it away from any individual." The constitution of that state provided that "trial by jury shall be as heretofore, and the right thereof remain inviolate." "What can this mean but that the right of having controverted questions of fact in common-law cases decided by a jury should be beyond the reach

of any department of the government, whether it be legislature, the executive, or the judiciary? This was the right which had always been enjoyed before, and, if the constitutional provisions were not intended to protect that in all its length and breadth, they can mean nothing." The learned judge said that the legislature of the state had no power to modify this provision of the constitution by an enactment which should undertake to relieve in equity in such cases as that in question, but that "any question which has always been triable according to the course of law by a jury," should still be so tried. And he said further that, if it were held otherwise, "then an ejectment founded solely on legal title, an action of debt on bond, or a replevin, or an action of trespass, may be sent into chancery, all contested facts in it be decided by the judge, and the intervention of a jury be unknown. * * * Were it admitted that the legislature could authoritatively convert a legal right into an equitable one, a court of equity could not, as such, enforce it. The judiciary, no more than the legislature, can deny to any litigant the right of trial by jury, in a case appropriate to such a mode of trial." The rule and position of the court in that case was readopted in *Norris' Appeal*, 64 Pa. St. 275, by Sharswood, J., upon the same line of reasoning, concluding with the declaration that "a court of equity, as has been said, may do great things, but not all things." And the following year, in *Tillmes v. Marsh*, 67 Pa. St. 508, the supreme court of that state, by Sharswood, J., again reaffirmed the exclusive jurisdiction of a court of law over questions touching the possession of real estate, and the right of trial by jury therein, declaring of a bill, which was similar to the petition for mandatory injunction in this case, that "it certainly does not require any elaboration to prove that this is a mere ejectment bill, and might have been demurred to as such"; citing 2 *Daniell, Ch. Prac.* 29. And in *Loker v. Rolle*, 3 *Ves. 4*,—a bill in many respects similar to this,—Lord Roselyn said: "Upon the face of the bill it is quite clear the plaintiff may draw a declaration in ejectment. The bill states the title, and that by some means or other the same persons are in possession of all the lands, and have confounded the boundaries. * * * If he had filed a bill for discovery only, he must have prayed for the discovery; but it goes on to pray relief; that is, merely an ejectment." The case of *Newman v. Duane*, 27 *Pac. 60*, in the supreme court of California, was an action for the possession of land, and it was declared, under that section of the Code of Civil Procedure of California which provides that the right of a jury trial shall be preserved, "in actions for the recovery of specific real or personal property" "plaintiff cannot deprive him of this right by framing his complaint so as to make the action an equity case, under Code Civ. Proc.

Cal. § 738, providing that 'an action may be brought by any person against another who claims an interest or estate in real property adverse to him, for the purpose of determining such adverse claim.' And the court said that: "Assuming that said section contemplates a case where the plaintiff is out of possession and the defendant in possession, still it is evident that the plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer." And in the case of *Bodwell v. Crawford*, 26 Kan. 292, cited in the dissenting opinion of *Woodruff v. Wallace*, 3 Okl. 353, 41 Pac. 357, in which the remedy under discussion was sought for to recover the possession of premises conceded to be the property of the plaintiff, from the defendant, who was in possession without any authority from the owner, under the pretended lease by an unauthorized agent, it was declared that "the owner's remedy was an action at law to recover possession, and he may not resort to equity, and obtain an injunction, and thus take away the constitutional right of a trial by jury"; and the court says that "in all such cases of the unauthorized taking possession of real estate the ordinary remedy is an action at law for the recovery of possession. Under such circumstances the owner may maintain forcible entry and detainer, and in all he may maintain an ejectment. Both are actions at law. Has he the further remedy of injunction? Counsel for plaintiff concede that this is a case of first impression, and that a careful examination of the authorities discloses no precedent for such an action." And the judge (Brewer) who wrote the opinion, now on the supreme bench of the United States, then declared that: "No one will contend that a mere unlawful possession gives occasion for the interference of a court of equity. * * * The legislature has not the power, even if it should attempt it, to deprive a party of this right of trial by jury by simply changing the form of the action; for if it could in respect to the recovery of real estate, it could in respect to any other common-law action, and so, simply legislating as to forms, set at naught the constitutional guaranty." And that distinguished jurist concludes that: "Counsel, conceding that there is no precedent to sustain this action, intimate that this court should establish one; but it is the duty of courts to stand by the ancient landmarks, to walk super antiquas vias. Additional remedies must be established by other bodies, and in other ways."

In the case of *Church of Christ at Independence v. Reorganized Church of Jesus Christ of Latter-Day Saints*, decided by the United States circuit court of appeals, at St. Louis (17 C. O. A. 387, 70 Fed. 179), Judge Thayer declared that: "A complainant who has only the equitable title to land cannot maintain a suit in chancery to recover possession from

an adverse occupant, and that this could only be done where the party having the superior equity seeks, as against the person holding the legal title, to make him the trustee." And it has been recently held by the supreme court of Kentucky, in *Hillman v. Hurley*, 82 Ky. 626, that "one seeking an injunction against trespassers on land must be in actual possession, as well as entitled to possession." In the case of *Killian v. Ebbinghaus*, 110 U. S. 246, 4 Sup. Ct. 232, in which the appellee sought to obtain the possession of real estate by a bill in chancery, it was said in the opinion of the court that the "fatal objection to the suit is that it is in fact an attempt by the party claiming the legal title to use a bill in equity in the nature of a bill of interpleader as an action in ejectment," and declared upon the authority of the leading case of *Hipp v. Babin*, 19 How. 271, "that, whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right of a trial by jury." And in *Town of Grand Chute v. Winegar*, 15 Wall. 373, it was again declared upon the authority of *Hipp v. Babin* that "the result of the argument is that, whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law," because the defendant "has a constitutional right of a trial by jury"; that "right of trial by jury is a great constitutional right, and it is only in exceptional cases, and for specified causes, that a party may be deprived of it." It is in vindication of this great principle, and as declaratory of the common law, that the judiciary act of 1789, in its sixteenth section, declares that suits in equity shall not be sustained in either of the courts of the United States in any case where an adequate and complete remedy may be had at law. 1 Stat. p. 82. *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631, was a case in which the bill of complaint alleged that the complainant had an equitable estate in fee in the premises in dispute, and that the defendants were in possession without title,—in other words, were naked trespassers,—and prayed that they might be turned out, and that complainant, who had the only equitable title, might be put in possession. In passing upon the case, the court said that: "To give a court of equity jurisdiction, the nature of the relief asked must be equitable, when the suit is based on an equitable title. The plaintiff does not allege that the defendants, who are in possession of the premises, have the legal title, or that they obtained possession under any person who had it; nor does she state any facts which connect them with her equity; that, being mere naked trespassers in possession, they might be turned out of, and she,

who has only an equitable title, may be put into possession. The relief prayed for is such as a court of law is competent to grant, if the plaintiff's title would justify it. But the plaintiff does not seek by her bill to better her title. If all the relief asked for were granted, she would still have an equitable title only. The case is, therefore, an ejectment bill, brought on an equitable title." The court then went on to cite the case of *Galt v. Gallo-way*, 4 Pet. 332, in which it was said that: "These occupants can be considered in no other light by the court than intruders, and the remedy against them is at law, and not in chancery. No decree could be made against them unless it be that they should deliver possession of the premises; and to obtain this the action of ejectment is the appropriate remedy." The court, in *Fussell v. Gregg*, then went on to say: "This decision is in point, and shows the bill to be without equity as to those of the defendants who are in possession. Their possession is good against all the world except the true owner. As the bill asserts no equity against them, they have the right to stand on their possession until compelled to yield to the true title, and to demand a trial by jury of the question whether the plaintiff has the true title. The plaintiff cannot deprive them of that right by neglecting to acquire the legal title, and upon the ground of her equitable title ask the aid of a court of equity. She can turn the defendants out of possession only upon the strength of the legal title, which she must first acquire. Having done this, a court of law is the proper forum in which to bring her suit. *Hipp v. Rabin*, 19 How. 271; *Parker v. Woollen Co.*, 2 Black, 545; *Town of Grand Chute v. Win-egar*, 15 Wall. 373; *Lewis v. Cocks*, 23 Wall. 466; *Killian v. Ebbinghaus*, 110 U. S. 246, 4 Sup. Ct. 232." It would be supposed, after this decision, that a demand would not be made to substitute a writ proceeding alone from the power of the chancellor, in lieu of a procedure at law in which the complainant, having an equitable title, would not be given the possession of land, and that, if such a demand were made, it would be acceded to by this court. But it is further contended by the court that: "The legal status of the parties has been determined, and the contestant who remains upon the land after his rights have been finally and adversely passed upon is there without color of right, and as a mere naked trespasser." That is, that upon the case set up in the answer there is no question of fact for a decision of the jury, and that, if all the facts contained therein were presented in the trial in a court of law, it would still be the duty of the court to instruct the jury that the defendant had no case, and that his interest in law was extinguished, and that, therefore, there is no reason why this court, sitting as a court of equity, should not administer the remedy. The argument is fallacious. The defendant, in his answer, aver-

red that this court had no jurisdiction as a court of equity, and he demanded his legal right; and, even if there were no evidence, he is still entitled to have his case heard in a court of law, and tried to a jury. *Haines' Appeal*, 73 Pa. St. 172, *Sharswood, J.* But this is not the case here. So much for such instruction as may be derived from the authorities of courts which appear not to have been directed by express and definite provisions of the statute. But no doubt whatever is left in this territory as to the law upon this subject, since it is provided in Code Civ. Proc. § 278 (St. 1893, p. 809, § 4156), that "issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial be waived." And the forum in which the trial shall be had is fully provided for in article 13, § 167, of the Code of Civil Procedure before Justices of the Peace (St. 1893, p. 919), in which it is provided that: "Any justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same, and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, or that the same, after a lawful entry, are held unlawfully, then said justice shall cause the party complaining to have restitution thereof." And section 168: "Proceedings under this article may be had in all cases * * * where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession." And when, or before, the land department has finally passed upon the rights of the entryman and settler and contestant in this territory, and has determined to whom the title is due, and it is found that the possession, or a part of it, is in the other, the losing party, and the matter of possession must be determined not by the land department, but by the courts of the territory, the legislature has incorporated the doctrine of the common law as hereinbefore set forth into precise and unmistakable provisions, by which that possession shall be determined. The instant the jurisdiction of the courts of the territory attaches, that instant the remedy provided by the statute of the territory attaches also, and when it is declared by the opinion of the court "that the courts of this territory are the courts of chancery to which litigants for public lands may come for relief after they have established their title in the tribunals of the law," it begs the question and assumes a jurisdiction that is without authority, and in defiance of a jurisdiction and remedy provided by the statute. It is an attempt to assume an authority to the chancellor which is expressly provided by the

statutes of the territory to be given to a jury; and when it is further said by the court that the land department, which, in the opinion of the court, is called the "law tribunal," not having the jurisdiction to give possession, "and the courts of the territory possessing it, what objection can be reasonably urged against granting immediate relief?" the court makes no advance in the argument, and but reaffirms an opinion not based upon "established practice and precedent," and which is in defiance to the statutes of the territory.

The court here also relies upon the precedent cases decided and passed upon in this court of *Sproat v. Durland*, 2 Okl. 24, 35 Pac. 682, 886, of *Reaves v. Oliver*, 3 Okl. 62, 41 Pac. 353, and *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357. In my judgment, the able dissenting opinion filed in *Sproat v. Durland* should have been adopted as the opinion of the court. In *Reaves v. Oliver*, no reason, in addition to those given in *Sproat v. Durland*, was given by the court for the foundation of its judgment other than that of the supreme court of the United States in *Marquez v. Frisbie*, 101 U. S. 473, by Justice Miller, in which it is said that: "We do not deny the right of courts to deal with the possession of the land prior to the issue of patent, or to enforce the contracts between the parties concerning the land;" and this concession or admission of jurisdiction by the supreme court of the United States in favor of the right of the courts to deal with the possession of land, while contention as to the title existed in the land department, was construed by the court, not in express terms, but inferentially, to concede the power of the chancellor in an equitable proceeding of the present character against the former precedent and practice which provided that the trial by jury should be a constitutional right, and against the provisions of the statutes heretofore recited by which the jurisdiction thus plainly prescribed by the supreme court of the United States was assumed to the chancellor, to whom it had been, by the general course of the common law, by the constitutional guaranties, by the statutory provisions and by the uniform judgments of the courts, prohibited. In *Woodruff v. Wallace* I joined in the then reiterated dissent of Justice Bierer to this doctrine, which then had the affirmation of the supreme court by virtue of the approval of two of its judges, inasmuch as, under the enactment of congress constituting the supreme court here, two of the judges are sufficient to constitute the court in affirming a judgment, while two of the judges dissented therefrom, the court in fact standing equally divided, and in the case now under discussion but two of the judges fully concurred in the opinion of the court, this being an affirmation, while another declared that he had not had time "to fully consider and investigate the principle involved," and because "the conclusion has

been for some time the rule of decision in this territory"; while a fourth (Justice Bierer) concurred because "it has now become the law of this jurisdiction," and "must be understood to be an acquiescence in the law as established by the decisions of the court," and that he still disagrees, and does not assent to the principles upon which the decisions were based. I wholly and absolutely dissented from the doctrine of mandatory injunction, in confirmation of which dissent my views are here more fully expressed. While I regret to differ upon so important a proposition from the supreme court of the territory, yet I am consoled by finding myself, as I believe, in company with the great masters in the law, with Justices Story and Kent, Justices Strong, Sharswood, and Brewer, and with the great judges of the common law in England and their successors in the various supreme courts of this country, and with the supreme court of the United States, in holding that upon all questions involving the possession of real estate the constitutional right of the citizens is, not to a single judge, but to a trial by a court of law with a jury; that while, if jurisdiction be once obtained upon equitable grounds,—as, for instance, to foreclose a mortgage,—a court of equity may "effectuate its decrees" by giving possession, yet equity may not, as a motive of original proceeding, undertake to control or transfer possession; that a court of equity will no further interfere with the possession of land than to afford relief to one having the legal title, and the actual possession against trespassers; that no other supreme court has determined one in actual, full, peaceable possession of land to be a trespasser, so that that possession may be destroyed by an order made by a single judge in an equitable proceeding; that the legal method provided by statute is as "plain, adequate, complete" method, and, as far as courts have hitherto spoken on the point, as "speedy," as the remedy sought to be applied; that to adopt any other course would amount to a revolution in practice, by which a single judge would be empowered to assume jurisdiction when, in his individual opinion, the legal remedy was not sufficient, and that a claim to the possession of real estate can be no more converted into an equitable proceeding in which the defendant can be deprived of a jury than can an action of debt on bond, an action in replevin, or an action of trespass, and either one of them would be a step towards the destruction of the right of trial by jury, which neither the executive nor the legislative branches of our government, nor the courts, have any right to take; that it is not justified by any established practice "or precedent," such as Chancellor Kent required in order to sanction such a step, nor is it "super antiquas vias," as the law should, in spirit of Judge Brewer, be interpreted; that the

authorities cited as a basis of the conclusion of the court are not apposite, since they do not relate to the possession of land, and the two or three which appear to relate to the question no more proximately apply than to declare that injunction will sometimes be granted to restrain acts of trespass, in behalf of one actually in possession in cases where some specific ground of equity jurisdiction exists; that, on the contrary, the jurisdiction here sought to be established did not exist at the time of the adoption of the constitution of the United States; that since that time it is forbidden in this territory under that provision of the organic act (26 Stat. 81) which "preserves the right of trial by jury inviolate"; that a similar interpretation upon similar guaranties has been made by the supreme courts of Wisconsin, California, Indiana, Pennsylvania, Kansas, and all others which have had occasion to treat of the matter, as well as time and again by the supreme court of the United States, whose decisions are of conclusive force in this territory in the absence of express statutory enactment; that the policy of the present interpretation declared by the federal statute which contains the enactment that suits in equity shall not be sustained in either of the courts of the United States "in any case where there is an adequate and complete remedy at law"; that, finally, the jurisdiction assumed by the court is prohibited by the territorial statute itself, which declares that "issues of fact for the recovery of * * * specific real or personal property, shall be tried by a jury unless a jury trial be waived"; that a specific method is further provided by the forcible entry and detainer act, by which the trial by jury may be had, "where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession"; and that, as the legislature has not the power, so neither have the courts the power, to convert a legal right into an equitable one; that when the courts of this territory come to pass upon questions involving the possession of real estate, the mode of procedure is not a question of construction for the courts; they must pursue the method provided by the statute; and I therefore believe that I act in conformity with the invariable rule and practice of the common law as preserved by the constitution of the United States, with the invariable rule and practice of the supreme court of the United States and of the several states of the Union, and in obedience to the precise directions of the statute, in declaring that, the recovery of the possession of real estate being involved, the defendant has the right to a trial in a court of law by a jury, that the district judges of this territory have neither power nor authority by established precedent or practice, by the common law, or under the statute, to assume such a jurisdiction.

(6 Okl. 455)

GRAY et al. v. STILES, Treasurer, et al.
(Supreme Court of Oklahoma. Sept. 8, 1897.)

TAXATION—ASSESSMENT—EQUALIZATION—COLLECTION—INJUNCTION—PARTIES—TENDER—DEPOSIT IN COURT—WAIVER.

1. Upon an injunction against a county treasurer to restrain the collection of taxes, a part of which are legal and a part of which are illegal, the petitioners having averred in their petition that they had tendered the amount admitted to be due, less an increase in the levy of 45 per cent., averred to be illegal, and that the defendant treasurer refused to receive the sum unless the amount claimed as due under the levy of 45 per cent. was also paid, and that the treasurer notified the plaintiffs that they need not make any further tender, and that he would refuse such a tender if made, and would not accept payment except of the whole tax, or of the one-half of said whole tax, including said 45 per cent., and this averment is not denied in the answer, but it is admitted therein that the tender was made as alleged, but it was not kept good by bringing the money into court, no legal or equitable issue is proffered by the defendant, because the statute does not require any such payment of the true and just amount of taxes due, except before the judgment prayed for, and because, when a tender of money is alleged in any pleading, it is not necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at trial, or when ordered by the court. No such judgment has been entered as prayed for, nor has any order of the court been passed whereby it has become incumbent upon the plaintiffs to make or aver any tender other or further than that which it is admitted by the pleadings the treasurer has refused to receive unless the amount claimed by him to be due under said levy of 45 per cent. is also paid.

2. The positive refusal of the treasurer to receive the part of the taxes admitted by the plaintiffs to be due unless the whole was paid, including that part claimed by the plaintiffs to be illegal, is a waiver of further tender. It is sufficient, under these circumstances, for the plaintiffs to deposit the money in court when ordered by the court.

3. Under the statute which provides that "an injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same," the taxes are a "charge" and an "assessment" upon the property of the plaintiffs, and a part of the "proceeding to enforce the same" is the issuance of the warrant to the sheriff. The issuance of such warrant is the duty of the treasurer, and is a part of the "proceeding to enforce the same," and an injunction will therefore lie against the county treasurer.

4. Chapter 70, art. 7 ("Territorial Board of Equalization"), par. 5624, § 1, St. Okl. 1893, provides that: "The governor, territorial auditor and secretary, shall constitute the territorial board of equalization, and said board of equalization shall hold a session at the capital of the territory, commencing on the first Monday of July of each year; and it shall be the duty of said board to examine the various county assessments and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the territory. And shall therefrom find the percentage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the territory, and shall notify the various county clerks of the percentage so ordered to be added to or subtracted from the

valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from the total value of the property assessed to each party the percentage so ordered and collect the taxes accordingly. Said board shall assess the rolling stock of railroads and all other property not otherwise provided for." It is the duty of the territorial board of equalization, under this statute, in order that the territorial and county taxes may be the same in all the local subdivisions, to reduce to the uniform basis the valuations made by the local assessors.

5. Assessment is the same as valuation of the property taxed. This assessment and valuation must be made by the officer or officers to whom it is by the statute expressly committed. The duty and function of assessment cannot be shared in by any officer to whom it is not so granted by the express language of the statute. Equalization of property is a wholly different matter, comprehending as it does simply the ascertainment of the average of the valuations already found. It is the equalizing of individuals among each other by the township boards, and of the townships among each other by the county boards, and of the counties among each other by the territorial board of equalization. It is, in the present case, the aggregate amount of property having been ascertained by the abstract of assessment rolls furnished to the auditor of the territory from the various counties, an ascertainment of the proper percentage which should be added to some counties and taken away from others in order to place the counties upon an equal footing; the aggregate amount of property remaining the same, except from such slight raising or lowering of the amounts as may be incidental to the operation of equalization of the taxes among the various counties.

Tarsney, J., dissenting.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by George Gray and others against Joseph Stiles, treasurer, and others, for injunction against the collection of taxes. There was a judgment for defendants, and plaintiffs bring error. Reversed.

Complainants alleged that they were the owners of real and personal property in Logan county upon which they had duly made returns for the year 1895 for taxes to the proper assessors for taxes within said county, and that the action of the township and city boards of equalization was proper; that the assessment for taxes was at a high rate of valuation,—in many cases, up to the full value of the property assessed; that, after such assessments had been made and equalized by the county board of equalization for Logan county, the list of such assessments and equalization was sent to the territorial board of equalization, as required by law; that the total valuation of such equalization and assessment, including all personal and real property in the county, and not including the railroad property and equipment, was not less than the fair, average amount and valuation which the property of Logan county bore to all the other property in the territory; that at the same time like assessment lists were sent from each of the other counties in the territory to the territorial board of equalization; that the aggregate of

said assessments and valuations, as sent to the territorial board of equalization, amounted approximately to the sum of \$28,000,000; that the territorial board of equalization, upon receiving such assessments, made and ordered an increase of valuation on the proper assessment of each county of the territory, except Kingfisher county, claiming that the property in each county, except Kingfisher county, was not fixed at its fair valuation; that the increase ordered in the different counties varied, according to the county, from 15 to 75 per cent. They further alleged: That the total valuation of the property of the territory, as ascertained by the township assessors of the territory, and returned by the county clerks of the various counties to the auditor of the territory to be acted upon by the territorial board of equalization, to wit, the sum of \$28,000,000, was by the action of the territorial board of equalization increased so as to make the total aggregate basis of taxation amount to the sum of \$39,279,000. That the increase provided for the county of Logan under such action of the territorial board of equalization was put by the board at 45 per cent. of the assessment, as made and sent up by the county board of equalization. That the county clerk of Logan county, upon receiving a certificate of the territorial board of equalization stating that such increase had been ordered, thereupon increased the valuation of each of the complainants upon both their personal and real property 45 per cent. and extended such increase upon the tax rolls of Logan county against the property of the complainants. That said tax rolls were transmitted to the treasurer, and the taxes so increased were by the treasurer extended upon his books, and levied thereon against the property of the complainants. That said tax rolls and levies were both a lien and incumbrance upon the property of the complainants, as shown by said books, and that the treasurer is now proposing to collect the whole of said assessment and levy, including the 45 per cent. increase aforesaid. That each of the petitioners has tendered the treasurer his taxes for said year, less said 45 per cent., and the treasurer has refused to receive said sum unless the amount claimed by him as due under said levy of 45 per cent. is also paid. That he has notified the complainants that they need not make any further tender, and that he will refuse the tender, and will not accept payment except of the whole tax, or of the one-half of said whole tax, including said 45 per cent. That S. P. Richardson, N. H. Sturgis, and W. R. Stapleton, as county commissioners, claim the right to require the treasurer to collect such tax and turn over the same for the benefit of Logan county. That the raising of the assessed valuation of the several counties of the territory of Oklahoma, including the county of Logan, by the territorial board of equalization, was

not for the purpose of equalizing the assessments of the several counties in the territory, but for the purpose of increasing the said assessment, in order thereby to create a greater revenue. That the board of equalization had no authority in law to raise said assessments for such purpose, nor for any other purpose; the authority of the board over the assessment rolls of the several counties of the territory, including Logan county, being limited by law to the act of equalization, and equalizing the assessment of all the counties in the territory. The action of the board in raising the assessment of the county of Logan, as well as that of the other counties in the territory, is wholly without warrant of law, and void. That the indebtedness of the territory and of the several counties of the territory, and particularly of Logan county, had already reached, if it had not exceeded, the 4 per cent. limit prescribed by the laws of the United States and the laws of Oklahoma territory, and further indebtedness of said territory and of each of said counties, and particularly Logan county, would be in violation of said laws. That to avoid the 4 per cent. limit upon the indebtedness of the territory and of the counties, and in order to create further indebtedness of the territory and of the counties, and to validate debts already incurred in violation of said statute, and above said 4 per cent. limit, the increase of 45 per cent. was proposed, and by the board of equalization was determined upon, and its action in the premises was based upon these premises. That the making of the advance was for the purpose of evading the statutory limit of indebtedness. That the assessment upon the personal property and real estate of Logan county was not upon the same basis of comparative value as the railroad property in the county, but that the railroad property was assessed at a much lower rate, compared with its fair value, by the territorial board of equalization, for the year 1896. That the railroad property was assessed at about 10 per cent. less than the assessment of railroad property the year before, which had been and then was and yet is a fair valuation, while the real estate and personal property was assessed at a much higher rate than it had been assessed at the year before, which rate of the year 1894 was a fair valuation for each year; the fact being that the personal property and real estate of the individuals in the county had very much diminished in value after the assessment of 1894, and continued much depressed below the value of 1894 during all of the year 1895. Wherefore the complainants said that upon their property they are charged and compelled to pay more taxes, according to its value, than are charged and assessed for collection upon the railroad property in the county, according to its value, and that these facts were known to the board of equalization at the time they put.

the increase of 45 per cent. upon the property in the county. Wherefore complainants said that such action of the board of equalization was unjust and contrary to law, and invalidated the assessment, and that such 45 per cent. increase should not be permitted; and the complainants said that in case this tax so levied is collected, including the 45 per cent., the damage to the plaintiffs, and each of them, will be great and irreparable, and that they have no adequate remedy at law, and prayed therefore for equitable relief by injunction. That at the same time, to wit, on the 17th day of June, 1895, when the territorial board of equalization increased the valuation of the property of Logan county and in the territory, the board also, upon such increased valuation, fixed the rate of taxation for territorial purposes at the highest possible rate which the laws of the territory would permit, and beyond the legal limit without such increase, and under such new valuations fixed the levy for the general territorial fund at three mills on the dollar of assessed valuation, increased as aforesaid; the normal school fund levy at one-half mill on the dollar of assessed valuation, increased as aforesaid; the university fund at one-half mill on the dollar of assessed valuation, increased as aforesaid,—and at the same time levied for territorial purposes a bond interest fund levy for one-half mill on the dollar of assessed valuation, increased as aforesaid, which one-half mill levy, according to the estimated valuation, would produce the sum of \$20,000, when in fact the interest to which such taxes could be applied would amount only to the sum of \$4,800; and at the same time the board levied for the board of education fund a tax of one-tenth of one mill on the dollar of such valuation, increased as aforesaid,—making the total taxes levied by the board four and six-tenths mills on the dollar of valuation for territorial purposes. That such assessments and levy were in excess of the statutory limits, and therefore invalid, and the last two assessments were without authority of law, and therefore void. That the object of the board in increasing the valuation as aforesaid was to evade the statutory limitation as to taxation and indebtedness, and to levy a larger tax upon the territory than the law would permit under the valuations fixed by the proper officers of the law, and equalized by the territorial board of equalization in the manner contemplated and required by law, and for the further purpose of enabling Logan county and other counties in the territory to issue bonds and warrants for debts beyond the 4 per cent. limit prescribed by the act of congress under the lawful and right assessment, valuation, and equalization by the proper officers under the law, and equalized as the law contemplated. That under such valuation the counties, townships, and other municipalities, including the townships and munic-

ipal corporations in which the property of the plaintiffs is located, have levied taxes and are proceeding to incur indebtedness above and beyond the amount which would be the limit under the law under the assessments and equalization of the proper assessors and boards of equalization of the townships, cities, and counties, equalized as the law contemplates. And the complainants prayed the court thereupon that a temporary injunction be at once issued, and that at the hearing thereof a writ should issue to perpetually enjoin the defendants, and each of them, from the levy or collection, as against the plaintiffs, of any tax, charge, or assessment for the year 1895 under said assessment and equalization, except for the same as found due by the board of equalization for the county of Logan, and to enjoin the treasurer from collecting, as against them, the 45 per cent. claimed to have been added to the assessment by the territorial board of equalization, and for all other proper and equitable relief. The petition was verified.

A demurrer to the petition as amended was filed, and counsel heard thereupon, and the demurrer overruled. The defendants thereupon answered, denying every material allegation in the petition contained, except such as might be thereafter specifically admitted. They further admitted that the plaintiffs are the owners of real and personal property in Logan county which was assessed and returned for taxation by the proper officers in the county for the year 1895, and that subsequent thereto the valuation of the property was equalized by the various equalization boards of the townships or city and county wherein the plaintiffs reside. The defendants admitted that the territorial board of equalization of the territory received the assessment lists from all the counties in the territory, and, in equalizing the valuations of property throughout the different counties in the territory, increased the aggregate valuation of all the property in the territory, and increased the valuation of the real and personal property in Logan county 45 per cent. of the valuation fixed by the board of equalization of the county; that thereby the valuation of plaintiffs' property was increased 45 per cent. of the valuation fixed thereon by the county board of equalization. The defendants admitted that in pursuance to this action by the territorial board of equalization, and upon receiving a certificate from the territorial board stating the increase that had been ordered in said county, the county clerk of Logan county increased the valuation of the plaintiffs upon their real and personal property 45 per cent., and extended said valuation so as to increase it upon the tax roll of Logan county, and that after the rate of taxation had been fixed by the proper officers the county clerk extended the same upon the tax roll of the county, and transmitted the same to the treasurer of the county, and that the treasurer of the county is now collecting said taxes; that the tender was made as alleged, but that it

was not continued or kept good by bringing the money into court. Defendants said that plaintiffs have slept on their rights, and failed to take any proceedings to prevent the extension of all of said taxes upon the tax roll of said county, or to make any objections or protests thereto; and defendants said that, if the action of the territorial board in ordering the increase was irregular, it is too late now for the plaintiffs to be heard to complain. Defendants said that the rate of taxation in Logan county was fixed by the board of county commissioners, subsequent to the action of the territorial board of equalization, upon the basis of the increased valuation of the property in Logan county as fixed by the territorial board of equalization, and that the board of county commissioners at the time of fixing said rates made a careful and conservative estimate of the expenses of the county for the current year, 1895, and levied only a sufficient rate of taxation to meet the expenses; that the amount of money required to be paid as taxes for the county is no greater than as though said increase by the territorial board of equalization had not been made; that, if said increase in valuation had not been made, the board of county commissioners would have been compelled to increase the rate of taxation in order to meet the actual and necessary expenses of the county. The defendants further said that any interference by injunction or otherwise in the collection of taxes at this time would work a great and irreparable damage and mischief to the public interests, and that, particularly, an entire new tax roll would have to be prepared, and that the treasurer of the county would be wholly unable to determine the amount of taxes due from any individual, so that work in the treasurer's office in the county could not progress at all; that the cost of preparing new lists and new tax rolls, and the extra help necessarily required in the treasurer's office, would cost the taxpayers of the county an amount of money largely in excess of any sum that plaintiffs would be entitled to retain had they moved in time. Wherefore defendants prayed that this action be dismissed, and that they have judgment for costs of suit. To this answer the plaintiffs demurred upon the ground that it did not contain facts sufficient to constitute a defense to the declarations of fact set forth in the petition. Upon the hearing the plaintiffs' demurrer was overruled, the plaintiffs thereupon electing to stand upon their petition and demurrer, and the case is thus brought here.

Horace Speed, for plaintiffs in error. Huston & Huston, for defendants in error.

McATEE, J. (after stating the facts). Since the demurrer of plaintiffs admits as true the statements of fact contained in the defendants' answer which are well pleaded, it is by the defendants contended that the plaintiffs had made no sufficient tender or averment of tender of the amount of taxes admitted to be

due from them, and that they have therefore no standing in court, and relief cannot be had here in the absence of such tender. Section 5671 of the Statutes of Oklahoma of 1893 declares that: "Whenever any action or proceeding shall be commenced and maintained before any court or judge to prevent or restrain the collection of any tax or part thereof, or to recover any such tax previously paid, or to recover the possession or title of any property, real or personal, sold for taxes, or to invalidate or cancel any deed or grant thereof for taxes, or to restrain, prevent, recover or delay any payment of taxes, the true and just amount of taxes due upon such property or by such person if in dispute, must be ascertained and paid before the judgment prayed for * * *." And section 4009 declares that: "When a tender of money is alleged in any pleading it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at trial, or when ordered by the court." When, therefore, the petitioners, as averred in the petition, had "tendered the amount admitted to be due, less said forty-five per cent.," and the defendant treasurer had "refused to receive the said sum unless the amount claimed as due under said levy of forty-five per cent. is also paid, and that he had notified the defendants that they need not make any further tender, and that he would refuse the tender, and would not accept payment except of the whole tax, or the one-half of said whole tax, including said forty-five per cent.," and this averment is not denied by the answer, but it is admitted therein that "the tender was made as alleged," but that "it was not kept good by bringing the money into court," no legal or equitable issue is proffered by the defendant on this subject, because the statute does not require any such payment on the "true and just amount of taxes due," except "before the judgment prayed for," and because, "when a tender of money is alleged in any pleading," it is "not necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at trial, or when ordered by the court." No judgment has been entered as prayed for, nor has any order of the court been passed whereby it has become incumbent upon the plaintiffs to make or aver any tender other or further than that which, as admitted by the pleadings, the treasurer has refused "to receive unless the amount claimed by him as due under said levy of forty-five per cent. is also paid." *Chicago, B. & Q. R. Co. v. Board of Com'rs* (Kan. Sup.) 39 Pac. 1041; *Dorsey v. Barbee*, 12 Am. Dec. 296; *Loughborough v. McNeve*, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773; *Kortright v. Cady*, 21 N. Y. 345, 346. And the positive refusal of the treasurer to receive that part of the taxes admitted by the plaintiffs to be due unless the whole was paid, including the part claimed to be illegal, is a waiver of further tender. It is sufficient, under these circum-

stances, for the plaintiffs to deposit the money in court when ordered by the court. *Dorsey v. Barbee*, 12 Am. Dec. 296; *Brewer v. Fleming*, 51 Pa. St. 102; *Lacy v. Wilson*, 24 Mich. 479.

It is also argued that the plaintiffs in error are too late with their proceeding, that they are guilty of laches, and that their proper resort would have been a writ of prohibition directed against the county clerk, to prevent him from obeying the order of the territorial board of equalization; and it is also argued that the remedy by injunction here sought should have coupled the sheriff as a defendant, inasmuch as the actual seizure of the property under the tax levy and upon warrants for the collection of unpaid taxes would have been in his hands for execution, and that, therefore, the plaintiffs in error are both too late, inasmuch as they have not proceeded against the county clerk to prohibit him from extending the taxes upon the rolls, which extension made the taxes complained of a lien upon the plaintiffs' property, and too soon, inasmuch as the remedy by injunction is sought against the treasurer, who is himself enforcing the payment of the taxes complained of, in the manner of an executive officer, whose official duty and function it is to sell the land or property upon which taxes remain unpaid. Neither contention can be sustained. The statute is not capable of misinterpretation. Its language is explicit, declaring as it does in section 4143 of the Statutes of Oklahoma of 1893 that: "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same." When the taxes complained of were extended on the tax rolls of the county they became both a "charge" and an "assessment." Since it is the duty of the sheriff to collect the taxes of the county, and the statute prohibits in specific terms "the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same," if the taxes complained of are illegal, and constitute, as they do, a charge and assessment upon the property of the plaintiffs, it is thus declared that such taxes may be enjoined on account of their illegality, and because they are a charge and assessment; and, if this is so, an injunction may lie against any officer by whose hands at the time the remedy by injunction is sought "the collection of the illegal taxes" is contemplated, or in whose hands the charge or assessment subsists. Not only so, but, the treasurer himself failing to make the collection, the next step to be taken by him would be to issue his warrant to the sheriff, undertaking to authorize the collection, and the issuance of such a warrant would be "a proceeding to enforce the same," and such proceeding may, in the express language of the statute, be enjoined; so that the remedy of the plaintiffs is rightfully against any officer who participates in the illegal levy of any

tax, charge, or assessment, or in the collection of any such tax, or in any proceeding to enforce the same, and may therefore be against the treasurer, while the matter is in his control, just as it would be against the sheriff if the matter had passed into his hands; and the remedy sought is therefore neither too early nor too late. *Cummings v. Bank*, 101 U. S. 156.

And the disposition of these questions brings us to the consideration of the case upon its merits,—that is, as to the power of the territorial board of equalization, under section 5624 of the Statutes, to raise the values placed upon all the property in the territory by the legal assessors, and to increase thereby the total amount of the assessable property in the territory, while sitting as a territorial board of equalization; and upon this proposition the case comes on upon a petition for rehearing; and upon this proposition this court held, by a majority of its members, in the case of *Wallace v. Bullen* (Sept. Term, 1896) 52 Pac. 954, in an elaborate opinion filed therein, that the territorial board of equalization had the power claimed for it by the defendants in error in this case, and thereupon determined this case, also, in accordance with those views. The judge who is now writing the opinion of the court upon the petition for rehearing in this case prepared and filed at the time an opinion dissenting from the views of the court, and will now proceed to discuss the question in accordance with the dissenting views then expressed, and substantially in the same terms.

To the statement of facts as they appear in the pleadings it is but fair, and necessary to the full comprehension of the issues involved in this case, of its origin, and to the far-reaching importance of it, to add a fact not directly appearing in the pleadings or of record in this particular case, but appearing to the court in the record of the case of *J. M. Lee, County Treasurer, and Mott, McDowell, and Meek, County Commissioners of Kingfisher County, v. A. Mehew et al.*, involving the right of the board of county commissioners, while sitting as a board of equalization, to raise the aggregate valuations returned to them upon the assessment rolls of the townships of that county, respectively, which was argued and submitted in connection with this case. The fact referred to is that the board of county commissioners of Kingfisher county, sitting as a board of equalization, in 1895, undertook to determine the aggregate amount of property in Kingfisher county by adding to the aggregate amount ascertained and returned by the various assessors of that county to the county clerk of Kingfisher county an additional amount made up by adding to the aggregate valuation 45 per cent. thereof. The increased sum so ascertained was forwarded by the clerk of Kingfisher county to the auditor of the territory of Oklahoma, and constituted the amount which the territorial board of equalization acted upon when it undertook to ascertain the aggregate amount of property

in the territory for the purposes of taxation. The valuation of property in Kingfisher county, as thus ascertained and returned by the board of equalization of that county, was the standard by which all the property in the territory was by the territorial board estimated for the purposes of taxation, and upon which action of that board was taken. While, therefore, the result of the action of the board of equalization of the territory was to raise the total valuation of the property in Logan county, for the purposes of taxation, 45 per cent., it did in fact act upon a standard of valuation ascertained by taking the aggregate values in Kingfisher county, which had already been raised 45 per cent. by the board of county commissioners of that county, and consequently adopting as a standard of valuation for the whole territory the aggregate values as returned by the total sum of values as found by the various assessors of Kingfisher county, and by adding thereto the increase of 45 per cent. made by the board of county commissioners of that county, and the additional increase of 45 per cent. made by the territorial board of equalization, or a total increase of 90 per cent. upon the amount ascertained by the assessors of Kingfisher county. While the action of the territorial board of equalization added by these means, as they did, to the aggregate amount of all property in the territory of Oklahoma as ascertained by the assessors, namely, \$23,000,000, the additional sum of more than \$11,000,000, which raised the total valuation of property in the territory of Oklahoma, for the purposes of taxation, to the sum of \$39,279,000, the territorial board of equalization took for a starting point not the aggregate amount of values returned by the assessors in any one county of the territory, but a starting point which had already been inflated by the action of the board of county commissioners of Kingfisher county to the extent of 45 per cent. of the aggregate assessment and valuation of that county made by the assessors thereof. The result was, as is apparent, to raise the value for the purposes of taxation of all property in the territory, not by the total sum of 35 per cent. upon the taxpayers of Logan county, and indeed upon the taxpayers throughout the territory, as fixed by the assessors, but to raise it in a much greater proportion, which there is no means of ascertaining by means of any figures or computations furnished to us in this case. The vast importance of the case to every taxpayer in the territory is thus apparent.

I have examined a multitude of cases from many states in the Union involving the question now under consideration, but have in no case found any exercise or attempted exercise of jurisdiction by state or territorial boards of equalization to be compared in magnitude with the jurisdiction sought to be exercised by such boards of equalization as the one now under consideration. The proposition upon which this action is based, and which has been sanctioned by the court, is that the territorial

board of equalization is not only authorized and empowered to equalize the aggregate values of property as returned from the various counties of the territory, and to bring them to a common standard, or to establish a just relation between them, but that it may raise the aggregate valuation of all property in the territory. We cannot give assent to this proposition. The different states of the Union have adopted systems of taxation and equalization alike in their general features, but unlike in their details. In some of the states the function of valuing is performed, not wholly by local assessors, who come in contact with the individual taxpayer, receive his return of property, and thus estimate its value, but by township boards, to which their returns are made, and who co-operate with them, or sit as boards of review and correction, with authority to make changes in values, and is shared also by the boards of county commissioners, who are authorized to review and correct the returns of the local assessors and the township boards, and are charged with the duty of valuing, as well as with the duty of equalizing values already ascertained; while in others, still, the function and duty of valuing are confined to the township and city assessors, with appeal to the boards of equalization of the townships, respectively, who are authorized to finally value individual assessments. In this latter class, when the assessors have assessed the property of their respective townships or cities, and have returned their assessments to the township or city boards of equalization, and when the township and city boards of equalization and review have concluded their work, thenceforth the boards of county commissioners and state boards of equalization are charged with the function of equalizing, alone. The system established in this territory belongs to the latter class.

It is provided in section 6 of the organic act of the territory that "all property subject to taxation shall be taxed in proportion to its value." And in the Statutes of Oklahoma of 1893, in section 6068, it is provided that: "The several township and city assessors shall meet at the county seat of their respective counties on the second Monday of January in each year and agree upon an equalized cash basis of valuation of such property as they may be called upon to assess." And in chapter 70, art. 2, of the Statutes, on "Revenue," it is provided that: "Sec. 5580. The territorial auditor, treasurer and attorney general shall provide for the use of the assessor * * * blank forms for the listing and assessments of all property, and such instructions as shall be needed to secure full and uniform assessment returns,"—and that the assessor should be furnished with them. Section 5583 of the Statutes provides that: "All taxable property, real and personal, shall be listed and assessed each year * * * including all property owned on the first day of Febru-

ary on that year, and in case of stocks of goods, wares and merchandise, and the personal property of banks and banking institutions, including money loans, discounts and credits, the statement shall include the average amount of the same for the preceding year ending on February first. And in order to make the assessment, such assessor shall demand from each person and firm, and from the president, cashier, treasurer or managing agent of each corporation, association or company within his county, a statement under oath or affirmation, of all the real estate within the county, and personal property owned by, claimed, or in the use, possession or control of such person, firm, corporation, association or company, whether held by the party sworn, for himself or as agent for another, and shall set out in such sworn statement an itemized account of all classes of property, by this act defined as subject to assessment, by him so held or controlled." In case of the failure of such person, etc., "to give under oath or affirmation" the statement required by this section, the assessor shall ascertain and estimate the "amount and cash value," and list the same accordingly. It is further provided in section 5586 that: "The assessor may place a different value on the property, if he is satisfied that the value so given is not correct; but in case he raise the assessment, he shall give to the person listing the same a copy of the schedule showing such increase; and the assessor shall seek to have assessed the same classes of property at a uniform value throughout the county." It is provided in section 5587 that: "The assessor shall take and subscribe an oath * * * and attach it to the assessment roll * * * swearing that the value of all property, moneys and credits, of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned * * * and that I have diligently and to the best means in my power endeavored to ascertain the true amount of value; and that, as I verily believe, the full value thereof is set forth in the above returns." It is provided in section 5588 that: "Any person placing a false value thereon" (upon such taxable property) "shall be deemed guilty of perjury." Section 5593 provides that: "An assessor who assessed property at less than its cash value shall be guilty of a misdemeanor and punished by a fine of not less than five hundred dollars and by imprisonment in the county jail for not less than three months, nor more than six months." Aside from the provisions contained in article 2, thus recited, section 5618 provides that: "On or before the first Monday of May annually, the several county or township assessors shall make out and deliver to the county clerks an assessment roll * * * together with "the assessed value thereof." Under article 6, "County and Township Boards of Equalization," it is provided (sec-

tions 5620, 5621) that: "Sec. 5620. The township assessor, or township clerk, and township treasurer, shall compose the board of equalization for each township; the town or city assessor, mayor or president of the board of trustees, and city clerk, shall compose the board of equalization for cities, towns and villages, and said boards shall meet on the third Monday in April of each year to hear all complaints of persons who feel aggrieved by their assessments, and the decision of said board shall be final as to individual assessments. Sec. 5621. The board of county commissioners of each county shall constitute a board, or a majority of the members thereof, shall hold a session of not less than two days at the county seat, commencing on the first Monday of June in each year, for the purpose of equalizing the assessment roll in their county between the different townships." Under article 7 ("Territorial Board of Equalization"), § 5624, as amended by an act of the legislature approved March 8, 1896, it is provided that: "The governor, territorial auditor and secretary, shall constitute the territorial board of equalization, and said board of equalization shall hold a session at the capital of the territory, commencing on the third Monday of June in each year; and it shall be the duty of said board to examine the various county assessments and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current year, together with any other general or special territorial taxes required by the law to be levied, and to equalize the levy of such taxes throughout the territory. And shall therefrom find the percentage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found, to be added to or subtracted from the assessed values of each of the various counties in the territory, and shall notify the various county clerks of the percentage so ordered to be added to or subtracted from the valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from the total value of the property assessed to each party the percentage so ordered and collect the taxes accordingly. Said board shall assess the rolling stock of railroads and all other property not otherwise provided for." These are the provisions made in the statutes of the territory for the purpose of ascertaining the value of property in the territory for the purpose of taxation. If the county commissioners are authorized to equalize the assessment roll of their various counties, and if the territorial board of equalization have any authority to raise the aggregate amount of property in the territory over and above the amounts returned to the auditor of the territory in the assessment rolls by the county clerks of the various counties, that power must be found in the two sections last recited,—sections 5621 and 5624 as amended. By section 5622 it is pro-

vided that the county clerk of the county shall be clerk of the board of equalization for the county, and by section 5623 that "as soon as practicable after the assessment rolls are equalized and corrected, as provided in the two preceding sections, and before the third Monday in June next ensuing, the county clerk shall make out an abstract thereof containing: [Here follows a description of the different kinds of property.] Which abstract the clerk is directed to transmit without delay to the auditor of the territory and the county commissioners are authorized to direct the clerk to add to the above list of items such other items as they may deem advisable." It will be seen from the recitation of the statutes thus made that it is not only provided by the organic act that "property subject to taxation shall be taxed in proportion to its value," but that an exact mode is prescribed by which that value shall be ascertained. The individual owner must, under the law, return "a sworn statement of an itemized account of all classes of his property, under oath." The assessor is a local officer. He resides in the township or city where the taxpayer and property are located. He is elected by the voters of the township. The purpose of the law and the presumption are that he is especially qualified to judge of and to estimate the value of property in his township. He is in a situation to be so informed. The law requires that "he shall ascertain and estimate from the best information that he can obtain, the amount and cash value of all the species of property required," and it is his duty "to seek to have assessed the same classes of property at a uniform value throughout the county." And before returning his assessment roll to the county clerk he must attach to it his oath, by which he has sworn "to ascertain the true amount of value and that he has returned the full value thereof, as set forth in the above returns." If any person has willfully returned under oath a "false list of his taxable property," or places "a false value thereon," he is deemed guilty of perjury, and a heavy penalty is imposed upon an assessor "who shall have assessed property at less than its cash value." To do that is made a criminal offense, punishable with fine and imprisonment. Values are thus ascertained, and nowhere in the statute can any provision be found by which the board of county commissioners or the territorial board of equalization are charged with the duty, or in any way authorized or empowered, to assume the function of fixing values, or of raising the aggregate values on the assessment rolls as returned to the county clerk by the local assessors, unless such authority is found in sections 5621 and 5624, above recited. Under the statutes of this territory quoted above, the duty and power of assessment and valuation cease with the assessor and the review of his work by the township board. No means are provided to the board of county commissioners or to the territorial board of

equalization whereby values of property can be ascertained. When the local assessors, after discharging their duty, have made up their assessment rolls and returned them to the county clerks, they have, therefore, made out a prima facie case by which "the true cash value" has been ascertained of all the property in their respective townships. The individual owner has returned and sworn to his property. The assessor has used the best local knowledge and information to ascertain and estimate the true cash value, and has returned "the true amount of value" in his township, and the "full value thereof," under oath. Unless the board of county commissioners or the territorial board of equalization are authorized to call witnesses and to take testimony, they can have no knowledge of the facts upon which to act, which would enable them to set aside the total sum of values thus ascertained. To undertake this jurisdiction the board sits for the discharge of the function in a room in the capital city of the territory, and, without any information furnished to them by any method prescribed by the law, undertake to say, without evidence, that the individual taxpayers of the territory have sworn falsely in making out their lists and returning them to the local assessors, and that the local assessors have individually and respectively sworn falsely in making out their returns. They have nothing before them upon which to act except an "abstract" of the "assessment rolls" which has been transmitted to the auditor of the territory. That abstract forms the subject of their consideration. To such information as they are thus furnished with they are compelled to confine their attention, in the absence of testimony which the statute does not enable them to take; and they have thus assumed to say, upon their individual and uninformed judgments, that all of the assessors of the territory, and that all of the taxpayers in the territory, have been mistaken and have sworn falsely, and that the property of the territory has not been truly assessed, and that they, the board of equalization, by the statute authorized no further than to "examine the various county assessments and to equalize the same and to decide upon the rate of territorial taxes to be levied for the current year, and to equalize the levy of such taxes throughout the territory, and to find the percentage that shall be added to, or deducted from, the assessed value of such county, and to then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the territory," have the power and authority over the property and taxpayers of the territory, while there is thus no information given to them upon which to act, save the abstracts furnished to the auditor, and while thus uninformed to say and to assume jurisdiction to determine what shall be the final and aggregate amount of property in the territory for the purposes of taxation.

It cannot be assumed that, because the power to raise the aggregate amount of property in the territory is not denied to the territorial board of equalization, the board therefore had the authority to make such raise, and to participate in fixing the values of property in the territory. It cannot be assumed that, because the board of equalization is a part of what may be, for the purposes of illustration, called the "machinery of taxation," therefore, as a part of such machinery, it may perform any function which may be committed to any other part of that machinery. It cannot be assumed, in the presence of such testimony as is afforded by the values and lists of property returned under oath by the individual owner and taxpayer, and in the presence of the sworn returns made by the assessors, and in the face of and against the returns made by the township boards of equalization, that the taxpayer and the assessor have not succeeded in fixing the value of property at its true cash value. It cannot be assumed that, because the board of equalization has undertaken to state what is the true cash value of property in the territory, in the face of the evidence furnished to it by the "abstract of assessment rolls," it has any authority or jurisdiction to ascertain what is the true cash value of the property of the territory. While the figure of speech may be admitted, for the purpose of imaginative description, that the board of equalization is a part of the machinery of taxation, it cannot be assumed, in anywise correctly, that it is a constituent part of the machinery for fixing the valuation of property for the purpose of taxation. Nor can it be assumed that the territorial board of equalization can participate in the function of fixing the value of property in the territory because it has not been expressly prohibited from doing so by the statute. That is not the rule nor the mode of reasoning which I think this court should follow. I understand the rule to be, in a case like this, that no authority exists except that which is plainly provided for in the statute, or which must, by the necessities of reasonable inference, be deduced from the statute. The board of equalization has statutory and special jurisdiction alone, and that jurisdiction must be strictly pursued in conformity with the very terms of the statute in which it is given. It has no general jurisdiction. Nothing is presumed in its favor. And in a case of the kind before us, where a jurisdiction is attempted to be exercised to increase the amount of taxes which shall be taken from the citizen, the rule is emphatic and should not be transgressed. Whatever goes beyond this is invalid and without authority. "It has been truly said that, where the law gives a special jurisdiction to any body of men, it must be strictly pursued. Courts of justice are bound to watch their conduct narrowly and investigate it minutely. The peace of society and the security of property are intimately connected with and depend upon such inquiries. Can any man be safe in the ten-

ure of his lands if they are liable, at the will and pleasure of county commissioners, to be sold through partiality or caprice, without treading in the path of their duty as sworn public officers?" Black, Tax Tit. § 155, citing *Wister v. Kammerer*, 2 Yeates, 100. "The state board, like the county and district boards, is a mere creature of the statute, and can exercise no authority but such as the statute confers." And one has within its sphere the same power, and is limited by the same restrictions, as the other. *Hamilton v. State*, 3 Ind. 456. "The board has whatever power is conferred by the statutes on that subject, and no other. The power which it possesses must be exercised in the mode prescribed by statute, and in no other. The mode in such cases is the measure of the power." *Desty, Tax'n*, 1241, citing *Pavement Co. v. Painter*, 85 Cal. 609; *Cooley, Tax'n*, 470. "The statute, having specified what they, the board of equalization, might do, necessarily excludes every other power." *Orr v. State Board* (Idaho) 38 Pac. 420. The principle is too well established to require, or perhaps even to permit, the citation of authorities. It applies as well to state or territorial boards of equalization as it does to those of the city or county. In the matter of taxation the officer authorized must not exceed the specific terms of his authority. The law does guard, and the courts should guard, with care and jealousy, the power which is exercised by any officer participating in the exercise of the powers of taxation. The power is exercised *ex parte*. No opportunity is given to the taxpayer to be heard. The power is liable to great abuse, for it is exercised by those who are dealing with the property of others. No jurisdiction can be presumed to exist in the officer exercising the authority. He is strictly limited to the terms of the statute. The statute, having specified what he may do, necessarily excludes every other power. No matter how great or small the sphere of action of a board of equalization may be,—whether its scope is that of the city, or the county, or of the whole state,—it is strictly limited by the law as laid down in the statute. If any discrimination in such a matter were permissible, the law would regard with a more jealous scrutiny the exercise of jurisdiction by a board of equalization acting under the statute than by one which acts only for a township or other subdivision of the territory. And inasmuch as the larger boards are more liable to attempt the exercise of jurisdiction which does not exist in them, and inasmuch as the injury resulting from their erroneous action is more far-reaching than in the case of similar boards acting in a more limited sphere, the limitations of the law should be applied to them with at least equal watchfulness and care.

In the case before us the territorial board of equalization acts upon abstracts made from the assessment rolls furnished to the auditor of the territory by the county clerks of the various counties. These assessment rolls con-

tain the whole subject-matter upon which it is possible for that board of equalization to act. They contain (being abstracts of the total assessment rolls) all which is furnished, or appears to the board, of the aggregate amount of property in the territory. Upon these assessment rolls and the aggregate amount of property in the territory, as it appears from them, the board is, in the language of the statute,—section 5624,—“(1) to examine the various county assessments, and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current year, and with any other general or special territorial taxes required by law to be levied; and (2) to equalize the levy of such taxes throughout the territory.” Is any authority here given to raise the amounts as they appear in the “various county assessments,” and to raise the aggregate amount of property in the territory above the total sum as it appears in such assessments? If so, the power must be drawn from those specifications and terms of the statute which denominate this board to be a board of equalization, and from the provision that its purpose is “to equalize the assessment rolls” and to “equalize the levy.” The plain and patent meaning of the word “equalization,” as here used, is to take the average of the assessments throughout all of the various counties, upon the aggregate amounts ascertained by the assessments, and to see upon these rolls that the counties, respectively, stand upon an equal footing. The power is a power to equalize the different assessments of values from the various counties constituting the aggregate amount of property in the territory, and is not a power to raise the aggregate amount of all the property in the territory. And so similar statutes throughout the United States, wherever we have been able to find and examine them, have announced the same interpretation which is here given to this statute. This interpretation has been many times adopted. The section of the statute providing and thus limiting the jurisdiction of this board to that of “equalization” does, in its closing sentence, make plain the fact that no power was committed to this board to assess the valuation of property in the territory; for under that closing sentence the board was given the power to so add to values of a particular class of property, for it was provided that the “said board shall assess the rolling stock of railroads and all other property not otherwise provided for.” And the legislature in passing this act did therefore, as to all property included in the “abstracts of assessment rolls” furnished from the various counties by the county clerks thereof, give to the board the authority to equalize only, but gave to the board the power, with reference to the rolling stock of railroads and all other property not otherwise provided for, the power, and charged it with the duty, to “assess” them. And the uninformed judgment, unaided by other circumstances and considerations, upon the subject, would be that,

inasmuch as the authority to "assess" was given to the board in the one case specified, it was excluded as to all other property with reference to which the power was given to "equalize" only. It was long ago declared by Mr. Justice Story that: "Statutes levying taxes or duties on subjects or citizens * * * are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing on a close analogy." *U. S. v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Suth. St. Const.* 361. The principle of interpretation here declared is sufficiently explicit, and is scarcely capable of being expressed in more peremptory terms. We understand it to have been the uniform rule followed by the courts. It excludes the power to value and assess property by a board which is, in terms, only authorized to equalize assessments or aggregates of value; and we must agree with its declaration for reasons founded upon safe principles of judicial construction, high authority, and established precedent, sound policy, and the true interest of the citizen and taxpayer, rather than consent to yield to that view which is here sought by the defendant in error, and which was formerly held by the court upon the reasoning in *Wallace v. Bullen*, that the territorial board of equalization has the power to "value and assess" because that power is not excluded from the terms of the statute creating the board of equalization, and the express terms of which define its function to be those of equalization alone.

The vast importance of the case; the extensive jurisdiction assumed by the territorial board of equalization over the property of the citizens of the territory; the fact that this jurisdiction has been so exercised as to increase the aggregate amount of property in the territory, as ascertained by the assessors, by the sum of more than \$11,000,000, after the summing up of the amounts contained in the assessment rolls from the various counties, and the ascertainment of the aggregate amount of property in the territory; the fact that this assumed jurisdiction is left by the opinion of the court without restraint, and practically limitless; the fact that, if this jurisdiction goes unchallenged in the court, it will render nugatory that provision of the statute by which the legislature undertook to limit the authority to levy a certain number of mills upon each dollar of property in the territory for the various purposes of government; and the fact that this jurisdiction was in the case of *Wallace v. Bullen* fortified in a carefully prepared and elaborately argued opinion, there concurred in by a majority of the court,—seem not only to justify, but to demand, a careful consideration of the law as we believe it to be, and as it has been repeatedly declared by the various courts of the country.

In the case of *Chamberlain v. City of*

Cleveland (decided by the supreme court of Ohio) 34 Ohio St. 551, upon a statute which provided for the appointment of "an equalizing board," and that "the board, after taking an oath honestly and impartially to discharge their duties, shall hear and determine all objections to the assessment, and equalize the same; which equalized assessment they shall report to the council," the court said: "These embrace all their duties,—that is, the duties of the board of equalization; and it is apparent that they have no power to add to or deduct from the assessment to be equalized, except that they may, ex necessitate, as a part of the costs of the proceeding, properly add to the assessment a reasonable compensation to themselves for making the equalization. In adding over nine thousand dollars to the assessment before equalizing it, the board of equalization acted wholly without authority, and their equalization was invalid and void, and on this ground the council ought to have set it aside." It is declared by the supreme court of Iowa in the case of *Royce v. Jenney* that: "The board of supervisors, as a board of equalization, has no authority to add property not assessed to the assessment roll or tax list, or to strike property therefrom duly assessed, its duties being to equalize the value of property assessed by the proper officer." In this case the county board of equalization had undertaken to add to the assessment of a private individual of the county 100 per centum upon the moneys and credits appearing in his assessment as returned by the assessor. Under the statute of that state "the township or city board of equalization" was charged with "the duty of equalizing the assessment of all taxpayers in the township or city," and the supreme court held that: "The county board of equalization is charged with the duty of equalizing the assessment of the townships and cities, not of the taxpayers. This is done by adding to or diminishing the valuation of property, so that the property assessed throughout the county may be uniformly valued. Code, §§ 832, 833; *Cassett v. Sherwood* (1879) 42 Iowa. 623. It has no authority to add property not assessed to the assessment roll or tax list, or to strike property therefrom duly assessed. Its duties are none other than to equalize the value of the property assessed by the proper officer." *Royce v. Jenney*, 50 Iowa, 679.

In *Harney v. Board* (1876) 44 Iowa, 203, the supreme court of that state again said that: "By section 832 the county supervisors are required to equalize the assessments of the several townships, cities, and incorporated towns of their county in June of each year, substantially as the state board of equalization equalizes the assessments among the several counties. Section 834 requires the state board, on the second Monday in July of each year in which real property is assessed, to equalize the valuation of

real property, which shall be done by adding to or deducting from the aggregate valuation of real property of the respective counties the proper per centum to equalize them." Upon this state of the law, the board of supervisors, acting as a board of equalization, made an order adding 20 per cent. to the valuation of all merchandise, moneys, and credits in the towns of Osage and Mitchell. And thereupon the court said that: "After the assessments were made and returned, the board believe that, if any class in any town or township is valued too high or too low, they may add to or deduct the proper per centum; and this we believe would be substantially the same manner as the state board are required to equalize, considering that the latter has no power to add to or deduct from the valuation of personal property."

In the case of *Kelly v. Corson*, 11 Wis. 2, the county board of supervisors, to equalize the valuation of real estate between the towns so as to provide a just relation between all the valuations of real estate in the county, undertook to assess the real estate in a "part of the town of Monroe," and to raise the valuation thereof, without raising the valuation of the other towns in the county. The supreme court of that state said that: "The action of the county board in diminishing the valuation of a part of the town was unauthorized."

It was in the case of *Kittle v. Shervin*, by the supreme court of Nebraska, declared (11 Neb. 78, 17 N. W. 861) that: "The city council, sitting as a board of equalization, had no power to raise the assessed value of all the property assessed in the said city. Such raising of the valuation is not equalizing, in any sense."

The case of *City of Indianapolis v. Sturdevant*, 24 Ind. 391, was a suit to recover taxes paid under protest, and to prevent the sale by the treasurer of the property upon which the taxes were assessed, upon the ground that the property was used for educational purposes, and that by the statute of the state it was provided that such property should be exempt from taxation. Upon demurrer the jurisdiction of the circuit court was challenged because the city charter provided for a board of equalization to pass upon all complaints with reference to the assessment roll, and that the original jurisdiction over the question resided exclusively in that board, and that the plaintiff was concluded, since he failed to make application for relief before that tribunal. The supreme court said: "We cannot concur in this proposition. The power of the board of equalization seems to extend only to equalizing valuations made by the assessor, and no authority is given [to the board] to determine whether or not the property assessed is taxable."

In the case of *Oregon Steam Nav. Co. v. Wasco Co.*, 2 Or. 206, the statute of that

state (Gen. Laws 1845-64, p. 628, §§ 1, 2) provided that: "The assessor, after qualifying shall forthwith proceed and assess all the taxable property, and shall return to such county clerk, such assessment roll, with a full and complete assessment of such taxable property entered thereon, and said town lots and lands shall be valued at their cash value," etc. "Sec. 2. * * * All the personal property shall be valued at its value in cash," etc. Section 4 provided that the assessor should give three weeks' public notice, and then proceed to publicly examine the assessment rolls and correct all errors in valuation, etc., and made it the duty of persons interested to appear at the time for the purpose of having the proper alterations made. The statute also provided that: "The county court of each county shall, at the September term, examine the assessment roll of its county, and shall have powers to correct the same, make alterations in the description of lands," etc., "upon such roll," etc., "and make any other alterations or corrections in such roll as it shall deem necessary to make the same conform to the requirements of this chapter." Gen. Laws 1845-64, p. 900, § 24. Upon this state of law, the assessor, having filed the corrected assessment roll with the county clerk, at the October, 1866, term of the county court, did, under the advice and order of that court, change the valuations on plaintiff's property, on the assessment roll, from \$349,200 to \$500,000. The taxes upon the difference between the two sums were paid under protest. The contention in the case was as to the extent and character of the jurisdiction of the county court over the assessment roll after that roll had been returned by the assessor. The court held that: "The assessor must * * * make up his judgment of the value of the property. He is an officer of the county, and intrusted by his fellow citizens with this most important duty, for the reason, as is presumed, of his special fitness and capacity, and is supposed to properly care for the interests of the county; and his judgment of appraisal of value is a judicial act, and can only be called in question as provided by the statute, and, in the absence of such provision, is final. * * * The only authority for revision in valuation, we deem, is vested in the assessor and clerk. * * * In *Patten v. Green*, 13 Cal. 329, the full court say: 'We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power. Any degree of strictness of procedure in these tribunals would be better than to give such arbitrary power to a board as would authorize it, without notice or evidence, or opportunity to the taxpayer to be heard, to increase his taxes

indefinitely, without any right of appeal. We hold, therefore, that the action of the board is void, in raising the tax.' This decision was made under a law expressly conferring the power upon the supervisors to 'correct any valuation, either by adding thereto or deducting therefrom.' * * * In *People v. Reynolds*, 28 Cal. 113, upon a very similar question with the one here, the supreme court says: 'No intendment is to be made in support of the acts of officers of inferior or limited jurisdictions, where it appears that such acts were not authorized.' Has there been found in any of the statutes of Oregon above cited a single inference indicating that an assessment may be increased? There is an express provision that it may be lessened, but not a word as to its increase. Acts without authority done by such officers are in the nature of things *coryam non iudice*, and void. In our state the taxpayer, knowing his assessment, and conscious that it cannot be increased, remains at home; and we fully concur with the two California decisions cited, that without further notice, and without authority derived from the law, an increase of valuation stands opposed not only to reason, justice, and sound policy, but it is unlawful. * * *

The court goes on to say that in the Code of the state "the legislature provides fully as to the manner, time and rules for affixing valuation to property and I find no such provision anywhere else. The officer, too, is clearly named whose sole duty it is to make that appraisal." And it also provides for "changes in valuation," but under the provision of the Code giving to the county court its authority over the assessment roll "change in valuation is not hinted at." The court has "power to correct the roll. That does not include the power to change assessments, for the words 'change' and 'correct' are not equivalent in meaning. It may change the descriptions of property. * * *

"Evidently the power of the assessor ceases when, having completed the enumeration of assessments, he makes return of the roll, and the same is filed in the county court." "The assessment roll becomes a record, subject only to statutory alterations." "By chapter 2, if the assessor do not know he must inform himself of these facts, must swear the owner, make practical examination of the property, must distinguish between the value of articles of even the same species or class. How can the county court do all this?" "The county court was undertaking to make the burden of taxation uniform on all persons, in strict proportion to the cash value of the property by each one owned, but we think the court did not have the authority necessary to increase the assessment." Liberal extracts are here introduced from the opinion of the court in this case because it especially distinguishes the functions of assessment and equalization, and shows what the law must, from the

necessity of the case, be, as to the fixing of values for the purpose of taxation. When the function of valuation has been committed to particular appraisers or assessors, by fit terms of the statute, and when no power is expressly given by the statute to change these values, they are final, and must remain as they are, and can only be the subject of alteration under express and well-defined statutory provisions, and no change in assessments can be made, that will be legal, which is not made upon notice; and the act of raising valuations cannot be performed by a county court, board of supervisors, or territorial board of equalization, when such board or boards have no means of information, and are without authority expressly given.

An instructive case upon the question is that of *Wells, Fargo & Co. v. State Board of Equalization*, decided in the supreme court of California, and reported in 56 Cal. 194. The case was presented upon a writ of prohibition against the state board of equalization to prevent the board from raising the assessment upon the property of the petitioner. Section 9, art. 13, of the constitution of that state, provides that: "A state board of equalization * * * shall be elected * * * whose duty it shall be to equalize the valuation of the taxable property of the several counties in the state for the purposes of taxation. * * * The boards of supervisors of the several counties in the state shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the boards may prescribe, as to the county assessments, and under such rules of notice as the state board may prescribe, as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll." This provision of the California constitution should be compared with the terms of our own statute creating the territorial board of equalization and declaring its duties. For all the purposes of the decision upon the point in question our statute is identical with the provisions passed upon in that case. But the supreme court of California, upon the matter, said that: "On the part of the state board of equalization it is contended that by virtue of this section they have the power to increase or lower any and every individual assessment in each and every county assessment roll within the limits of the state; and that, too, irrespective of any action on the part of the county boards of equalization in respect to individual assessment upon the rolls of their respective counties. If the state board has such power, it is unquestionably a tremendous power. * * *

That such a power may readily lead to great abuses does not admit of doubt. Such considerations, however, afford no reason for denying the power, if it does exist. They should only make us cautious in considering the question, which recurs, and is, what is the true and fair construction of the provision already quoted? Its meaning, when ascertained, we are bound to give effect to, whatever the consequences. In the first place, the section in question provides for a state board of equalization, and also for county boards of equalization. They are all boards of equalization. To equalize is to make equal; to cause to correspond, or be like in amount or degree, as compared with something. The meaning of the term is important to be borne in mind. Reading the proviso as it is claimed on behalf of the state board, it should be read, that board is authorized and empowered 'to increase or lower the entire assessment roll, or any assessment contained therein'; and exactly the same power is conferred on the county boards in respect to the rolls of their respective counties. For many reasons, it is manifest the proviso should not be so read. To do so would not only lead to the most glaring absurdities and serious conflicts between the respective boards, but would make the proviso inconsistent with the body of the section, and contrary to the fundamental idea of equalization. * * * It was therefore eminently wise on the part of the framers of the constitution to limit the powers of the state board in respect to equalization, as we think they did do by the section under consideration, to the equalization of the assessment rolls of the various counties by comparing the assessment roll of each one of the counties with the roll of each and all the others, and thus make the assessment conform to the true value in money of the property contained in the respective rolls. * * * Thus, each board becomes what the provision treats of,—a board of equalization." And the constitution of California having, therefore, expressly provided that, under such rules of notice as the state board may prescribe, it "may increase or lower the entire assessment roll, or any assessment contained therein," so as to "make the assessment conform to the true value in money of the property contained in said roll," its supreme court held that, the boards having been constituted upon the theory and for the purposes of equalization, they could not increase or lower the entire assessment roll, and that the provision thus made was but an obscurity, to be disregarded in the presence of the duty with which alone the equalization board was charged, namely, the duty of equalization.

In the case of *People v. Lothrop*, 3 Colo. 428, the supreme court of Colorado has given the question somewhat fuller consideration, and, upon a similar statute, arrives, in unmistakable terms, at the same uniform result as that which is indicated by all the cases which we have been able to find, except that

of a majority of this court in the case of *Wallace v. Bullen*. And yet it is concluded by this court in the case of *Wallace v. Bullen* that: "It is not necessary that we should dissent from the reasoning and conclusion of the learned court in that case in order to arrive at a different result in the case which we are now considering." The constitution of Colorado provides for the election of a county assessor in each county. The statutes of the state, pursuing the constitutional direction, provide for the election of this county assessor. The county commissioners of each county are constituted, by the statutes, a board of equalization for the correction and completion of the assessment roll, with power to supply omissions in the assessment rolls, and, for the purpose of equalizing the same, to increase, diminish, or otherwise alter and correct any assessment or valuation. It provides, in case of a change of the assessment of any taxpayer, that he shall be notified, and have a hearing before the board. It constitutes a quasi court to hear any and all complaints of the taxpayer touching the valuation or listing of his property, with power to adjust and correct the assessment roll as they may deem proper and right, thus adding statutory duties to their constitutional duties "to adjust and equalize." And it was contended by the court here in *Wallace v. Bullen* that the difference in the constitutional and statutory provisions of the state of Colorado upon this point so differentiate the Colorado case as to make the conclusions of the court there inapplicable here. By the court here it was, in *Wallace v. Bullen*, argued that inasmuch as the statute of Colorado provided an appeal to the board of county commissioners, and gave to that board authority to participate in the duty and power of assessing and fixing values, on that account it was unnecessary that the board of equalization of the state of Colorado should have or assume this assessorial power, but that inasmuch as the boards of county commissioners of this territory are not clothed with any authority to join in the assessment of values such as was, as it is claimed, given to the boards of county commissioners in the state of Colorado, therefore this authority to complete the assessment and valuation of property after the local assessors have finished their work must, by implication, exist in the territorial board of equalization of the territory, and that inasmuch as the property, for the purposes of taxation, must be assessed at its true cash value, therefore the territorial board of equalization has this power also (that is, to see that the property of the territory is assessed at its true cash value), and that it is the duty of that board to examine, and, if it finds that this has not been done by the local assessors, that they have, therefore, the authority to review the whole assessment rolls, showing the aggregate amount of property resulting from the local assessment, and to fix "the true cash value" of property in the territory. I cannot concur in the slightest degree

in these conclusions. Unlike the method of assessment adopted in Colorado, our system provides, as has been seen, for assessment by local assessors, with statutory provisions for the equalization of individual assessments by the boards of equalization of each township, and, upon the conclusion of its work by the last-named board, that the assessment shall be final as to individual assessments. The duty and power of making assessments or valuations ends with the local assessors and the township board of equalization. With us the board of county commissioners is given the power to adjust and equalize. The board of territorial equalization is charged with the same functions, and no other. The two last-named boards have nothing to do with the "true cash value" of property in the territory. It is their duty, respectively, to adjust and equalize between the different townships in a county, and between the different counties in the territory, the aggregate amount of property, as ascertained by the assessment rolls, of the respective townships within the county, and the assessment rolls of the counties, respectively, furnished to the auditor of the territory by the county clerks of the various counties. It was held in the opinion of the court in *Wallace v. Bullen* that: "That honest and uniform valuation which the law expressly demands is its assessment and valuation at its true cash value. The board of equalization found on examination that the property in Kingfisher county had been honestly assessed and returned at its true cash value. They further found that in every other county in the territory property had been assessed and returned with values fixed at from five to seventy-five per cent. below the true cash value; and they ordered that percentage to be added to the returned valuation of each of the counties, except Kingfisher, that would make the assessment represent the true value, and thus equalize the valuation of all the counties upon the basis of the requirement of the law." I dissent from this statement of fact. The board is furnished with no means of ascertaining whether property in the various counties had been honestly assessed or not. It had no means of determining that property in Kingfisher county had been honestly assessed or not. Nor had they any method of ascertaining that in every other county in the territory property had been dishonestly assessed. The statutes furnish them with no method of procuring information upon these points, nor do they furnish the board with the legal authority to make the inquiry. If the board had been so furnished, they would have found that the valuation in Kingfisher county had already been raised 45 per cent. by the board of county commissioners, upon the assessments of that county, as returned by the township assessors, under an assumption of authority which we believe to have been of a similar character with, and only less in geographical extent than, that assumption of authority by the territorial board

of equalization which we are now considering. And I dissent from the conclusion that the "equalization" thus effected was in any sense the equalization intended by the statute, which is nothing more than taking the average of all the county assessment rolls, and thus ascertaining the percentage which should be added to or deducted from the assessment rolls of the various counties in order to equalize them with one another. No power exercised upon inference can be justified, when the power of taxation is to be exercised, by which the property of the citizen can be taken away from him. And the supreme court of Colorado properly declared that: "A power so vast and important, involving the integrity of constitutional limitation, cannot be founded on an implication of law. A statute in derogation of the rights of property, or which takes away the estate of the citizen, must be strictly construed. *Sharp v. Speir*, 4 Hill, 76; *Bloom v. Burdick*, 1 Hill, 130." *People v. Lothrop*, 3 Colo. 467.

I do not understand the court, in its opinion, to cite any case as authority for its conclusion, other than that of *Black v. McGonigle*, 103 Mo. 192, 15 S. W. 615. Rev St. Mo. 1879, § 6672, provided that the board of county commissioners, sitting as a board of equalization, should not only "equalize the valuation and assessment of all such property, both real and personal," but should do so in such a manner that "each tract of land shall be entered on the tax book at its true value." Upon this provision of the statute the court held in that case that: "In such a case it is not necessary to specify each parcel of land thus increased. It is sufficient to increase the assessed values of all the lands in a particular township by one order." This opinion was rendered, as is stated in the opinion of the court in *Wallace v. Bullen*, "without support of authorities." While it may be correct upon the Missouri statute, I do not consider it of force as illustrating or interpreting ours, since the county board of equalization in that case was especially charged with the function of reviewing and fixing values, not given in the statute of this territory to the territorial board of equalization, and was a statutory authority given in addition to the function of equalization, inasmuch as it was expressly charged with the duty of seeing that "each tract of land shall be entered on the tax book at its true value." It does not support the conclusion of law sought to be drawn from it. But the proposition now here asserted has been distinctly upheld in that state in the case of *Paul v. Railroad Co.*, 4 Dill. 35, Fed. Cas. No. 10,845, in the United States circuit court for the Eastern district of Missouri, in an opinion announced by Dillon, Circuit Judge. The statutes of the state of Missouri required each railroad company to make a list of its property, and to affix a value to it. These lists were transmitted to the counties, and there was a county board established, whose duty it was "to examine the statement furnished them by the officer

of the company, and to determine the correctness thereof, as to the amount of property and the valuation thereof." The companies complied with this provision, and transmitted their descriptive lists and valuation to the various counties. The valuation of the railroad property in Pettis county, as returned by the officers of the company, amounted to \$300,260, but, as increased by the county court, it amounted to \$500,000. Another provision of the law is that this valuation, as fixed by the county court, shall be transmitted to the state board of equalization. That board consisted of the state senate. The statute provides that the "state board shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies, liable to taxation, under the provisions of this act." And without authority the state board of equalization undertook to raise the property of the railroad companies from \$9,000 a mile to \$23,000 a mile. The opinion of the court, in which Mr. Justice Miller, of the supreme court of the United States, and United States District Judge Treat, participated, declared that "the law limited the functions and powers of this body to the work of equalizing," and that the raising of the valuation of the railroad company amounted to an assumption of the functions and powers of an original assessment, which did not exist in this board, but that its functions and powers were those of "adjustment and equalization of valuations alone."

And after my dissenting opinion was filed in the case of *Wallace v. Bullen*, and on the 28th day of September, 1896, the views here expressed were again declared by the supreme court of Montana in the case of *State v. State Board of Equalization*, 46 Pac. 266. The constitution of Montana provides (section 15, art. 12) that: "The governor, secretary of state, state treasurer, state auditor and attorney general shall constitute a state board of equalization, and the board of county commissioners of each county shall constitute a county board of equalization. The duty of the state board of equalization shall be to adjust and equalize the valuation of taxable property among the several counties of the state. The duty of the county boards of equalization shall be to adjust and equalize the valuation of taxable property within their respective counties. Each board shall also perform such other duties as may be prescribed by law." Acting under this provision, the state board of equalization undertook to and did increase the aggregate total of all the values of property in the several counties of the state from the sum of \$111,084,350, which was the total value of property as disclosed by the abstracts of assessment rolls and statements transmitted to and received by the state board from the county boards of equalization and assessors, to the sum of \$114,231,702, which was an aggregate increase of the total assessed valuation of all the property in the several counties of the state, as shown above, of \$3,147,370.

The supreme court of the state held the increase to be void, saying that: "The state board of equalization was without power to increase proportionately the valuation of the property in the several counties of the state, and thereby increase the aggregate value."

My understanding of the authorities of the supreme court of the various states, as thus recited, is confirmed by the interpretation placed upon them by the text writers. It is said in 1 *Desty, Tax'n*, p. 498, that: "Boards of equalization cannot act unless specially authorized. Their jurisdiction is special and limited, and must be conferred in express terms. * * * The valuation of the assessors is conclusive, except when otherwise provided by statute. When the question of valuation has been once regularly referred to the proper board, the valuation of that tribunal is final." And on page 496 that: "The powers of such board are limited to securing uniformity between the several assessorial districts." And on page 505: "It is the duty of the state board to adjust and equalize the valuation of the real and personal property among the several counties, with the view of apportioning equitably the burden of the state government. * * * Although the power to determine the valuation of taxable property is lodged in the assessors and boards of county commissioners, yet the state board of equalization may, for the purpose of adjusting and equalizing, increase the aggregate valuation of one county and decrease that of another, but it has no power to increase the aggregate valuation above the valuations as returned by the clerks of the several counties." And it is said in *Burroughs, Tax'n*, p. 235, that: "The functions of these boards is twofold. They are sometimes invested with the powers of boards of review, in addition to other powers; but, when not invested with such powers, their duty is to equalize the assessment of each county so that all the towns of the county may bear the burden of taxation equally, or to equalize the assessment of the counties so that each county may bear its proper proportion of the burden. In the latter case it is called 'State Board of Equalization.'" And it is said in the text of 25 *Am. & Eng. Enc. Law*, p. 247, that: "The duty of boards of equalization is to adjust and equalize the valuation of property among the several districts, with a view of an equitable apportionment of the burden; and for this purpose they may increase the aggregate valuation of one district and decrease that of another, * * * but they cannot increase the sum of all the valuations of the several districts."

The law, as thus uniformly declared, not more explicitly by the supreme courts of the various states, and in the various text-books which treat of the subject, than in the interpretation of the statute by the natural reason unaided by such authoritative exposition, has found its way into the lexicography of the language; and "equalization," in the law, is

defined in the Century Dictionary as: "Board of equalization, in the state or county governments of some of the United States; a board of commissioners, whose duty it is, in order that the incidents of state or county taxation may be the same in all the local subdivisions, to reduce to a uniform basis the valuation made by the local assessors."

We have thus examined and stated, not only all the cases bearing upon the questions which were presented to the court in the briefs of counsel, but many others, and have, in the course of our examination, been unable to find a single case which has undertaken to construe a statute similar to that now under consideration in any other way than as limiting the powers of the board of equalization, having only an abstract of assessment rolls before them for consideration, to the power of equalization alone; and we conclude that any attempt on the part of such a board to increase the aggregate amount of taxation was an unauthorized assumption of authority to assess and fix values, which does not exist under a statute of that character.

The opinion of the court in *Wallace v. Bullen* sought to be fortified by the consideration that indebtedness has been incurred and bonds issued, in good faith, in reliance upon the validity of the increase made by the territorial board of equalization to the aggregate amount of property in the territory for the purposes of taxation. The inference is that the finding of the court ought to support the jurisdiction of the territorial board of equalization thus assumed to secure the payment of such indebtedness. And it is said in the opinion of the court in that case that: "This court, having regard for public honor, faith, and credit, cannot consent that the ordinary and common rule for construing a public statute shall be violated or strained, and clearly expressed legislative intent be disregarded, when such departure from established rules of interpretation would clearly result in the violation of private rights and the impairment of public faith, and might seriously impair the usefulness of territorial, county, and municipal governments, by depriving them of the just revenue necessary for a proper discharge of their functions." If we could agree with this mode of reasoning, and with the declarations that a statute prescribing the procedure for taxation was to be construed to include the exercise of a specific power, because the exercise of that power is not prohibited, and that a plain legislative intent is manifested, authorizing the board to assess and value, when it is authorized in express terms only to "equalize," we might also conclude that in assuming the functions of assessment and the power to value the property in the territory, and in setting down that aggregate value at \$39,279,000, instead of \$28,000,000, ascertained by the assessors of the territory, the territorial board of equalization was taking its course plainly and directly in the broad highway of the law, with its sails full of jurisdiction; but we de-

clare our belief to be that the well-known and established rule for construing the public statutes in question has been disregarded by the territorial board of equalization, and that a power has been assumed by it which is clearly outside of the statute which is the sole source and foundation of its authority, and which does not exist in that body, and that in order to sustain that jurisdiction a construction must be applied to the statute which strains and warps it from that clear meaning which all of the courts have hitherto attributed to similar statutes expressed in like language. The limitation of the federal statute referred to is that of July 30, 1886, which provides that: "No political or municipal corporation, county or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void." 1 Supp. Rev. St. U. S. p. 504. This federal statute speaks for itself. It is a protection, and was intended as a protection, to the taxpayers of the territories of the United States. By various arguments in several cases heretofore argued to this court and before the several district courts of the territory, its force and effect have been, prior to the action of the territorial board of equalization here complained of, sought to be set aside by those who hold warrants issued in excess of the 4 per cent. limit specified in the act. This court and the district courts of the territory have uniformly held that the municipalities are limited in their power to incur indebtedness by the terms of this act. Since it was intended by the holders of such indebtedness, incurred beyond the 4 per cent. limit, and hitherto held to be illegal, to adopt some other method of securing payment than by any further direct application to the courts, a plausible ingenuity suggested the direct application to some board of county commissioners of the territory, as was in this case made to the board of county commissioners of Kingfisher county, to assume jurisdiction and inflate the aggregate values of property in the county by an addition of 45 per cent. to the assessment and valuation of that which had already theretofore been ascertained by the legal method prescribed in the statute, and a subsequent application to the territorial board of equalization to further inflate the aggregate valuation of all property in the territory to an average addition of 35 per cent. Is it too much to assert that this is just what occurred in this case? Or would such an assumption be going beyond the proper limits of a judicial opinion? A vast amount of illegal warrants were current in the territory before the action referred to was taken

by the board of county commissioners of Kingfisher county and by the board of equalization for the territory, and still subsist. The existence of such a sum of illegal indebtedness furnished a fertile field for investment and speculation, and a large quantity of such illegal warrants, issued in excess of the 4 per cent. limit, having become finally located in the hands of a comparatively few persons, the incentive became active and vigilant to secure, not the small amount of percentage which had been originally paid upon the purchase of, and for the assignment of, these illegal warrants and indebtedness, but to secure the payment of them for their face value; and, since the adventurer in this line of industry had failed to secure the co-operation of the courts in the attempted abrogation of the federal statute limiting the indebtedness of municipalities to 4 per cent. of their last assessed valuation, no device remained except that of widening the basis of taxation by the successive illegal and unauthorized overvaluations which were made in this case. If successful, and if the supreme court could now be induced to consummate the scheme, and complete and crown its success by an affirmation of this court, the federal statute of limitation would be completely evaded, and the taxpaying citizens of the territory loaded with an indebtedness not theirs to carry, under the laws. If, indeed, the illegal and fraudulent addition of \$11,000,000 to the value of property for taxation by the action thus taken be made the subject of taxation and further indebtedness, then, by the means of the indebtedness on behalf of the counties, respectively, up to the 4 per cent. limitation, and of the townships, respectively, up to the 4 per cent. limitation, and of the school districts, respectively, up to the 4 per cent. limitation, and of the territory itself up to the limitation of 1 per cent., then the speculators who are back of the illegal assessment thus made by the territorial board, here sought to be upheld, would have been successful in saddling upon the taxpayers of the territory, by means of the board of county commissioners of Kingfisher county and the territorial board of equalization, an added annual tax of 13 per cent. upon such addition to the aggregate valuation of the whole territory, to wit, upon \$11,000,000. In other words, it would have been made possible to collect from the taxpaying citizens of this territory \$1,500,000 of illegal taxes, a large part of which illegal indebtedness was undoubtedly held in warrants by those who devised this gigantic and nefarious scheme of robbery. We cannot understand how the defeat of such a scheme could result in the violation of private rights and the impairment of public faith, or might seriously impair the usefulness of territorial, county, and municipal governments, by depriving them of their just revenue. To accede to such a proposition would be to hopelessly mingle with the high duty of this court, to interpret the laws as they are, regarding such simple interpretation as the surest and safest foundation of the in-

tegrity of the state, the corrupt schemes of those who would destroy the citizenship of the territory by loading them with obligations in violation of the statute, and not honestly theirs to carry or to pay. I think that the courts best discharge their duty, and are held in the highest esteem, and reach their highest usefulness, when they confine themselves most carefully to the duty of interpreting and stating the law as it is; and when we, as judges, do that, we can safely rely upon the "public honor, faith, and credit" of this territory, and the honor of this court, taking care of themselves.

We conclude that assessment is the same as valuation of the property taxed; that this assessment or valuation must be made by the officer or officers to whom it is by the statute expressly committed; that the duty and function of assessment cannot be shared in by any officer to whom it is not so granted by the very language of the statute; that equalization of property is a wholly different matter, comprehending, as it does, simply an ascertainment of the average between valuations already found. It is the equalizing of individuals among each other by the township boards, and of the townships among each other by the county boards, and of the counties among each other by the state board, of equalization. It is in the present case, the aggregate amount of property having been ascertained by the abstract of assessment rolls furnished to the auditor of the territory from the various counties, an ascertainment of the proper percentage which should be added to some counties and taken away from others in order to place the counties upon an equal footing, the aggregate amount of property remaining the same, except from such slight raising or lowering of the amounts as may be incidental to the operation of equalizing the taxes among the various counties, and that if the assumption of such authority, and its sanction by the court here, be indeed the law, then it would make very little difference whether there be any limitation in the statute of one, two, or ten mills in the levy to be made by the territorial board and the boards of county commissioners in their respective counties; for, if they be restrained in the statute in one place, and set free, by inference, to increase the aggregate amount of property in the territory, the extent to which that power might be exercised would be a mere matter of private opinion among the members of the board, and of helpless conjecture on the part of the taxpayer. And we therefore believe that the board of equalization exceeded any power given to it by the statute in making the equalization complained of, and that, to the extent of such addition to the aggregate amount of property in the territory as was made by the territorial board of equalization,—being 45 per cent. in Logan county in addition to the values of a county already overvalued 45 per cent. by its own board of county commissioners,—the taxes levied upon the petitioners were void. The or-

der of the district court is reversed. All the justices concur, except DALE, C. J., who presided below, and TARSNEY, J.

KEATON, J. (concurring). I concur fully with the conclusion reached by Justice McATEE in the foregoing opinion, and with most of the reasoning therein contained. Hence, were the question decided not one of extraordinary importance, and one which has heretofore been decided by a majority of this court directly contrary to the position now taken by a majority of the members thereof, I should content myself with merely concurring with the views so ably expressed by my Brother McATEE, without attempting to elaborate them or to give any additional reasons therefor. In this connection, however, I will be pardoned the statement that, in my judgment, both the foregoing and the majority opinion in *Wallace v. Bullen* go somewhat beyond the matters presented by the record, and deal too much with supposed consequences, and the alleged motives of those assumed to be peculiarly interested in the determination of the question involved, which, as I understand it, is solely one of statutory construction.

There is one proposition raised by the pleadings and urged by the defendants in this and the other similar cases which has not been noticed in either of the prepared opinions. It is, in substance, that, the value of all the property in the territory having been raised to a common plane, no taxpayer is injured thereby, as the rate of taxation was correspondingly reduced, and the amount of taxes levied in each county and the amount required of each taxpayer were the same as they would have been had the raise not been made by the territorial board of equalization. In the answer of defendants in the case at bar this proposition is sought to be raised by the following allegations: "Defendants say that the rate of taxation in said Logan county was fixed by the board of county commissioners, subsequent to said action by the territorial board of equalization, upon the basis of the increased valuation of the property in said Logan county as fixed by the territorial board of equalization as aforesaid; that the said board of county commissioners at the time of fixing said rates made a careful and conservative estimate of the expenses of said county for the current year 1895, and levied only a sufficient rate of taxation to meet said expenses; that the amount of money required to be paid as taxes for said county is no greater than as though said increase by the said territorial board of equalization had not been made; that, if said increase in valuation had not been made, the said board of county commissioners would have been compelled to increase the rate of taxation in order to meet the actual and necessary expenses of said county." Conceding that there are sufficient facts pleaded in said answer to properly present the point relied on,—

which, to say the least, is extremely doubtful,—the contention, in my opinion, is not tenable, for several reasons, among which are the following: First. It would be wholly impracticable for a court to determine, with any degree of certainty, that an individual's tax has not been increased by such raise. Second. The statute authorizes an injunction "to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same." Section 285, Code Civ. Proc. Third. To sustain this contention would be to give said board of equalization unlimited power in this regard, and the value of all the property in the territory, except railroads, might be raised to 10, or even 10,000, times its actual value; and, as this board is required to assess railroad property at "its actual cash value," any increase of the other taxable property beyond such value would necessarily impose an unjust burden thereon.

I heartily agree with what is said in the foregoing opinion as to its being utterly impossible, under the law, for the territorial board of equalization to ascertain the true or actual value of any classes of property except that which it is said board's duty to assess. This position is made perfectly apparent by the provisions of article 4, c. 43, Sess. Laws 1895, which make it the duty of said board "to assess all the property of the railroads and railroad corporations in the territory of Oklahoma at its actual cash value"; and, in order that said value may be ascertained, "every person, company or corporation operating or constructing a railroad in this territory" is required to "return sworn lists or schedules of the taxable property of said railroad company or corporation as hereinafter provided." It is then specifically provided in section 5 of said article how and by whom these lists or schedules shall be made, what they shall contain, etc. It will suffice here to say that said lists or schedules shall contain a sufficient statement of the amount, character, and value of such railroad property to enable said board to determine, almost (if not quite) definitely, the actual cash value thereof. Then, in section 7 of said article, it is further provided that, if the proper officers fail to make the required statements or schedules, the person, company, or corporation owning such railroad property "shall forfeit, as a penalty, not less than five thousand dollars for each offense," etc. It is still further provided in section 8 of said article that the board of railroad assessors shall have power to compel the attendance of the officers and other agents of a railroad company as witnesses to testify before said board concerning any necessary matters to enable said board to properly assess such property, and that "any president, secretary, receiver, accounting officer, servant or agent of any railroad company, who shall knowingly make any false answer to any question put to him by such board or by its order,

touching the business, property, money and credits and value thereof, of said railroad company, shall be guilty of perjury, and it shall be the duty of the president of said board to prosecute any person liable to the penalties of this section immediately upon the accruing of the liability of such prosecution." How, then, can it be asserted that the legislature, which understood that all of the foregoing provisions were necessary to enable these officers, when acting as the board of railroad assessors, to determine the actual cash value of the railroad property of the territory, could possibly have intended that said officers, when acting as the territorial board of equalization, should assume to fix the actual cash value of the other property of the territory at a different amount from that fixed by the various assessors thereof, as equalized by the township and county boards of equalization, without any means whatever for ascertaining same except abstracts of the assessment rolls of the different counties?

Another phase of the question which seems to have been overlooked by the other justices who have prepared opinions herein is that, if this court holds that said board of equalization has the power to raise the aggregate valuation of the taxable property of the territory as shown by the abstracts of the assessment rolls of all the counties, by a parity of reasoning we must also hold that it is vested with the power to reduce said aggregate valuation; and, so far as the writer can discern, there will be no adequate means of correcting the action of said board, no matter to what extent it may in the future increase or decrease such aggregate value. It certainly will not be contended that a taxpayer can maintain a proceeding in court to review and correct the action of said board in this regard upon the sole ground that his property has been overvalued thereby; and, as there is no appeal therefrom, I can see no possible remedy, if this power is conceded that the taxpayers of the territory would have to correct such action, should the territorial board of equalization increase the aggregate valuation of their property to twice, or even many more times, its "true cash value." On the other hand, I can see no means with which to review and correct the action of said board should it decrease the valuation of the property of the territory to one-half, or even a less proportion, of its "true cash value." Can it be possible that the legislature ever intended to invest this body with such tremendous powers, to be exercised without the right of a hearing on the part of those affected thereby, by providing simply that "it shall be the duty of said board of examine the various county assessments and to equalize same"? The objections just suggested are not satisfied by saying that, as the territorial board of equalization is composed of sworn officers, it will be presumed that they will fairly and honestly perform the

duties assumed by them; for this argument will apply with greater force to the local assessors, who are also sworn officers, and whose duties are definitely prescribed by law, and heavy penalties provided for a failure on their part to honestly and faithfully perform them. Confer this unlimited and absolute power, and some future territorial board of equalization—surrounded by different environments, and actuated by different considerations from those which seem, in part, at least, to have influenced the one whose action is now under consideration—may, by an arbitrary reduction of the aggregate assessed value of the property of this territory, accomplish the very result which is sought to be avoided by the majority opinion of this court in *Wallace v. Bullen*, 52 Pac. 954, to wit, "the violation of private rights and the impairment of public faith, and might seriously impair the usefulness of territorial, county, and municipal governments, by depriving them of the just revenue necessary for the proper discharge of their functions." It may be urged that there is no possible danger of any board of equalization, in this territory, ever reducing the aggregate assessed value of the property within its jurisdiction, and, judging from precedents, there would seem to be considerable plausibility in this contention; but courts, when they look to consequences at all as an aid in interpreting the meaning of a statute and the intention of the legislature as expressed thereby, must take into consideration all such consequences as are made possible by a certain construction, and which can logically be expected to follow same. I accede to the suggestion in the opinion of the court in *Wallace v. Bullen* to the effect that the territorial board must necessarily be conceded the power to raise or lower the aggregate assessed value of the property of a county in order to properly perform its duties as a board of equalization; but, when used solely for the proper exercise of these functions, this power is not an arbitrary and unlimited one, since it is confined strictly within established and well-defined limits, and, while restricted to such purpose, it can never be made an engine of oppression, on the one hand, or of repudiation, on the other; and, although the proper exercise of said power may result in increasing the assessed valuation of the property of many taxpayers, they must submit thereto, in order that the burdens of taxation shall be so distributed as to require each to contribute to the support of government in proportion to the value of his property. To this extent the power to change valuations by boards of equalization is legitimate and proper, but to extend it beyond this scope, without providing those whose property is revalued with an opportunity to be heard, is to remove all restrictions upon the power of the state to tax the property of the citizen. See *South Platte Land Co. v. Buffalo Co. Com'rs*, 7 Neb. 253, wherein it is held: "The county commission-

ers, acting as a board of equalization, cannot raise the assessment on property without giving notice to the owner; and, if they do so increase the assessment of property without notice, they act without jurisdiction of the person or subject-matter, and their proceedings are void and of no effect." In the body of the opinion, Chief Justice Gantt, speaking for the court, says: "Therefore the main question presented for consideration is whether the commissioners, acting as a board of equalization, can reassess property without giving notice to the owner. * * * But it is insisted that, as section 27 constitutes the county commissioners also a board of equalization, and provides that the said board shall have the right to raise or lower the valuations of any or all property (except property valued by the state board) as may be deemed just and proper, absolute power resides in this board to reassess property as it may choose, and that, as the statute fixes the time when the board shall meet, it may exercise this power without giving notice to the owner of the property. * * * Certainly such absolute power to tax the property of the citizen without notice would establish a precedent too dangerous to be tolerated, and it is not to be supposed that it was the intention of the legislature to confer on the board a power so dangerous and so liable to abuse. * * * Tax his property, and the constitution declares that no man shall be deprived of his property without due process of law. * * * But, if the proposition contended for is maintainable, then the board, by its arbitrary act, may, without due process of law, raise the tax on property of the citizen without limit, and without his knowledge. * * * It seems to me that, if the proposition contended for on the part of the defendants is to be maintained, it must be at the sacrifice of those great principles upon which private rights repose for their security, and which are secured by the solemn guaranties of the constitution; and therefore I must conclude that the county commissioners, acting as a board of equalization, cannot interfere with those rights and reassess property without first giving notice to the owner."

I fully agree with the conclusion of my associates (McATEE and BIERER) that the action of the territorial board of equalization in raising the aggregate assessed valuation of all the property of the territory, except railroad property, more than \$11,000,000, as shown by the record in this case, amounted to a reassessment of all the property whose aggregate assessed valuation was so raised, rather than an equalization thereof. While it is true that "the valuation of Kingfisher county was adopted as a basis for equalization," and the valuation of each of the other counties raised thereto, yet the same reasoning which will support this raise, to wit, the power and duty of said board to see that "the law requiring all the property to be assessed at its actual cash value" is complied with, will also support a raise of the valuations of all the

counties of the territory to some common plane entirely above that of any county, which, in the opinion of a majority of the members of this board, would come most nearly fulfilling the requirements of the law. In fact, such was the practical effect of the action of said board in this instance, since the aggregate valuation of the taxable property of Kingfisher county, which was used as the basis for said action, had previously been increased by the county board of equalization in the sum of \$382,335.75, being an increase of about 25 per cent. over and above the aggregate valuation fixed by the several assessors of the taxing districts of said county, as is shown by the record in the case of *Lee v. Mehew*, now pending before this court, and submitted, as I understand, to abide the decision in the case at bar, and the other cases involving the same question. In other words, the majority of the members of this board have attempted to exercise the powers and duties conferred by law upon the assessors of the territory, except that they have reassessed the taxable property thereof by county, instead of individual assessments.

I also entirely agree with those of my associates who have reached the conclusion that the legislature never conferred, and never intended to confer, any such jurisdiction or authority upon this board; and I go still further, and hold that the legislature itself is not invested with the power to confer such authority, unless it also provide for a hearing before said board on the part of those whose property is to be reassessed thereby. Fortunately for the property owning citizen, under the sacred guaranty of our federal constitution no person can be deprived of his property "without due process of law"; and it has been the unanimous holding of the courts of this country that the attempted exercise of the power on the part of a state to provide for the assessing of the property of her citizens, or any portion thereof, for taxation, without an opportunity for them to be heard at the time, or after the date, of such assessment, is in violation of this constitutional provision, and therefore nugatory. The fact that our law makes ample provision for such a hearing before the township boards of equalization is no compliance with said constitutional guaranty, if both the county and territorial boards of equalization, or either of them, can, subsequently thereto, reassess the property listed for taxation. *Railroad Tax Cases*, 13 Fed. 722, 8 Sawy. 270. Perhaps the leading and best-reasoned case to be found upon this proposition is that of *Stuart v. Palmer*, 74 N. Y. 183, wherein the very able court of that state, per Earl, J., say, in part, the following: "It will be observed that two assessments are provided for by the acts,—one for the damages awarded to the owners of the land, under section 3 of the act of 1860, as amended, and another for the expense of regulating, grading, etc., under section 4, as amended. The former assessment was to be made and confirmed after proper notice to and hearing of the persons interested. The latter assessment could be made without any notice to or hearing of any

person. The law requires no notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing; and the assessment, when once made in the exercise of the arbitrary discretion thus conferred, would be unassailable, and, however unjust, unfair, and oppressive, would be subject to no review, unless fraud or corruption could be shown. I am of the opinion that the constitutional sanctions no law imposing such an assessment without a notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice. The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation on this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer v. Bunbury*, 30 Mich. 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights. It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That 'due process of law' requires this has been quite uniformly recognized. No case, it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments; and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it, in the cases which they were considering. It has sometimes been intimated that a

citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well have said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." The principles declared by the supreme court of New York in the case just cited and quoted from are recognized and affirmed in numerous decisions, both state and federal, among them being the following: *South Platte Land Co. v. Buffalo Co. Com'rs*, supra; *People v. San Francisco Savings Union*, 31 Cal. 138; *Slaughter v. City of Louisville* (Ky.) 8 S. W. 917; *Davidson v. Board*, 96 U. S. 97; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 16 Sup. Ct. 83, and cases therein cited; *Railroad Tax Cases*, supra, and note. The valuation or assessment of property for the purpose of imposing an ad valorem tax thereon is a judicial act, which cannot be exercised by the legislature itself, nor delegated by it to any other body or person, to be exercised without due notice to, and a right to be heard by, those affected thereby. See *Slaughter v. City of Louisville*, supra, wherein it is held that: "The valuation or assessment of property is not only a judicial, but an indispensable, act, in order to levy ad valorem taxes upon it. In the nature of the thing, there must be an assessment. * * * Can the legislature, in order to authorize the collection of ad valorem taxes, fix the valuation upon the property to be taxed? It seems to be well settled that the legislature, as the lawmaking department of the state government, has no constitutional power to fix the valuation of property which is to be taxed upon ad valorem principles. The reason for this rule is that the legislative department has no judicial or executive power, and, as the valuation is judicial, it follows that the legislature has no constitutional power to make the valuation. Taxes are not debts. 'Debts are obligations founded upon contracts, express or implied,' but taxes are impositions levied for the support of the state government, or for county or city purposes. When they are imposed by authority they operate on the taxpayer in invitum. When they take the form of a per centum there must be a valuation as a basis of the power to levy and collect them. The taxpayer is entitled to be heard in fixing this valuation. The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation would be the taking of his property without due process of law. The valuation is the due process of

law by which the right to take his property for taxation is begun; and, the legislature having no judicial or executive power, it cannot make the valuation; but the valuation must be made by some person authorized to exercise judicial power, and such person is an assessor."

The principles announced in the cases herein cited upon this constitutional question in no wise conflict with the decision of the supreme court of Missouri in *Black v. McGonigle*, 103 Mo. 192, 15 S. W. 615, which seems to have been relied upon as the sole support of authority for the conclusion of a majority of this court in *Wallace v. Bullen*. The decision in the Missouri case is based upon statutes amply providing for notice to, and the opportunity of a hearing by, all persons, the valuation of whose real estate had been increased by the county board of equalization to comply with the requirement "that each tract of land shall be entered on the tract book at its true value," and it appears that the board was not authorized to change the valuations of personal property for any such purpose. In addition to the authority given said board by section 6672, Rev. St. Mo. 1879, "to hear complaints," section 6673 thereof, as amended by act of 1887, provides: "But after the board shall have raised the valuation of such real estate, it shall give notice of the fact, specifying the property and the amount raised, (to the persons owning or controlling the same, by personal notice through the mail, or by advertisement in any paper published in the county,) and that said board will meet on the fourth Monday of April, to hear reasons, if any may be given, why such increase should not be made." In discussing the sufficiency of the notice given by the board of equalization in that case, said supreme court of Missouri say, among other things, that: "The order of the board on the 3d of April raised the assessed value of all lands in Lyon township 50 per cent, while the notice given by the clerk showed an increase of 50 cents on the \$100 valuation. There is certainly a vast difference between the order as made and the notice given. The notice as given cannot be said to specify the amount raised. The taxpayer might well disregard the increase as specified in the notice, and yet have a serious and valid objection to the increase made by the board. The question then arises whether the board, on discovering the mistake, had the power to order a new notice." Thus, it is seen that *Black v. McGonigle*, supra, instead of supporting the conclusion of a majority of this court in *Wallace v. Bullen*, is strictly in line with the many other able and well-considered decisions holding that the owners must be afforded the right of a hearing at some stage of the proceedings relative to the assessment of their property before the same can be charged with an ad valorem tax. I concede that, as the law of this territory fixes the time and place for the meetings of the county and territorial boards of equalization, this would probably be a sufficient notice to the taxpayers to enable them to appear before said boards for the purpose of adjusting any griev-

ances they may have concerning the matter of the assessment of their property; but, as the law gives them no right of hearing before such bodies, they are in no better position in this regard than if they had no notice whatever of the time and place of such meetings. See *Hagar v. Reclamation Dist., and Railroad Tax Cases*, supra. To sustain a law providing for the assessment or reassessment of the taxable property of our territory without the right of a hearing on the part of those whose property is to be so assessed thereunder would be little, if any, less dangerous, as a precedent, than to uphold an enactment abrogating the right of trial by jury; and for this court to interpret a plain provision authorizing and requiring the equalization of the assessed valuations of property into such a law would, in my opinion, be to commit an error that it could never retrieve, and one which, if not corrected by legislative action, must almost inevitably, sooner or later, result in the oppression of those of our citizens who own the material wealth of the territory, if not in the absolute confiscation of their property.

The question of whether or not the legislature has the power to authorize the territorial board of equalization to increase the assessed valuation of any county of the territory, even for the sole and necessary purpose of equalization, without providing those whose property valuations are thereby increased with an opportunity to be heard in opposition thereto, and without any other evidence than abstracts of the assessment rolls of the various counties of the territory, is not now before us, and I express no opinion whatever thereon.

As both Justices McATEE and BIERER have, from the same point of view as that occupied by the writer, heretofore prepared written opinions in this cause fully covering all of the other material points raised and presented, I deem it unnecessary to extend this concurring opinion further than to reiterate that the position now taken by this court upon this, undoubtedly the most important question which has as yet been presented thereto, is not only sustained by the better reason, but also by the great weight of authority.

BIERER, J. (specially concurring). Realizing the great importance of this question, it being one which affects every taxpayer in the territory, as the legal assessments as approved by the township boards of equalization and returned to the county clerks have been in every instance raised, I feel it my duty to enter an affirmative, rather than a passive, approval of the conclusions which have been reached, and which are so ably presented in the foregoing decision of my associate, Justice McATEE. The conclusion of the court in this case overrules the former conclusion of the court in *Wallace v. Bullen* (decided at the June term, a year ago, of this court) 52 Pac. 954, and, as that case was one appealed from my decision in the trial court, of course I could express no

views in that case; but, as the former opinion in this case followed that, I did in this case dissent from the conclusions reached in the case of *Wallace v. Bullen*, and my dissenting opinion then rendered in this case is now, very agreeably to myself, at least, changed into a concurring opinion. I agree fully with the conclusions of Justice McATEE, and his opinion reviews the question so fully and extensively that I will be content with perhaps but an emphasis of one or two of the more important phases of the question, and a review of a few cases on the subject, and a limited number of additional citations from the text writers. The sections of the statute which are pertinent to this question are all set out in the opinions already rendered, and it will be unnecessary for me to repeat them here, but it will be sufficient for me to state my conclusions of what the law is from them.

The territorial board of equalization is clothed purely and solely with the power of equalization of assessments, and not with the power to change valuations. It must take the valuations as returned by the county clerks, and has, in my judgment, no power whatever to change such valuations. So far as the territorial board of equalization is concerned, it makes no difference whether the assessments have been made, as they should be made, at the actual cash value of the property, or whether they have been made upon a basis greater or less than that. The statute makes it the board's duty "to examine the various county assessments and to equalize the same." The terms of this language is the sum total of its power with reference to equalization. It is to examine the county assessments. It has no power to examine anything else, nor to hear anything else, nor to review anything else, nor to decide from any other matter presented than the county assessments; and it must then equalize, and not reassess, the same. The statute is most complete and comprehensive in defining the mode and manner of making the assessments. The individual must give in his property under oath, and the assessing officer must also swear to the correctness of the valuations. The territorial board of equalization does not have the responsibility of determining the correctness of the valuations of the property. It hears nobody's statement under oath, and makes none of its own, and it is not presumed to know anything more about these valuations than the man who owns the property, or than the legal assessor who has imposed upon him the particular responsibility of ascertaining what these valuations are. The returns made to the territorial board of equalization showed that the assessed value of the property of the territory was \$28,000,000. This board changed the sum of these assessments to over \$39,000,000,—a raise of more than one-third in the valuation of the property of the territory. The record in this case from the trial court does not tell us, in any of its find-

ings or conclusions, whether the falsehood which it found lies at the basis of this assessment consisted of perjury on the part of all the taxpayers to the extent of one-third of the property, or on the part of one-third of the taxpayers with reference to all of their property, or whether scattered indiscriminately throughout the territory there have been such an undetermined number of false returns as involve one-third of the property of the territory. But that the finding of the court involves some one of these conclusions is obvious, or else it is obvious that the decision of the court is wrong; for, if the decision of the court is right, then some one of these three falsehoods must have been committed in making the returns, and we cannot escape from this conclusion except by saying the decision of the court is wrong. I think the latter is the correct conclusion, for the reason that there is nothing whatever in the record to show that any false returns of property or valuations were made, and the legislature has given to the territorial board of equalization no power to hear and determine the question as to whether or not there has been any lack of observance of the law in the assessment of property. It has only given it the power "to examine the various county assessments and to equalize the same." If the legislature had intended that the territorial board of equalization should determine whether or not the property was correctly assessed at its cash value, it would have given the board some means and power to determine this question. It has only given it, however, the power to equalize these assessments, the power to adjust differences made in the assessments in the various counties, as it has given to the county boards power to adjust differences in the assessments in a county by the assessors of the different townships, in order that the provision of section 6 of the organic act, that "all property subject to taxation shall be taxed in proportion to its value," should be enforced as the fundamental and just rule for the apportionment of the burdens of taxation. The conclusion of the court, in any event, instead of enforcing the one provision of the statute that all property shall be assessed at its actual cash value, has manifestly violated this rule, and it has done it by the punishment of the innocent rather than the punishment of the guilty.

Suppose we take that construction most favorable to the honesty of those who have listed their property for taxation, and to the honesty of the assessors of the territory, and we then have the conclusion that the falsehood that the court substantially finds in the return of the property only existed in one-third of the assessments. If that is true, then the other two-thirds must have been correctly returned. To the extent of the increase of the per cent. upon the assessments in the various counties, just so far, then, two-thirds of the property of the territory, honestly assessed and returned, would, if the decision of the court were permitted to stand as the law, be now placed upon the tax rolls at an increased valuation. This, in my

judgment, is the inevitable result of such a conclusion, and I believe, if that were sustained, many honest taxpayers of the territory would be required to pay a tax at a high rate upon the assessments now entered upon the tax rolls, at an amount much greater than represents the actual cash value of their property. Suppose, in the case now under consideration from Logan county, a man owned property to the value of \$1,000. He honestly assessed it and swore to it, and the assessor honestly entered it and swore to it, at what it was actually worth,—\$1,000. The increase in this assessment places his property on the tax rolls at \$1,450, and this is done because the board, without evidence, without proof, with no power to determine the fact, has found that some other taxpayers of that county have made a false return of their property. Is this equity? Is this justice? I say no. It is the punishment of the innocent in order that the guilty may be required to do what is right. This principle has never met the approval of an appellate court, and it cannot find sanction in this one. My candid belief is that the property of the territory was originally assessed at its fair cash value, and that few, if any, of the taxpayers swore falsely with reference to their property; and, if this were in fact done in isolated and very few cases, it was more than compensated for in the returns by the high assessment at which, owing to the peculiar conditions which existed, the assessors have insisted upon entering the citizens' property.

It is a part of the history of this territory that the courts have been, time and again, appealed to to hold that the 4 per cent. limitation contained in the act of congress of July 30, 1886, was wholly inapplicable to this territory, by reason of its organization subsequent to that legislation, and by reason of the fact that the counties of the territory were all organized before there was a possibility of an assessment. But by the decision in *Hoffman v. Commissioners*, 3 Okl. 325, 41 Pac. 566, the question was settled in favor of the existence of the 4 per cent. limitation. Prior to the 1895 assessment, as is well known by those who understand the history of this territory, the judges of this court then acting all entertained the view that the 4 per cent. limitation was in force in this territory, and either prevented any indebtedness to exceed 4 per cent. of the property as shown by the assessment rolls when the same should be returned, or became operative from and after the first assessment, or prevented the contracting of any indebtedness until there should first be an assessment, and then not to exceed 4 per cent.; and it was, as I believe, to escape the effect of this decision just named, that the board of equalization was persuaded to make the raise in these assessments in the various counties, and not in fact to enter the property at its actual cash value because false returns had been made. And those persons who were unable to evade the force of this congressional limitation directly would, if the decision of the

court below were sustained, be able to do it indirectly. This, in my view of it, would be the unwitting effect of the decision of the court below; and to a decision which would so operate, of course, I could not agree. If this court sustains a raise of \$11,000,000 in 1895, it must, if the board shall so choose, and the legislature should fail to be loyal enough to pass a statute that could not be construed into giving such power, sustain a raise of 10 times that amount this year or next year, and the congressional limitation which we have held to be in force here will amount to nothing more than a meaningless collection of words of the English language. If there has been, however, any falsehood practiced in making these returns, I think the statute gives ample power to correct it. It provides for township and city boards of equalization, who have power to hear complaints of parties who feel aggrieved at the assessments made, and that the decisions of these boards shall be final as to individual assessments. Before that board was the place to have made complaint, if the assessed and the assessor had made false returns. That board had power to hear complaints, and therefore power to determine the complaints, and had power to correct mistakes, errors, and deception, if any was practiced in making individual assessments; and I can see no reason why the determination of that board ought not to be as final upon the officers whose duty it is to administer the law as upon the individual whose duty it is to obey it. If these complaints had been made before that board, as the officers could well have made them if there was any ground therefor, then the one-third of the taxpayers who made such false returns of their property could have been met by a proper raise thereof, and the trouble properly corrected, instead of burdening two-thirds of the taxpayers of the county with an illegal increase in their taxation.

The only authority cited in support of the former conclusion of this court in following the decision in the case of *Wallace v. Bullen*, sustaining the claim that the territorial board of equalization had power to make these assessments, is the case of *Black v. McGonigle* (Mo.) 15 S. W. 615. That case, I claim, is no support whatever for the authority which the territorial board of equalization has attempted to exercise, and a citation from the opinion will show that it was upon an entirely different character of statute from that under consideration in this case. It is there stated: "The first contention of the appellant is that the action of the board in raising the assessed values of real estate in all the townships except one by a single order on a per centum basis is illegal and void. The propositions contained in this objection must, of course, be determined by the statute. Section 6072, Rev. St. 1879, gives to the board power 'to hear complaints, and to equalize the valuation and assessments upon all real and personal property within the county'; and it is then made the duty of the board 'to equalize

the valuations and assessments of all such property, both real and personal, * * * so that each tract of land shall be entered on the tax book at its true value.' According to the plain letter of the statute, the board has not only the power to hear complaints, but it has the power, of its own motion, to equalize the valuation for the purposes named in the law, namely, so that each tract of land shall be entered at its 'true value.' In performing these duties the board acts judicially. This has been often held, and the very nature of the duty to be performed makes it a judicial one." Now, there was an express power given to the board of equalization in that case "to hear complaints" and to equalize the valuation, as well as the assessments upon the property, and it was their duty to equalize the valuations and assessments "so that each tract of land shall be entered on the tax book at its true value." Under our statute there is no power whatever given to this board to equalize any valuations. All they are given power to do is "to examine the various county assessments and to equalize the same." It seems to me too patent for argument that that case can be no authority in this. The case of *Kimball v. Trust Co.*, 89 Ill. 611, is a decision from one of the leading supreme courts of the country, which, if followed, would have led the court then to a different conclusion. I think it, in principle, is squarely in point. It is true that the raise which was objected to, and the only raise in the assessment which was objected to in that case, and therefore the only one under consideration, was that made by the county board of equalization. But what difference does it make whether it was a county board of equalization or a territorial board of equalization? The powers of these boards are purely legislative. They have no power whatever save such as the legislature grants, and the power granted to the territorial board of equalization can give no greater authority than a like grant of power to a county board of equalization. They both, in my judgment, stand upon the same principle, and must abide the same determination. The county board of equalization in that case added 20 per cent. to the valuation of personal property in the town of South Chicago, but made no changes in any other towns. This per cent. made an increase in the aggregate value of the assessed property of that town of over \$2,000,000, and thereby increased by a large per cent. the aggregate assessed value of the entire property of the county. This was done under a statute which provided that the board "shall ascertain whether the valuations in one town or district bear a just relation to all the towns or districts in the county, and may increase or diminish the aggregate valuation of property in any town or district by adding or deducting such sum upon the hundred dollars as may be necessary to produce a just relation between all the valuations of property in the county, but shall, in no instance, reduce the aggregate valuations of all

the towns or districts below the aggregate valuation thereof as made by the assessors, neither shall it increase the aggregate valuations of all the towns or districts except in such an amount as may be actually necessary and incidental to a proper and just equalization." Rev. St. 1874, p. 873, § 97, subd. 4. A majority of the court in the case of *Wallace v. Bullen* seem to take the view that this Illinois case is not in point, because of the provision of this Illinois statute prohibiting this board of equalization from making an increase in the aggregate valuations of a town or district. I think this entirely too narrow a view to take of this decision. It is true, this limitation is mentioned in the opinion, but the decision is based as strongly upon the want of authority in this board to make an increase in the assessments as it is upon the language of the limitation contained in the statute. This court said in its opinion in that case: "It follows, as a matter of course, that any material increase, beyond what was actually necessary or incidental, of the aggregate valuations of all the towns of the county, as was made in this case, is without authority of law, and must for that reason be void. It is not merely an irregular or erroneous exercise of powers conferred, but it is an imposition of taxes in a case where no authority is given by statute, which is the source of all power a county board may rightfully exercise in such matters." It will be seen that this part of the opinion, which is, indeed, the stronger language of it, absolutely omits any reference to the language in the limitation upon the power of this board, but squarely says that no authority to make this increase was given by statute, and that the statute is the source of all power that the county board could exercise in the case. And this principle, indeed, has been so often reiterated by the courts and law writers that it ought not to be disputed. If it is a question, then, of want of authority, it does not lessen the effect of the opinion that it was made under a statute which also contained a limitation. Legislatures in fact often provide such a limitation where authority would not exist without it, and the fact that the limitation is omitted in a particular case is no argument that the authority exists except for such restriction. I think a little addition to the extract which the court in that case took from this opinion may give us a better idea of what the court meant than that which was given. The part there quoted by the court, with the addition, is as follows: "The case of *Scammon v. City of Chicago*, 44 Ill. 269, cited, is not an authority in the case we are considering. That case arose under a different law,—one that conferred power on the board, acting for the purpose of equalizing assessments, 'to add to, take from, or otherwise correct and revise the same,' without imposing any limitations upon their discretion in the matter. It is a misapprehension to suppose the present revenue law invests county boards, in the matter of equal-

izing assessments between the several towns or districts of the county, with a discretion to diminish in any instance, or raise, the aggregate valuations made by the assessors beyond an amount that may be actually necessary or incidental to a proper and just equalization. Had the legislature invested county boards with a discretion as to the amount that should be added or deducted in any given case in equalizing valuations, without imposing restrictions, then the rule declared in *Law v. People*, 87 Ill. 385, as to reviewing such discretion, would apply. But the fallacy of the argument on this branch of the case lies in the assumption county boards have a discretion in such matters. Such is not the case. The powers such boards may rightfully exercise are defined, and limits fixed beyond which they may not go. All acts beyond the restrictions imposed are void, as being without warrant of law." The syllabus of this case on the point in controversy says: "If any material increase is made by a county board in the aggregate amount of all the towns or districts, in equalizing the valuation between the different towns, beyond what is actually necessary or incidental, it is without authority of law, and void. Where a county board of equalization raised the tax on personal property in one town twenty per cent., without any corresponding deduction in other towns, so that the valuation of taxable property of the county was raised \$2,000,000, and the state board, taking the aggregate valuation of the several counties as a basis, as the law required, raised the valuation of personal property in the same county fifty-seven per cent., which was added to the increased valuation as made by the county board, it was held that the proceedings of the county board increasing the valuation were not merely irregular, but without sanction of law, and void, and the tax on such increased valuation was enjoined." It will be seen from this language taken from the syllabus that not one word is said about the restriction contained in the statute, but it is based entirely upon the proposition that the board did not possess authority to make the raise, and therefore the raise was void. And this view of the case has been taken by several eminent text writers on the question of taxation. *Desty*, in his work on *Taxation* (1 *Desty*, *Tax'n*, p. 496), under the title "Board of Equalization," says: "An increase in the aggregate amount of all the towns or districts in equalizing the valuation between the different towns beyond what is actually necessary or incidental is without authority of law, and is void"; citing this Illinois case as authority for this doctrine. *Cooley*, in his work on *Taxation* (page 418), says, under the title "Review of Assessments": "Powers of Board. These tribunals are mere creatures of the statute, and must look to it for all their powers"; citing, also, this case, and a large number of other authorities in support of the rule. I think, then, it is a fair statement to make that the case of *Kimball v. Trust Co.* decided that

a board of equalization has no power to make a material increase in the aggregate assessment of property unless it is given authority so to do by the act which creates it.

The case of *Law v. People*, referred to, was one in which the validity of the assessment of corporate property at one-half of its value was raised. The statute provided that the state board should assess corporate property at its fair cash value. The constitution required that the burden of taxation should be made to bear equally upon all property, whether owned by private persons or corporations. It was ascertained in making the assessment of corporate property that the private property was assessed at one-half of its value, and for that reason the state board also, in order to comply with the requirements of the constitution, assessed the corporate property upon the same basis; and it was held in this case that the state board had to act upon the valuations as returned to it by the local officers, notwithstanding it might be shown that the local officers had not complied with the requirements of the statute that the property should be assessed at its cash value. The opinion states: "It was obligatory upon the state board to equalize valuations of property under the law as the same had been certified by the local officers making the same, and it is difficult to appreciate the argument the state board had no authority to equalize the valuations of property on the basis of fifty per cent. of its cash value. What possible difference could it make whether the state board regarded the valuations of property made by local assessors as having been made upon a basis of fifty per cent., or upon its fair cash value? In either case it was the duty of the state board to equalize the valuations as they came before them." I think the same principle is applicable to the territorial board of equalization. It makes no difference, as a matter of fact, whether the property of the territory has been assessed at its actual cash value, or two-thirds of its cash value. The territorial board must equalize the county assessments, as returned, just the same. It has no power to change the aggregate of the county valuations. All it has to deal with is the assessments, and the assessments it must equalize and not reassess. The remedy for improper valuations, if they were made, of which the board of equalization had no proof, and no power to hear any proof whatever, was before other bodies and other officers.

It is not my opinion that a review of the decisions and authorities on this momentous question, all of which, on statutes similar to ours, are opposed to the former conclusion which this court reached, will convince either the bar or the people of the territory that those who oppose this unlawful as well as unjust taxation laid upon them by the unauthorized act of the territorial board of equalization are subject to the charge to which the court gave countenance by its approval in its former decision, written in the case of *Wallace v. Bullen*, that

we have departed from the ordinary and common rules of construing statutes, and have resorted to a strained construction thereof, in violation of the public honor, faith, and credit of the territory. I think the court there might have been able to use more forcible and convincing language than it did upon this phase of the case had it reviewed this charge as opposed to its own decision, instead of using it as an argument against the position then affirmed by a minority, and now by a majority, of the court. The withholding of the hand of the collecting officer from the enforcement of this illegal tax is but giving effect to the plain and unequivocal language of the statutes, and certainly that ought hardly to be charged to be resorting to a strained construction. We have resorted to no strained construction of these statutes. In fact, they are so plain and certain in their language that there is nothing in them that admits of construction; but, if that were a duty devolving upon us in this case, it has already been performed for us by many of the ablest courts and judges of the country, with whose opinions the majority of this court in the case of *Wallace v. Bullen* expressed the first effective, if not the only, dissent. Is it a violation of the public honor, faith, and credit of the territory to say that the collecting officer must be clothed with the authority of the law before he lays his hands upon the property of the citizen? Is it a disregard of the public honor, faith, and credit of these people to say that it is the duty of the courts of this territory to permit the public officers to collect only such tax as the law has said they may demand? Is the giving effect to the enactments of the legislature a departure from the public honor, faith, and credit? It seems to me the public honor, faith, and credit can as well be maintained by the courts being guided by the law's ancient, time-honored, and respected landmarks, and saying every official exaction must be based upon authority first given, as by saying that, although the imposition may be illegal, unauthorized, and void, yet it must be enforced to uphold the public honor, faith, and credit. Let us enforce the law as it is plainly written for us, and no perverted sentiment of public honor, faith, and credit, urged by those who have been their first violators, will ever make *Justitia* blush because of what we have written. A kindred argument was answered by the supreme court of the United States in the case of *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, by quoting the following magnificent language from *Law v. People*, 87 Ill. 385: "But, should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citi-

zen is imperilled. Then the will, it may be the unbridled will, of the judge would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or harmful in their operation, the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted."

RAYMOND v. NIX et al.

(Supreme Court of Oklahoma. July 30, 1897.)

APPEARANCE—ATTACHMENT—COMMENCEMENT OF ACTION—GROUNDS—VALIDITY—RETURN—AFFIDAVIT OF PUBLICATION.

1. Where a defendant appears in court, and moves to dissolve the attachment on the merits of the proceedings, such as the insufficiency of the attachment affidavit, he enters a general appearance in the case, and thereby waives all objections to the service on him in said case, and to the jurisdiction of the court over the person of the defendant.

2. An action is commenced when plaintiff files his petition, and causes a summons to issue thereon, or when, in an attachment proceeding, he files an affidavit for publication, which is thereafter made good by pursuing the requirements of the statute, or where the regularity of the subsequent proceedings is waived by the entry of the defendant's appearance within 60 days.

3. An attachment order may issue at any time after the action is commenced in the manner above stated.

4. While an affidavit for publication should be filed separately from the affidavit for attachment, the supreme court will not hold it error for the trial court to refuse to dissolve an attachment where the affidavit for attachment may be held good also as an affidavit for publication.

5. An affidavit for publication which states defectively, but inferentially, the things required by the statute, is voidable, but not void, and the defects may be cured by amendment; and where the defendant enters a general appearance in the case without first attacking the service by publication, on the ground of the defect in the affidavit for publication, he waives such defect.

6. An attachment in this territory may be based on both of the grounds that the defendant so conceals himself that a summons cannot be served upon him and that the defendant is a nonresident of the territory.

7. Without expressing an opinion at this time as to whether or not, in an action in a probate court in this territory, lands and tenements of a defendant may be attached, it is held that, even if such property could not be attached in such a proceeding, that part of the order of attachment which directed the sheriff to levy on the lands and tenements of the defendant was surplusage, and void, the order also directing the sheriff to seize the personal property of the defendant.

8. An attachment order is not void because the sheriff is not directed to return it in 10 days, but is directed to "make due return of this order,

with your proceedings thereon, when fully executed or discharged."

(Syllabus by the Court.)

Appeal from probate court, Pottawatomie county.

Action by Nix, Halsell & Co. against Osie Raymond. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. B. Blakeney, for plaintiff in error. Cotteral & Hornor, for defendants in error in this court.

BIERER, J. Nix, Halsell & Co., a partnership engaged in the grocery business at Guthrie, Okl., brought their action in the probate court of Pottawatomie county against the defendant in the name of Osie Griffensteln, but who, the petition alleged, had been married, and whose real name was unknown, to recover an account for goods, wares, and merchandise sold and delivered to her in the sum of \$440.51, with interest and costs. An attachment was had, and on the trial of the case judgment was rendered for plaintiffs for the amount of the account, interest and costs, the attachment sustained, and the personal property levied on ordered sold to pay the judgment. From this judgment the defendant appeals.

Assignments of error are based on the action of the court in overruling defendant's motion to set aside the service by publication, and also her motion to dissolve the attachment. The petition and other papers hereafter to be noticed were filed in the case on the 18th day of February, 1895, and the attachment order issued on that day. On the 5th day of April, 1895, the defendant filed her motion to dissolve the attachment on numerous grounds, including, as will hereafter be seen, objections to the sufficiency of the attachment affidavit. This was, on the 12th day of April, 1895, overruled, and the motion to set aside the service by publication was not filed until the 4th day of May, 1895. In this latter motion the defendant sought to test the sufficiency of the affidavit for publication because it did not show that the case was one in which service by publication could be had, and objected to the notice because it did not describe the property attached, and did not show the nature of the judgment which the plaintiff sought in the action, and because it did not have the seal of the court attached thereto. The motion to discharge the attachment was upon jurisdictional and nonjurisdictional grounds, and, while it stated that the defendant entered a special appearance, it also attacked the attachment proceedings by alleging the insufficiency of the attachment affidavit. This was an objection to the merits of the attachment, and was a general appearance in the action, and the plaintiff thereby waived any objections which she might have relied upon had she objected, and on that sole ground, to the jurisdiction of the court over the person of the defendant. It is well set-

tled, and particularly so under our Code, that when a party attacks a proceeding of a court upon nonjurisdictional as well as jurisdictional grounds he has made a general appearance, no matter what kind of an appearance he may state in his motion he makes; and he thereby waives all jurisdictional defects over his person. *Cohen v. Trowbridge*, 6 Kan. 385; *Burdette v. Corgan*, 26 Kan. 102; *Gorham v. Tanquerly* (Kan. Sup.) 48 Pac. 916; *Mercantile Co. v. Dymont*, 2 Okl. 365, 37 Pac. 1052. In the case of *Burdette v. Corgan*, supra, the party made a motion to vacate a judgment, the motion being based upon nonjurisdictional as well as jurisdictional grounds. In the opinion, by Mr. Justice Brewer, it is said: "A party cannot come into court, challenge its proceedings on account of irregularities, and, after being overruled, be heard to say that he never was a party in court, or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground. This is familiar doctrine." The case of *Gorham v. Tanquerly*, supra, is a stronger case on this question than the one at bar. In that case the party raised an objection to the sufficiency of the service by publication at the same time that he presented his motion to discharge the attachment. In the opinion the court says: "The trial court held that, while the service was not good, the defendants below had, by their motion, waived the service, and had submitted themselves to the general jurisdiction of the court. The ruling meets our approval. A motion made by defendants for the special purpose of contesting the jurisdiction of the court does not waive notice nor confer jurisdiction, but, if he appears for any other purpose, it will be construed to be a general appearance in the case, and to give the court jurisdiction over him. In the early days of *Cohen v. Trowbridge*, 6 Kan. 385, it was held that a motion grounded wholly or in part upon errors or irregularities aside from the question of jurisdiction is such waiver as constitutes an appearance. Here the defendants did not confine themselves to questions of jurisdiction, but grounded their motion in part upon errors and irregularities in the proceedings. They invoked the opinion of the court as to whether the affidavit upon which the attachment was based was sufficient." In *Mercantile Co. v. Dymont*, supra, the defendant Whitlock made a motion to set aside the judgment which had been rendered against him. The overruling of this motion was assigned as error, and in passing upon the question this court said: "Notwithstanding that there was no summons ever issued to Whitlock, and that his name was not mentioned in the service by publication with the other defendants, yet he was one of the defendants in the action, and his appearance in the motion to discharge the attachment was a sufficient appearance for the court to

acquire jurisdiction over him, and the rendition of judgment against him was not error." This doctrine is also supported by the case of *Gans v. Beasley*, 4 N. D. 153, 59 N. W. 719. The defendant must, therefore, be held to have waived any question as to the sufficiency of the service by publication, so far as jurisdiction over her is concerned.

In support of the claim that error was committed in overruling the defendant's motion to dissolve the attachment it is contended that the attachment order was issued before the action was commenced, and that, therefore, it was void. Section 190 of the Code of Civil Procedure provides: "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated; * * *"; and under such a statute it has been held that an attachment order issued before the action was commenced was void. *Low v. Henry*, 9 Cal. 538; *Keller v. Stanley* (Ky.) 5 S. W. 477. In the case of *Dunlap v. McFarland*, 25 Kan. 488, it was taken as a matter of course that an attachment could not be issued before the action was commenced. But was this attachment issued before the action was commenced? Section 57 of the Code of Civil Procedure provides that: "A civil action may be commenced in a court of record, by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." Sections 72-75 of the Code of Civil Procedure provide for service upon the defendant by publication. In *Bannister v. Carroll*, 22 Pac. 1012, where the supreme court of Kansas reversed the trial court for dissolving an attachment because no summons was issued in the action before the order of attachment was issued, a similar contention to that made by plaintiff in error here was urged, and it was held that a suit is commenced when the petition, bond for costs, and affidavit for publication are filed, and that "the proper construction to be given to section 57 of the Code is that, when a petition is filed and a summons served, or the first publication is made within 60 days, such service or first publication relates back to the time of the filing of the petition and præcipe and other necessary papers, and by such relation the suit is to be deemed to have been commenced at the date of their filing." The language used by that court with reference to the præcipe for publication summons we do not consider of any importance. It was used in that case, no doubt, because the record showed that such a præcipe was filed, and not as being one of the necessary prerequisites of service by publication, for the statute does not require any præcipe for such service. The necessary papers referred to also in the part of the opinion given were undoubtedly the petition, bond for costs, and affidavit for publication, for the summons by publication was no part of the papers to be filed with the clerk. It must be taken as settled, then, that an action under our Code, which is the

Kansas Code, may be commenced by filing a petition and procuring a summons to be issued, or by filing a petition with an affidavit for publication, where the service by publication is duly perfected by commencing the publication of such notice within 60 days after the filing of the petition.

It is contended, however, by plaintiff in error, that even under the authority of the case of *Bannister v. Carroll* this case was not commenced until three days after the order of attachment was issued on April 18th, for the reason that the affidavit for publication was not filed until February 21st. It does appear that an affidavit for publication—that is, a paper by that name—was not filed until the latter date. The defendant in error, in answer to this objection, claims that the affidavit for attachment which was filed on February 18th contains all the necessary ingredients of an affidavit for publication, and that this should be taken as supplying the place of an affidavit for publication. The statute provides, in cases like this, for an affidavit for attachment and an affidavit for publication, and good practice would dictate that these affidavits be made separately, and they ought to be so made; but the objection which is here asserted to the attachment proceeding is not one that goes to the merits of the litigation between these parties. In other words, the objection is a technical one, and, where the rights of parties are involved, we do not believe that a litigant should be defeated in his right, and a substantial portion of his cause dismissed, in order that we may insist upon technical correctness, or even good practice. If what has been done may reasonably be held to be all that was required to be done to comply with the statute, even though it has not been done in the form that skilled practice would dictate, we believe it should be held sufficient, and the rights of parties protected. In the case of *Dunn v. Crocker*, 22 Ind. 324, it was held that the grounds for attachment, which are under that Code to be set out in the attachment affidavit, may be incorporated and sworn to in the petition. In *Irwin v. Irwin*, 3 Okl. 186, 41 Pac. 369, in which this Indiana case was cited as authority, we held that the jurisdictional facts which were to be shown by affidavit in a divorce proceeding might be set out in a verified petition, and we will hold that the same principle which governed the matter of practice in that case should be made to apply here to prevent the defeat of the just rights of a litigant upon purely technical grounds. An examination of the affidavit for attachment, considered also as supplying the place of the affidavit for publication, is, indeed, very defective in the matter of showing that the case is one of those in which service by publication may be had. The affidavit is as follows:

"In the Probate Court of Pottawatomie County. May Term, 1895. *Nix, Halsell & Company, Parties, etc., Plaintiff, vs. Osie Griffenstein*, whose married name is to plaintiff unknown, Defendant. Territory of Oklahoma,

Pottawatomie County—ss.: Frederick King, being duly sworn, says that the plaintiffs in the above-entitled action have commenced said action for the recovery of four hundred and 50/100 dollars against Osie Griffenstein, now married, and whose married name is to affiant unknown, the defendant in the above-entitled cause, who is indebted to the plaintiffs in said sum for goods, wares, and merchandise purchased of plaintiff by defendant and delivered to her; that said claim is just, is due, and is wholly unpaid, the amount of which said affiant believes that said plaintiff ought to recover of said defendant; and that said defendant so conceals himself that a summons cannot be served upon him, and is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that defendant is a nonresident of the territory of Oklahoma. Frederick King.

"Subscribed and sworn to before me this 18th day of February, 1895. W. A. Ruggles, Probate Judge. [Seal.]"

The affidavit ought to have set out definitely what diligence had been used to serve summons upon the defendant, and it ought to have set out that what was sought to be done in this case was to attach the property of the defendant, which was located in this territory, and should have stated what that property consisted of. These matters are exceedingly defectively stated in the affidavit. Indeed, the fact that the proceeding is an attachment to subject the property of the defendant in this territory to the payment of the plaintiffs' claim, or that the defendant, indeed, has any property at all in this territory, can only be drawn from inference from the affidavit. Something, however, with reference to these subjects, is stated in the affidavit, although only inferentially, and not by very strong inference at that; but it is inferentially stated, and the affidavit is therefore not void, but only voidable (*Ogden v. Walters*, 12 Kan. 282; *Pierce v. Butters*, 21 Kan. 124; *Long v. Fife* [Kan. Sup.] 25 Pac. 594; *Shippen v. Kimball* [Kan. Sup.] 27 Pac. 813), and the defects in the affidavit could have been cured by amendment (*Foreman v. Carter*, 9 Kan. 674; *Pierce v. Butters*, supra). And as the defendant, by her motion to dissolve the attachment on the merits thereof, entered a general appearance, the defects in this affidavit, treated as an affidavit for publication, were waived, and the defendant cannot now be heard to assert any of these defects.

Another ground for the dissolution of the attachment which the plaintiff in error asserted below and asserts here is that the ground of nonresidence was not stated in the affidavit for attachment so explicitly as that an order could issue thereon. The contention is

that, while the affidavit did state that the defendant was a nonresident of the territory of Oklahoma, it also stated that the defendant so concealed himself (meaning herself) that a summons could not be served upon him (meaning her), and that this allegation was equivalent to an alternative allegation in the affidavit for attachment, and made it uncertain or inconsistent. We cannot agree with counsel in this contention. The statute expressly allows an attachment on the two grounds, among others, that the defendant so conceals himself that summons cannot be served upon him, and on the ground that the defendant is a nonresident of the territory of Oklahoma, and a party can allege both these grounds in an attachment affidavit without waiving or injuring either claim.

The next contention is that the writ of attachment was void because it commanded the sheriff to levy on the lands and tenements of the appellant. Without determining now whether, in an action in the probate court of this territory, the lands of the defendant may be attached, it is sufficient to observe that no lands were attached; and, even if it were conceded that lands could not be attached in such a proceeding, this part of the order should simply be treated as surplusage. It did not in any way affect any of the rights of the defendant, and did not render the order void. The order did direct the sheriff to seize the personal property of the defendant, and that appears from the judgment to have been all that was seized.

It is further contended that the order of attachment was void because it directed the sheriff to "make return of this order, with your proceedings thereon, when fully executed or discharged," instead of directing him to return it in 10 days. This objection is met by the decision of the supreme court of Kansas in the case of *Smith v. Payton*, 13 Kan. 362, where it is held that: "Where an order of attachment is issued at the commencement of an action, and the clerk fixes the return day thereof at twenty days from its date, instead of within ten days, as prescribed by law, the order of attachment is not void for that reason, and that the sheriff may serve the same at any time within ten days from its date; and when so served it is error for the court to set aside and vacate such order merely because of such mistake of the clerk in fixing the return day."

The other objections relied on in the brief of counsel go to the sufficiency of the service by publication, and, as we have seen, these objections were waived by objecting to the attachment upon other grounds than to the jurisdiction of the court over the person of the defendant. The judgment is affirmed, with costs. All the justices concurring.

TAYLOR v. NEWBLOCK, Sheriff.

(Supreme Court of Oklahoma. July 30, 1897.)

CONTEMPT—SUFFICIENCY OF JUDGMENT.

A judgment or order of court that a defendant stand committed to the county jail until the further order of the court, for a contempt in refusing to obey a previous order requiring him to surrender certain promissory notes adjudged to be the property of another, is illegal, and void for uncertainty as to the duration of the punishment, and will not justify the imprisonment.

(Syllabus by the Court.)

Application of William Taylor for a writ of habeas corpus. Writ granted.

S. H. Harris and Asp, Shartel & Cottingham, for petitioner. John Franing and Cotteral & Hornor, for defendant.

DALE, C. J. William Taylor filed his petition in this court for a writ of habeas corpus, alleging illegal restraint by H. F. Newblock, sheriff of Cleveland county. The writ was granted, return was made, and from the petition and return we find that the imprisonment of the petitioner arises out of his failure to obey an order of Henry W. Scott, then judge of the district court of Cleveland county, and which order was issued out of said court in a proceeding for a divorce. Briefly stated, the facts are as follows: Elizabeth Taylor brought an action for a divorce and alimony against her husband, William Taylor, and upon a trial a decree of divorce was awarded to her on April 18, 1895, and the cause continued upon the question of alimony until April 27, 1895. On the last-named date a judgment was by the trial court rendered awarding the plaintiff in the action alimony out of the property of the husband, and as a part of said alimony so awarded the plaintiff was given two promissory notes for \$700 each, the notes then being in the possession of the defendant. The defendant was given 15 days after the rendition of the judgment within which to turn over to the plaintiff the possession of the personal property, including the notes in question, and the judgment for alimony recited that, in case defendant failed to comply with the judgment and order within the time fixed, he would be in contempt of court. It further appears that, on May 14th following the judgment of April 27th, Elizabeth Taylor, plaintiff in the divorce proceeding, and in whose favor the judgment for alimony ran, moved the court for an order of delivery of the property set apart to her in the judgment, and that the court granted such motion, and directed the sheriff to forthwith take possession of the property, and deliver the same to the plaintiff; that the sheriff served the order, but that William Taylor refused to surrender the possession of the two promissory notes heretofore referred to as having been awarded to Elizabeth Taylor. The next proceeding taken in the case appears to have been on June 1st, at which time the court, acting upon the affidavit of Elizabeth Taylor, adjudged

William Taylor in contempt of court, and sentenced him to jail. The affidavit of Elizabeth Taylor does not appear in the record, but we note that the order adjudging the contempt recites the fact of an affidavit having been filed. The order of the court, omitting the caption, is as follows: "Order. Now, on this 1st day of June, 1895, the same being one of the regular adjourned term days of the district court in and for the county and territory aforesaid, this cause coming on to be heard upon the affidavit of Elizabeth Taylor, asking for an order for contempt of court to issue for the defendant, William A. Taylor, who having refused to obey the order of the court made on the 27th day of April, 1895, the plaintiff appeared in person and by her attorneys, Franing & McLaughlin, and defendant appeared in person and by A. Hutchin, his attorney. Defendant filed motion to dismiss proceedings for the reason no notice was served upon defendant or his attorney as provided by law, and also demanded a jury to try the cause for contempt. The said motion was duly presented and argued to the court, and the same was overruled by the court, to which the defendant excepted; whereupon the evidence was adduced, and, the court being fully advised in the premises, it is therefore ordered and adjudged that the sheriff in and for the county of Cleveland, territory of Oklahoma, take and commit the said William A. Taylor to the jail of Cleveland county, territory of Oklahoma, and there keep him in close custody until the further order of this court. H. W. Scott, Judge." Upon this judgment, and without any further order or commitment, Taylor was incarcerated, and it is to relieve against the imprisonment so ordered that this proceeding in habeas corpus was instituted.

It is contended: First. That the sheriff has no right to restrain the petitioner of his liberty without a written order, warrant, or commitment from a court of competent jurisdiction, which writ should state the cause which authorized the sheriff to confine the petitioner, and which should specify a definite length of such commitment. Second. That the order of the court is not sufficient in law to justify the imprisonment, for the reason that the order was made without authority of law, and is wholly void, and does not show that the petitioner has been adjudged guilty of any offense against the laws which would warrant confinement in jail, or of any contempt of court which would justify punishment of any kind. Third. That no accusation in writing accusing petitioner of contempt has ever been filed against him. Fourth. That petitioner has been confined in jail on account of the order of the court for more than 30 days. Fifth and Sixth. That the order made April 27th, adjudging the petitioner in contempt, was and is wholly void, and is of no effect, for the reason that the case out of which the order had been issued had been finally determined on the 18th day of April, and the court had no jurisdiction

to punish for contempt to enforce the final judgment of the court. Eighth. That the petitioner has never been adjudged to be in contempt for failure to comply with any order of court, and the order to the sheriff directing his confinement is not based upon any final judgment of any proceedings to determine the guilt or innocence of him upon any charge or offense. At the time the writ was allowed to petitioner, bail was granted, and, pending a decision, and upon request of counsel, the case was continued to permit the filing of briefs, in order that the questions involved should receive the careful attention which their importance demands at our hands.

The first question to be disposed of is the authority of this court to entertain this case under the facts stated in the petition for the writ. It is earnestly contended by counsel for the defendant that this court, under section 4578 of our Statutes, has no jurisdiction to inquire into the legality of the judgment or process whereby the petitioner is in custody. The section of the statute in question is as follows: "4578. No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody and discharge him when the term of commitment has not expired in either of the cases following: First. Upon process issued by any court or judge of the United States or where such court or judge has exclusive jurisdiction; or Second. Upon any process issued on any final judgment of a court of competent jurisdiction; or Third. For any contempt of any court, officer or body having authority to commit; but an order of commitment as for a contempt upon proceedings to enforce the remedy of the party is not included within any of the foregoing specifications; Fourth. Upon a warrant or commitment issued from the district court or any other court of competent jurisdiction upon an indictment or information." Under the restrictive terms of this statute it is argued that, inasmuch as the lower court had jurisdiction of the parties and subject-matter, and the commitment not having expired, this court cannot question the validity of the same by habeas corpus. Many decisions are cited for the purpose of showing that all irregularities in the proceedings of the lower court are overlooked in an action of this character, and that the question of the validity of the judgment cannot be inquired into in this manner. We shall not take time to discuss these questions, as we fully concede the proposition that, if the court had the power to render the judgment, and such judgment upon its face is valid, and also had jurisdiction of the defendant, the relief sought could only be obtained by appeal; but our statute does require us to determine if the restraint be without authority of law, and, if we so find, it then becomes our duty to discharge from such custody. St. 1893, § 4667. And in the very section which counsel for defendant contend restricts the power of this court to inquire by habeas corpus into the legality of the judgment or process whereby the

petitioner is confined in jail is an exception which we think clearly permits this court to act, because the statute specifically states: "But an order of commitment as for a contempt upon proceedings to enforce the remedy of a party is not included in any of the foregoing specifications." Id. § 4578. And the two questions—first, as to jurisdiction, and, secondly, as to the form of the commitment—are open for consideration, and are presented by the petitioner for decision. Rap. Contempt, § 157; *People v. Sheriff of New York*, 29 Barb. 622. As to whether or not the court below had jurisdiction to punish for the disobedience of the order is a question which we shall not attempt to review in this decision. There is much in reason to support a judgment of that character, and many courts hold that an order requiring the payment of alimony or the surrender of property to carry into effect the final judgment of the court may be enforced by a judgment as for contempt. *Wightman v. Wightman*, 45 Ill. 167; *Haines v. Haines*, 35 Mich. 138. And there is good reason why the power of the court should thus be upheld. In an action of divorce the law places the property of the litigants under the jurisdiction of the court to make such a division and disposition as to the court may seem proper; and it would seem that, after the court has thus obtained jurisdiction, the power to speedily and fully enforce its judgments would follow. Upon the other hand, it has been held that, divorce being a statutory action, the power to punish for contempt does not obtain, unless it is a part of the statute itself. *Coughlin v. Ehlert*, 39 Mo. 285; *Gerard v. Gerard*, 2 Barb. Ch. 73; *Lansing v. Lansing*, 4 Lans. 377. But the later decisions of the New York courts seem to have modified the rule on which they had theretofore been holding that the court does not possess such power. *Isaacs v. Isaacs*, 61 How. Prac. 369. But, inasmuch as the question is unsettled, and we have not the time to devote to the subject which its importance demands, and it being unnecessary to reach a conclusion upon this feature of the case, we will pass it, and determine the validity of the commitment or order upon which the petitioner is held in custody.

It will be observed upon an inspection of the order that the petitioner was adjudged to be in contempt, and sent to the jail until the further order of the court. There is no definite time fixed by which it may be determined how long he shall remain in the jail. The period of his incarceration does not depend upon time or the happening of any event; in fact, it appears to be contingent upon the will or pleasure of the court pronouncing the sentence. It always has been the theory of the law that punishment should be for a fixed period of time where it is assessed as a penalty, or, if the imprisonment is to compel a witness to testify, or to compel a person to do a specific act, then the imprisonment is fixed as of the time when he shall obey the order of the court and perform such act. This view of the law is upheld by numerous

authorities, and is, we think, correct in principle. In the case of *People v. Pirfenbrink*, 96 Ill. 68, upon this subject the court states the law as follows: "All judgments must be specific and certain. They must determine the rights recovered or the penalties imposed. They must be such as the defendant may readily understand and be capable of performing. If his committal had been for a definite period, or until he should perform a specific act, then the judgment would have been capable of being reviewed on error; but on such a judgment as this the appellate court cannot know the duration of the imprisonment, and determine whether the confinement is reasonable or is oppressive and wrong. Whether it is to extend to days, weeks, months, years, or for life none can certainly know. That is still in the breast of the judge, and is by its terms to be determined in the future; not for a trial, or for the performance of any act, but it depends alone on the will of the judge. Had this order been simply erroneous, we could have no power to discharge. In such a case error or appeal is the only remedy, but it is otherwise where the judgment or process is void." In *Whittem v. State*, 36 Ind. 196, the same doctrine obtains, and in this case the court quotes approvingly from *Ex parte Alexander*, 2 Am. Law Reg. 44,

this statement: "Is it necessary that the courts in this country should have power to commit until further order of the court? I cannot find it. I can see no call for it. I can see danger in it; and the law should not make danger where there is no necessity. A freeman should never, by the laws of freemen, be placed in such dreary uncertainty of imprisonment as that when he inquires of the 'law of the land' it cannot tell him when it shall end. No absolute power lives in this country. It cannot exist in a republic. Suppose the court should adjourn without having made any further order; the consideration of the case is cut off at once, and entirely, until the next term. So he must be left without any authority of the judiciary even to mediate his case. And a person committed for contempt cannot be bailed." To the same effect is *State v. Galloway*, 98 Am. Dec. 404. We have no doubt that the order upon which the petitioner is confined in jail is void for uncertainty, in that it does not fix the duration of the punishment, and for that reason the petitioner is released from the judgment imposed in the order.

KEATON, J., having been of counsel in the cause, not sitting; all the other justices concurring.

MEMORANDUM DECISIONS.

PEOPLE v. LAPIQUE. (Cr. 237.)*
(Supreme Court of California. Aug. 12, 1897.)

REVIEW ON APPEAL.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge. John Lapique was convicted of embezzlement, and he appeals. Affirmed. H. E. Heighton, for appellant. W. F. Fitzgerald and A. Ruef, for the People.

PER CURIAM. Defendant, convicted of embezzlement, appeals from the judgment and an order denying him a new trial, urging the single point that the evidence does not warrant the verdict. It is urged that the evidence fails to show either that defendant was the agent of Jean Ader, whose money he is charged with embezzling, that he got the money in the course of his agency, or that he fraudulently converted it to his own use. The contention is untenable. There is evidence in the record which, believed by the jury, was amply sufficient in law to support their finding upon each of the essential facts indicated; and, as they were the sole judges of the credibility of witnesses, their verdict cannot be disturbed. Judgment and order affirmed.

CAMPBELL v. McLAUGHLIN et al. (Supreme Court of Kansas. July 10, 1897.) Error from district court, Lyon county; W. A. Randolph, Judge. Action by James R. Campbell against William S. McLaughlin and others. Judgment for defendants. Plaintiff brings error. Affirmed. L. B. & J. M. Kellogg and J. G. Hutchison, for plaintiff in error. E. W. Cunningham, for defendants in error.

PER CURIAM. The conclusion reached in the case of Coale v. Campbell (just decided) 49 Pac. 604, disposes of this also. The judgment is affirmed. All the justices concurring.

CARR v. MISSOURI PAC. RY. CO. (Supreme Court of Kansas. June 5, 1897.) Error from district court, Brown county; J. F. Thompson, Judge. Action by John F. Carr against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed. R. F. Buckles, for plaintiff in error. Waggener, Horton & Orr, for defendant in error.

PER CURIAM. This was an action for bodily injuries received by plaintiff in error in crossing the track of defendant in error in front of a moving train. The court below sustained a demurrer to the plaintiff's evidence upon the ground of his negligence contributing to the injuries received. This ruling of the court was entirely proper. The evidence of plaintiff in error himself shows a case of most reckless disregard of his personal safety. He has no ground of complaint, and the judgment of the court below will be affirmed.

KINGMAN et al. v. KINGMAN. (Supreme Court of Kansas. July 10, 1897.) Error from district court, Saline county; R. F. Thompson, Judge. Action by Freeman Kingman against Kingman & Co. Judgment for plaintiff. Defendants bring error. Affirmed. J. Marshall Lamer and John D. Milliken, for plaintiffs in error. Bond & Osborn, for defendant in error.

PER CURIAM. There is no formal specification of errors in the brief of counsel for the complaining party in this case, but we have never-

theless examined the claims of error made. They are that the court excluded material evidence; that the verdict is contrary to the evidence; that requests for pertinent instructions were refused, and erroneous instructions given. None of these claims is well founded, and the judgment of the court below is therefore affirmed.

LEAVENWORTH, N. & S. RY. CO. v. WILKINS. (Supreme Court of Kansas. June 5, 1897.) Error from district court, Atchison county; W. D. Webb, Judge. Action by Sarah E. Wilkins against the Leavenworth, Northern & Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed. A. A. Hurd and Mills, Smith & Hobbs, for plaintiff in error. W. D. Gilbert and B. F. Hudson, for defendant in error.

PER CURIAM. A careful examination of the claims of error in this case convinces us that there is nothing in the record requiring a reversal or modification of the judgment. It is therefore affirmed.

STATE v. CLARK. (Supreme Court of Kansas. July 10, 1897.) Appeal from court of common pleas, Wyandotte county; W. G. Holt, Judge. Rafe Clark was convicted of crime, and brings error. Affirmed. F. E. & J. A. Smith, for appellant. L. C. Boyle, Atty. Gen., S. C. Miller, and I. F. Bradley, for the State.

PER CURIAM. This case came to this court in connection with that of State v. Geary, 49 Pac. 596, in a record entitled against the two defendants together, as though they had been charged and tried under one information. As a fact, however, there were separate trials. The only claim of error made by the defendant in this case is that the court overruled a plea in abatement on the ground that he had not been accorded a preliminary examination. The facts of the case are identical with those in State v. Geary, just decided, and the law must therefore be held the same as in that case. The sentence of conviction is affirmed. All the justices concurring.

ORTMAN v. DENNISON. (Court of Appeals of Kansas, Northern Department, E. D. July 16, 1897.) Error from circuit court, Shawnee county; J. B. Johnson, Judge. Action between Carl Ortman, executor of Fred Ortman, deceased, and William W. Dennison. From a judgment awarding execution against him, Ortman brings error. Modified. A. Bergen, for plaintiff in error. E. N. Gunn and J. R. McNary, for defendant in error.

PER CURIAM. This cause, coming on for decision this 15th day of July, 1897, having heretofore been argued and submitted, it is by the court adjudged that the judgment of the district court of Shawnee county be modified by eliminating therefrom that part of said judgment awarding execution against the plaintiff in error, and, as so modified, be affirmed. It is further considered and adjudged by the court that the plaintiff in error pay the costs of this proceeding, taxed at \$—.

MURRAY v. CLARK et al. (Supreme Court of Montana. June 21, 1897.) Appeal from district court, Silver Bow county; J. J. McHatton, Judge. Action by James A. Murray against H.

* Reversed in banc. See 52 Pac. 40, 120 Cal. 25.

S. Clark and others. From a judgment in favor of defendants, plaintiff appeals. Reversed. Carroll & Leehy, for appellant.

PER CURIAM. It is agreed by counsel in this case, by stipulation on file, that the facts and questions involved in this appeal are precisely the same as in *Murray v. Conlon* (decided by this court on April 26, 1897) 48 Pac. 743. Therefore, upon the authority of that case, the judgment and order in this case are reversed, and the cause remanded, with directions to the district court to make the same orders and pursue the same instructions as were directed by this court in *Murray v. Conlon*. Reversed.

MUTUAL BEN. LIFE INS. CO. v. WINNE et al. (Supreme Court of Montana. June 14, 1897.) Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge. Action by the Mutual Benefit Life Insurance Company, a corporation, against Peter Winne and others. Judgment for plaintiff. Defendants appeal. Affirmed. B. P. Carpenter, A. K. Barbour, and W. J. Kinsley, for appellants.

PER CURIAM. This action was brought by plaintiff to recover judgment against defendants Winne and Gallup and wife for \$7,500, due on a promissory note or bond dated at Helena, Mont., October 1, 1891, and interest, costs, and attorney's fees, and for a decree of foreclosure of a certain mortgage made by defendants Winne and Gallup and wife to plaintiff to secure said note to plaintiff. The questions involved are the same as those considered and decided in the case of *Insurance Co. v. Winne*, 49 Pac. 446; and it being stated to the court by respective counsel in this and the preceding case that like orders may be made in both, it is therefore ordered that the judgment herein be affirmed.

EARLY TIMES DISTILLERY CO. et al. v. ZEIGER et al. (Supreme Court of New Mexico. Aug. 5, 1897.) Appeal from district court, Bernalillo county; before Justice N. C. Collier. Action by the Early Times Distillery Company and others against Charles Zeiger and others. From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Reversed. F. W. Clancy, for appellants. W. B. Childers, for appellees.

HAMILTON, J. This is an appeal from the Second judicial district court of the territory of New Mexico. The case is of the same character as case No. 673, bearing the same title. 49 Pac. 723. The decision in this case follows the opinion rendered in No. 673. The cause is reversed and remanded, with directions to the court below to overrule the demurrer and allow the cause to proceed.

In re **JARAMILLO**. (Supreme Court of New Mexico. Aug. 2, 1897.) On motion for rehearing. Denied. For former opinion, see 45 Pac. 1110.

LAUGHLIN, J. In this case the motion for rehearing is denied. An order will be made accordingly, a written opinion not necessary.

SMITH, C. J., and the associate justices concur, except **COLLIER, J.**, who was disqualified and did not sit.

JARRELL v. BARNETT. (Supreme Court of New Mexico. Aug. 2, 1897.) Appeal from district court, Chaves county; before Justice H. B. Hamilton. Action between J. S. Jarrell and R. F. Barnett, as assignee of W. C. Bird & Co. From the judgment, Jarrell appeals. Affirmed. J. A. Poage, for appellant.

LAUGHLIN, J. In this case the records disclose no reversible error, and the judgment of the lower court is therefore affirmed, with costs against appellant and sureties on his appeal bond.

An order will be accordingly entered, a written opinion not required.

SMITH, C. J., and **COLLIER** and **BANTZ, JJ.**, concur. **HAMILTON, J.**, did not sit in the case, having tried it in the court below.

BESSENT et al. v. LEVY et al.
(Supreme Court of Oklahoma. Feb. 12, 1897.)

INSOLVENT—PREFERENCES.

The decision of the court below is reversed, and this cause remanded, for the reasons announced in the case of *Smith v. Baker* (decided at this term) 49 Pac. 61.

Bierer, J., dissenting.

Error from district court, Cleveland county; before Justice Henry W. Scott.

Action commenced by Levy, Price & Co. and others, by petition, against C. H. Bessent and others, seeking to have certain chattel mortgages set forth in said petition declared to be and to constitute a general assignment for the benefit of creditors, and asking the court to appoint a receiver for the stock of goods conveyed by said mortgages, and to restrain the defendants, as mortgagees, from selling said stock of goods. The court below granted the injunction as prayed, appointed a receiver to take charge of said goods, and on the 14th day of May, 1896, found upon the issues in said cause for the plaintiffs therein, defendants in error, and held the said mortgages to constitute a general assignment for the benefit of creditors. From this judgment the plaintiffs in error duly appealed, and the cause is brought to this court for review. Reversed.

B. F. Williams, W. M. Newell, John I. Dille, and **J. H. Burford**, for plaintiffs in error. **Botsford & Brewer, Fisher & Hennessey,** and **Douglas & Douglas**, for defendants in error.

TARSNEY, J. Defendants in error have filed a motion to dismiss the appeal in this cause upon several grounds, which we deem it unnecessary to state or discuss, the same being untenable. The facts stated in the record in this cause are such as to present the identical question only which was presented in the case of *Smith v. Baker* (decided by this court at this term) 49 Pac. 61, namely, whether chattel mortgages or other conveyances made by an insolvent and failing debtor of all or substantially all his property in good faith, and in payment of subsisting bona fide indebtedness to one or more of his creditors to the exclusion of all other creditors, constitutes a general assignment for the benefit of creditors, under the general assignment law, and whether a court of equity, upon such facts, may decree such mortgages to have the effect of an assignment in trust for the benefit of all the creditors of such insolvent debtor. The decision of this court in the case of *Smith v. Baker*, decisive of the only point involved in this cause, is held to be conclusive herein; and for the error of the court below in holding and adjudging said mortgages to be an assignment in trust, under the assignment law, this cause is reversed and remanded, with instructions to the court below to dismiss the same. The other judges concur, except **BIERER, J.**, dissenting, and **KEATON, J.**, who was of counsel, not sitting.

KOLLER v. ODNEAL. (Supreme Court of Oklahoma. July 30, 1897.) Error from district court, Oklahoma county; before Justice H. W. Scott. Action between John J. Koller and George W. Odneal. From a judgment for the latter, the former brings error. Affirmed. Amos Green & Son, for plaintiff in error. Treadway & Wilkinson, for defendant in error.

PER CURIAM. It is admitted by counsel for the appellant that this case is in all respects similar in principle to the case of *Woodruff v. Wab*

lace, 3 Okl. 355, 41 Pac. 357, and the judgment in such case governs. The judgment of the lower court is therefore affirmed.

O'DELL v. BOURNE. (Supreme Court of Oklahoma. July 30, 1897.) Error from district court, Oklahoma county; before Justice H. W. Scott. Action between Daniel J. O'Dell and E. W. Bourne. From a judgment for the latter, the former brings error. Affirmed. Amos Green & Son, for plaintiff in error. L. M. Keys, for defendant in error.

PER CURIAM. It is admitted by counsel for appellant that this case is in all respects similar in principle to the case of Woodruff v. Wallace, 3 Okl. 355, 41 Pac. 357, and the judgment in such case governs. The judgment of the lower court is therefore affirmed.

CHRISTY et al. v. PALATINE INS. CO. OF MANCHESTER. (Supreme Court of Oregon. July 31, 1897.) Appeal from circuit court, Umatilla county; Robert Eakin, Judge. Action by John H. Wise and Harry E. Wise, under the firm name of Christy & Wise, against the Palatine Insurance Company, of Manchester, England. From a judgment for plaintiffs, defendant appeals. Reversed. Geo. E. Chamberlain, for appellant. John J. Balleray and Chas. H. Carter, for respondents.

BEAN, J. This is an action brought in the circuit court of Umatilla county to recover \$16,800 on a policy of fire insurance issued by the defendant company. The plaintiffs are citizens and residents of the state of California, and the defendant is an alien corporation organized and existing under the laws of Great Britain. The same question of removal to the federal court is involved in this case as in the two cases of Koshland v. Insurance Co. (just decided) 49 Pac. 850, 886, and it is therefore governed by the decision in those cases. Judgment is reversed, and the cause is remanded, with directions to proceed no further in the matter unless the jurisdiction of the state court shall hereafter be restored.

BECKER v. MARBLE CREEK IRR. CO. et al. (Supreme Court of Utah. July 16, 1897.) On motion for rehearing. Overruled on modification of former decision. For prior report, see 49 Pac. 892.

On motion for rehearing the above opinion was modified by striking out therefrom the words,

"And the 10th day of July in each year," in line 24 on page 5 [lines 39 and 40, col. 1, page 894] of the opinion. With this modification, the motion for rehearing is overruled.

BUCHANAN v. BAUER, County Assessor. (Supreme Court of Washington. May 28, 1897.) Appeal from superior court, Adams county; C. H. Neal, Judge. Suit by D. Buchanan against Jacob Bauer, Jr., assessor of Adams county, to restrain defendant from allowing the exemptions from taxation provided by the revenue laws of 1897. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed. Mount & Merritt, for appellant. O. R. Holcomb, for respondent.

PER CURIAM. This case involves the same questions discussed in *State v. Daniel* (just decided) 49 Pac. 243, with the additional exemptions by the legislature of fruit trees under the age of four years, and ships, vessels, and boats in actual construction, and material designed and set apart for the construction of the same. For the reasons announced in the case above cited the judgment in this case will be reversed.

JACKSON v. JACKSON. (Supreme Court of Washington. May 6, 1897.) Appeal from superior court, King county; T. J. Humes, Judge. Action by Emma O. Jackson against Henry F. Jackson, her husband, for separate maintenance. From a judgment for plaintiff, defendant appeals. Affirmed. W. S. Smith and J. L. Vertrees, for appellant. Humes & Lysons, White, Munday & Fulton, and Sapp & Lysons, for respondent.

DUNBAR, J. This is an action brought to obtain separate maintenance by an abandoned wife, without being coupled with an action for divorce, and therefore involves the same question that was decided in the case of *Kimble v. Kimble*, 49 Pac. 216. In fact, the briefs in these two cases were considered together, so far as this proposition is concerned. The ruling in this case will therefore follow the case of *Kimble v. Kimble*, and an examination of the testimony, which is brief, convinces us that it sustained the findings of the court. The alleged abandonment is not denied, and there is no attempt on the part of the husband to justify it. The maintenance allowed the wife, while at one time it might have been sufficient, is now plainly inadequate. The amount allowed by the court is moderate, and the attorney's fee reasonable. The judgment will be affirmed.

ANDERS and REAVIS, JJ., concur.

